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Secrets, half-truths and deceit in mediation and negotiation — Lawyers beware!

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Regulating behaviour in ADR

Secrets, half-truths and deceit in mediation and negotiation — Lawyers beware!

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A legal practitioner with a reputation for integrity and fairness has recently been fined for professional misconduct occurring while representing a client in mediation.[1] The solicitor was acting for a client in a compulsory statutory mediation to resolve a claim for damages for personal injuries.[2] He withheld information, newly available, from the insurance company representatives: his client had just discovered he had cancer. This was unrelated to the incident giving rise to his claim. The cancer was secondary and likely would reduce his life expectancy and the value of his claim (although this was assumed rather than established). The insurance company settled in ignorance of this information and later sought to set aside the settlement.[3]

The solicitor involved had sought advice from senior counsel and conducted research into the issue before accepting his client's instructions to withhold the information. This conduct was nonetheless subsequently held to be improper.

Professional misconduct

His honour, Byrne J, effectively held in the *Mullins* case that the lawyer had been guilty of intentional deception about material facts.[4] Such behaviour would clearly amount to professional misconduct under the *Legal Profession Act 2004* (Qld).

Meaning of 'unsatisfactory professional conduct'

The definition of *unsatisfactory professional conduct* appears in s 244:

> 'unsatisfactory professional conduct' includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

Meaning of 'professional misconduct'

Section 245 defines *professional misconduct* as including:

> … unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence …

Barristers Rules

In deciding that the practitioner had been guilty of professional misconduct in withholding the new information, his Honour referred especially to Rules 51 and 52 of the *Barristers Rules 2004* (Qld) which forbid the making of false statements and require correction of such statements (when made unknowingly and later discovered). He also mentioned Rule 21 which forbids a barrister from knowingly making a misleading statement to a court. His Honour noted that the definition of 'court'

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in the Rules includes the practice of mediation.[5]

Issues raised by this decision

The case raises interesting issues regarding the nature of settlement negotiations, especially statutory compulsory mediation, and the extent of any obligation to volunteer information in such a context. In order to determine the right behaviour for the legal representative, one must consider first any obligation of the client to disclose information, and then any additional obligation of candour on the part of the legal representative.

Legal representation

The legal practitioner in the *Mullins* case had sought advice from senior counsel and considered his responsibility with care. How could he have gone so wrong? Byrne J considered that he had posed the wrong question to himself, and senior counsel. He had been concerned about what he ought to have done should this case go to court. This, however, is the primary context in which the *Barristers Rules* mentioned above apply. This case raises interesting questions about the differences in the nature of an adversarial hearing and a negotiated settlement (with or without the aid of a mediator).

What must a practitioner do for a client? In simple terms, legal practitioners may — and must — do for clients all that they can legitimately do for themselves. A client may not lie to a court, nor may his or her legal representative. However, in the adversarial context of our civil courts, a client need not voluntarily disclose all relevant information. The ancient development by equity courts of disclosure procedures, enhanced in recent years by the stripping of legal professional privilege from expert reports, substantially dilutes the supposed adversarial nature of such proceedings. Nonetheless, it is not, but for compulsory disclosure rules, incumbent on a client (or his or her legal representative) to volunteer to the court all material evidence. Each side is entitled to present to the judge the information on which they wish to rely.

Had the client been diagnosed with cancer and been aware of his reduced life expectancy prior to the compensable accident, this ought to have been taken into account in his calculation of his damages — since the compensable reduction in life expectancy would be to his already reduced life expectancy at the time of the accident. On the other hand, had he obtained the diagnosis of cancer after the case had been resolved in court, or settled, the discovery would have had no bearing on his damages. The claim could not have been re-opened. In this case the client discovered he had cancer after the accident and during negotiations to settle his claim.

The insurer did seek to have the settlement set aside due to the failure to disclose information, but that claim never went to court. It was settled on confidential terms. There was no evidence before the disciplinary tribunal of the affect of the cancer diagnosis on the client's life expectancy or the value of any reduction in his claim. One may reasonably assume, as did the judge, that the cancer would diminish the client's life expectancy. There is no evidence, however, that at the relevant time the client or his lawyers were aware of the extent of such diminution.

Civil court cases

The civil case is less of a search for the truth than is a criminal case. Civil courts provide a state-sanctioned, state-funded dispute resolution procedure with the guarantee of a result. Judges do not generally call clients or ask witnesses many questions — and rarely go beyond the scope of issues raised in examination or cross-examination. Parties are generally free to call or withhold evidence.

