

A photograph showing two business professionals in silhouette, shaking hands in front of a large window. The man on the left is wearing a dark suit, a light-colored shirt, and a striped tie. The woman on the right is also in a dark suit. The background shows a blurred cityscape through the window. The lighting is dramatic, with the subjects in shadow against the bright light from the window.

" ... a practitioner must take all necessary steps to correct any false or misleading statement ... as soon as practicable after the practitioner becomes aware that the statement was false or misleading."

Ethical and legal obligations in mediations and other negotiations

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Over the last few years there has been a steadily increasing emphasis on mediations and other forms of settlement negotiations. This article updates a paper written and presented by Steven Penglis at a Law Society seminar in 2009, and is intended as a reminder of the ethical and legal obligations imposed on practitioners when undertaking such work.

This writer has recently heard it suggested that it is acceptable for a lawyer to make inaccurate or exaggerated statements during a mediation or other negotiations for settlement of a matter because both parties expect that sort of conduct to occur and neither party relies on what the other party says. However, when negotiating a settlement (including at a mediation), a legal practitioner is acting as the client's agent. Any conduct undertaken by the practitioner which is misleading or deceptive or likely to mislead or deceive could result in a contravention of legislation such as the Competition and Consumer Act (Cth) and/or the Fair Trading Act. In that event, not only may the client be exposed to action by the other party who relied upon such conduct to conclude the settlement, but so too may the practitioner (as having been knowingly concerned in the contravention).

In addition to being potentially exposed to civil action, a legal practitioner who goes too far for the client in negotiating a settlement may also find themselves exposed to a finding that such conduct constitutes unsatisfactory professional conduct, or even professional misconduct, within the meaning of the *Legal Profession Act 2008 (WA)*.

For all papers dealing with legal ethics, the starting point is an acknowledgement that a legal practitioner's paramount duty is to the court and the administration of justice. Whatever a legal practitioner does in the discharge of his or her duties to a client is, at all times, subject to that paramount duty.

LEGAL PROFESSION CONDUCT RULES AND MISLEADING AND DECEPTIVE CONDUCT

The *Legal Profession Conduct Rules 2010 (WA)* (the Rules) have a number of provisions going to the issue of misleading and deceptive conduct.

Rule 37(1) of the Rules provides that "... a practitioner must not knowingly make a false or misleading statement to an opponent in relation to a matter (including its compromise)."

Rule 37(2) of the Rules deals with the situation where a false or misleading statement is not made knowingly; it provides that "... a practitioner must take all necessary steps to correct any false or misleading statement unknowingly made by the practitioner to an opponent as soon as practicable after the practitioner becomes aware that the statement was false or misleading."

Accordingly, even an inadvertently false or misleading statement must be corrected as soon as it becomes known to the practitioner that the statement was false or misleading in some way.

Rule 37(3) provides that "... a practitioner who does not correct an error in a statement made to the practitioner by an opponent has not by that omission made a misleading statement, unless by the practitioner's silence the opponent might reasonably infer that the practitioner is affirming the statement."

Accordingly, silence can also be misleading for the purposes of the Rules, at least in circumstances where silence might reasonably be inferred to be an affirmation of an opponent's error.

There are other, more general provisions in the Rules which are also relevant to the issue of misleading and deceptive conduct. Rule 6(1)(b) provides that a practitioner must "... be honest ... in all dealings with clients, other practitioners and other persons involved in a matter where the practitioner acts for a client

... ", Rule 6(1)(d) requires a practitioner to " ... avoid any compromise to the practitioner's integrity ... ", and Rule 16(1) provides that a " ... practitioner must not attempt to further a client's matter by unfair or dishonest means."

The obligations embodied in these Rules are to be kept firmly in mind when devising and implementing a negotiation strategy. If the negotiation is taking place in circumstances where the facts may not be fully known to all parties, then the scope for unfair or misleading and deceptive conduct is greater. There is a risk in assuming that conduct such as bluff, exaggeration and selective referencing of facts will always be a harmless and legitimate part of the bargaining process.

MISLEADING AND DECEPTIVE CONDUCT UNDER THE COMPETITION AND CONSUMER ACT AND FAIR TRADING ACT

Schedule 2 of the *Competition and Consumer Act* (CCA) comprises *The Australian Consumer Law* (ACL). The ACL provisions are broadly mirrored in the fair trading legislation of the various states. Section 18 of the ACL contains the well-known general prohibition of misleading and deceptive conduct - "... a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

It is beyond the scope of this article to consider section 18 in detail. There may in some cases (particularly involving a court ordered mediation) be a question as to whether representations were made 'in trade and commerce.'¹ However, section 18 of the ACL is of potentially broad application. Intention to mislead or deceive is not a necessary element of a contravention. Nor does it matter that the person engaging in the conduct was not the author of the information (unless the person makes it clear that he or she is merely passing on information and is not vouching for its accuracy). Further, silence can in at least some circumstances, amount to misleading and deceptive conduct.

Some lawyers overlook the possibility that what they say in negotiations might give rise to personal exposure to a misleading and deceptive conduct claim under the ACL or state fair trading legislation. There have been a number of cases where lawyers have been found to be personally liable for misleading and deceptive conduct.² The fact that the conduct may occur during without prejudice negotiations (for example, to settle a dispute) is unlikely to matter; in *Quad Consulting v David R Bleakley*³, Hill J observed that "... a party cannot,

with impunity, engage in misleading or deceptive conduct resulting in loss to another under the cover of 'without prejudice' negotiations.