This must be contrasted with criminal cases, where the prosecutor (though not the defence) must present all evidence relevant to guilt or innocence. In ex parte applications in civil cases, there is also a higher obligation to tell the court all relevant facts. Since there is no opponent at the hearing, such applications are not adversarial. Legal representatives have an additional obligation in all hearings, over and above that of the client. They must inform the court of all relevant precedent; even cases which detract from the client's claim. But in a hearing where both sides are represented, they

cannot disclose to a court any factual information that a client wishes to withhold.

Legal practitioners owe duties to both their clients and the courts. The balance between these obligations is struck by protecting the client's information in the hands (or head) of the lawyers from disclosure without the client's consent, but requiring the legal representatives to cease representation if the client wants to actually lie to or mislead the court. What amounts to 'misleading' must be carefully analysed in a context where voluntary disclosure of all relevant information is not required.

Compulsory disclosure

In the *Mullins* case a further complication was introduced by the statutory requirement to disclose information. Under the *Motor Accident Insurance Act 1994* (Qld) both parties were required to exchange extensive information with each other. This process had been in train for some time and the parties had met their obligations. The parties were ready to meet in mediation on an agreed date. The client saw his doctor and received his cancer diagnosis. That Act required that this information be disclosed within one month.[6] The mediation, already scheduled, took place before the end of that period.

Deception by omission

Prior to the mediation, the client, through his lawyers, had provided information to the insurer regarding calculation of his damages. This included expert reports which expressly claimed and relied on a 20 per cent reduction in life expectancy for the client due to the compensable injuries. We do not know if the report asserted the life expectancy of the client except by indicating that the compensable injuries led to a 20 per cent reduction in usual life expectancy for a male of the client's age. One imagines that this may have been the extent of the claim. Heads of damage relating to future needs were based on this statistical estimate of the client's reduced life span. By implication, at least, the client was asserting that his likely life span was 20 per cent shorter than that of a comparable uninjured male. The legal practitioner had continued to rely on the reports and figures contained therein during the mediation. He thus misled the insurer by omission of the new information that undermined the life expectancy calculation.

While one may be rightly appalled at a negotiator who deliberately lies, or misleads by omission, one may also have some sympathy for the client paralysed in a motor accident due to another's fault, and his legal representative, for not wanting to lose any of the benefit of the anticipated settlement simply because this poor man had endured a further misfortune. One may understand the reluctance to allow an insurance company the benefit of this sad circumstance.

One may even doubt that the insurer relied on the client's calculation of his reduction in life expectancy. Imagine if the insurance company had attended the mediation and asserted that in its opinion, based on its vast expertise in such matters, the client had suffered not a 20 per cent but a 25 per cent reduction in his life expectancy. It would not have been improper for the client (and lawyers) to simply concede that assertion for the purpose of negotiations. Similarly, if the matter had proceeded to court, and the insurance company had asserted such a fact in its pleadings, the client could have conceded that and the issue of life expectancy would have been resolved and would no longer have constituted a live question for the court.

In this case, however, the client and practitioner continued to refer to and rely on the reports which, although true when prepared, no longer reflected the true position. This deception undermined the settlement and amounted to misconduct by the lawyer.

Nature of negotiation

Is negotiation (including within mediation) an adversarial process?[7] While many would hope to enter into negotiations in a spirit of cooperation, I doubt any but the most naive assume that all parties intend to come to the negotiation table both fully prepared and willing to disclose fully all relevant information to all parties. In general, there is no positive obligation to be thoroughly prepared for a negotiation. One may sometimes bargain effectively from a position of ignorance. Moreover there is no general legal obligation to volunteer all relevant information when selling one's car, or bargaining at the markets, or settling a dispute.[8] Von Doussa J in *Beach Petroleum NL v Johnson* explains:

> 22.58 The tort of deceit will be made out on proof that a wilfully false statement or representation was made with the intention that it should be acted upon, and that it was acted upon by the applicants to their detriment: *Derry v Peek* (1889) 14 App Cas 337 at 374; *Bradford Third Equitable Benefit Building Society v Borders* at 211 ...
>
> 22.60 The traditional general law approach is that between parties dealing at arm's length, a failure by one party to disclose to the other that the transaction is not as the other would believe in the circumstances does not give rise to a representation capable of founding an action in deceit: *Ward v Hobbs* (1878) 4 App Cas 13. In an arm's length

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> transaction in a commercial situation it is recognised that the parties will have conflicting interests. One party will ordinarily not be under any obligation to the other to bring forth information which may cause the other party to take a different negotiating stance: see *Lam v Ausintel Investments Australia Pty Ltd* (1990) ATPR 40-990 at 50,880 per Gleeson CJ.[9]

In some areas the law has intervened — for example, the obligation to volunteer information against one's own interest does apply in making insurance contracts. Where partial disclosure amounts to deliberate deception this is not lawful, in any event, and it will vitiate any agreement reached. Sometimes the language used may itself be misleading.

In *Legal Practitioners Complaints Committee v Fleming*[10] another legal practitioner was fined for conducting negotiations in a manner held to amount to unprofessional conduct.[11] He was acting for a widow who anticipated that her late husband's siblings would contest his will. It was an informal will.

The practitioner negotiated with the representative of the siblings in order to reach agreement which would, inter alia, require them to consent to probate of the informal will. He had formed the view that the informal will would certainly be accepted for probate and eventually, despite objections by the siblings, the informal will was probated. The widow, however, instructed the lawyer neither to inform the siblings of the informal nature of the will, nor to allow them to see it. He followed these instructions. He referred only to the 'will' and not to the 'informal will'. He acknowledged that the latter would be the language he would choose in other circumstances. The Tribunal held him guilty of unprofessional conduct[12] by knowingly making misleading representations.

The Tribunal in the *Fleming* case gave some useful guidance on what may or may not be misleading in negotiation:

> This is not a case where the opposing party acted under a misapprehension to which the practitioner had not contributed, but which he subsequently took advantage of. Neither is it a case where the subject of the validity of the informal will was not affirmatively raised by the practitioner. Rather, the practitioner, on instructions, was the moving force (even if not the initiating force in one respect) in the other side's misconception, pursued by the practitioner to obtain a material advantage for the practitioner's client …
>
> … the conduct of a practitioner might be regarded as misleading because an affirmative statement is made in circumstances which required some qualification. In this context, misleading and unprofessional conduct might also be made out where a practitioner states a partial truth, or in the context of making statements of fact, omits relevant information. It might extend to statements which are literally true but where a qualification is called for, or where a statement initially true becomes false in the course of the negotiations …[13]

The last paragraph quoted above is that which applied in the *Mullins* case. Interesting questions remain, however, about the legal ramifications of bluff and ignorant assumptions in negotiation. Legal practitioners in particular must exercise special care in deciding how to represent their clients' cases fairly in negotiation and mediation. They may even be under a greater obligation than their clients, according to this comment by the Tribunal in *Fleming's* case:

> And in some circumstances the duty to not bring the legal profession into disrepute and fairness to an opponent may require that the practitioner draw attention to a particular matter, even where the opponent's misapprehension is not induced by that practitioner.[14]

Let negotiators and especially legal representatives in mediation and negotiation beware of the secrets and half truths that may cause deceit. ●

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Endnotes

1. *Legal Services Commissioner v Mullins* [2006] LPT 012 delivered November 2006. Mullins was publicly reprimanded, fined $20,000 and ordered to pay costs.

2. The case involved a motor vehicle accident and the parties were subject to onerous statutory requirements — to disclose information and participate in exchanges of settlement offers and a compulsory mediation — in order to encourage a settlement.

3. The insurance company settled its claim to set aside the mediated agreement. The settlement terms were confidential.

4. *Legal Services Commissioner v Mullins* [2006] LPT 012 at [28] and [31].

5. This could be the subject of another article. An unthinking application of this would, for example, require lawyers to submit to 'mediation' a full list of relevant legal precedents.

6. *Motor Accident Insurance Act* 1994 s 45(3): If, after notice of a claim is given to the insurer but before the claim is resolved, the claimant becomes aware of a significant change in the claimant's medical condition, or in other circumstances, relevant to the extent of the claimant's disabilities or financial loss, the claimant must, within one month after becoming aware of the change, inform the insurer of the change.

7. Certainly not according to the Tribunal in *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352. The Tribunal said, 'In seeking to settle a matter pursuant to his client's instructions or the procedures of the Court, the practitioner, in some senses, gives up his "adversary" role in favour of a "negotiating" role. In that cooperative role it is important that practitioners may be relied upon by the other party and his advisers to act honestly and fairly in seeking a reasonable resolution of the dispute.'

8. See for example *Lam v Ausintel Investments Aust Pty Ltd* (1989) 97 FLR 458; (1990) ATPR 40-990; *General Newspapers Pty Ltd v Telstra Corp* (1993) 45 FCR 164; 117 ALR 629; ATPR 41-274; *Leda Holdings Pty Ltd v Oraka Pty Ltd* (1998) ASC 55-718; ATPR 41-601 at 40,514.

9. (1993) 11 ACSR 103.

10. [2006] WASAT 352 delivered 7 December 2006.

11. Fleming was ordered to pay a fine of $7,500 and costs fixed at $25,224.

12. Under the *Legal Practitioners Act 1893* (WA).

13. [2006] WASAT 352 at [66] and [73].

14. At [73].