SOME EXAMPLES

It goes without saying that a legal practitioner must at all times act honestly and ethically and not attempt to further a client's case by unfair or dishonest means. Whether a practitioner has overstepped the mark will depend on the facts of a particular case. The following cases serve to illuminate the application of the relevant principles to some different factual scenarios.

Williams v Commonwealth Bank of Australia [1999] NSWCA 345 concerned the settlement of Supreme Court proceedings at a mediation conducted by Sir Laurence Street. For the purposes of the mediation the plaintiff forwarded to the defendants various unsigned statements including an unsigned statement of one Peter Neale. Along with other matters, that statement caused the defendants to conclude that they should settle the case on the most favourable terms that they could obtain.

The defendants subsequently contended that the plaintiff's conduct constituted a representation that Mr Neale's statement had been approved by him as his statement and/or was not a statement that Mr Neale had rejected or refused to sign as a statement of evidence. The defendants contended that they were led to believe that the statement was one which Mr Neale would be prepared to sign and which would form the basis of the evidence he would give at any hearing of the matter. They were not aware, as was the fact, that Mr Neale had refused to sign the statement as a statement of his evidence.

The New South Wales Court of Appeal noted the various authorities indicating that the courts are well aware of the need not to be over zealous in interfering with settlement processes because of the public interest in negotiations leading to agreement. The court held, however, that the process of mediation "is not properly categorised as a process of negotiation alone" [121]. The court held as follows (at [121]):

Certainly the mediation was entered upon in an attempt to assist the process of negotiation which had been proceeding but, to use His Honour's expression, had reached a 'Mexican standoff'. The mediation was part of the process designed to bring about the settlement of a long-standing dispute which was the subject of pending litigation which had proved intractable to

settlement. That made it likely that, if the matter were to be settled, the settlement would only be achieved with the assistance which a mediator could give. The primary purpose of the preparation of the statements of both parties was to send them to the mediator to assist him to understand their respective cases. Copies of statements to be relied upon by each party were given to the other so that there would be a degree of common ground between them. Differences in the evidence likely to be given by witnesses called by each of the parties would be disclosed. The extent to which there was a factual dispute would be ascertained. This would enable the mediator to perceive strengths and weaknesses in the case of the parties and to point out factors which might tell for or against one party or the other which might be such as to show that there was substantial uncertainty about critical facts so that the likely outcome of the litigation, if it depended on factual findings, was uncertain.

The court concluded that, in such circumstances, the provision of various statements, without any qualification, constituted a representation that the statements, although brief in form, were an accurate indication, albeit in broad outline, of the evidence which the plaintiff would be likely to have at its disposal [122].

As that representation was, to the plaintiff's knowledge, untrue insofar as it concerned the statement of Mr Neale, the Court of Appeal concluded that a misrepresentation had been made by the plaintiff with respect to Mr Neale's statement and remitted to the matter to the Trial Judge for further hearing.

Although the court made no express findings with respect to the conduct of the plaintiff's lawyers, it would be a reasonable conclusion, based on the cases next discussed, that the plaintiff's legal representatives involved in the making of the misrepresentation engaged in professional misconduct.

Legal Services Commissioner v Mullins [2006] LPT012 concerned a barrister in Queensland who was found guilty of professional misconduct in connection with negotiations for the compromise of a personal injuries claim. In essence, the barrister knowingly misled the defendant's insurer (and the insurer's lawyers) about his client's life expectancy.

The barrister was acting for his client in regard to a motor vehicle compensation claim. The barrister's instructing solicitors supplied the defendant's insurer with a

report of the then 48 year old claimant's future care needs and an accountancy valuation of the costs of that care. Expressly, the report was based on an assumption that certain information and medical reports were correct. One such medical report concerned the claimant's life expectancy, and was to the effect that the claimant's life expectancy had reduced by 20% of that of a normal male of his age.

During a conference between the claimant, his solicitor and the barrister, one topic of discussion was a draft schedule of damages which the barrister had prepared. During discussions the claimant informed the barrister and the instructing solicitor that he had been advised by his doctor that he had cancer spots on his lungs and in other places throughout his body, the cancer was described as 'secondary cancer', the doctor had been unable to find the 'primary cancer' and that he was to receive chemotherapy treatment.

On hearing this, the barrister told the claimant that it was his preliminary view that these facts needed to be disclosed to the insurer before the mediation and that the mediation was likely to be adjourned so that the insurer could investigate the issues.

The claimant instructed the barrister and his instructing solicitor that he did not wish to reveal these facts unless he was legally obliged to do so and that he wished the mediation to proceed because he wanted the claim resolved.

The barrister subsequently conducted some research and spoke to Senior Counsel about his situation. By the time of the mediation he had resiled from his initial impression that these facts should be disclosed. Instead, he came to the view that as long as the claimant's lawyers did not positively mislead the insurer and his lawyers about the claimant's life expectancy, they would not be violating any professional ethical rules.

Accordingly, the mediation conference proceeded. At the conference the barrister tabled a document headed 'Plaintiff's Outline of Argument at Mediation' which included reference to a figure for future economic loss recorded as having been arrived at "as per the Evidex Report, and reduced for contingencies by 20%, including the prospect that the plaintiff may not have worked to age 65".

The claim was settled at the mediation. The insurer would not have settled had the fact of the claimant's cancer been disclosed.

Before the Legal Practice Tribunal of Queensland, the barrister accepted that,

at the mediation, he thought that the claimant's longevity was at least "likely to be further reduced ... by the cancer facts". In this regard, the Tribunal held "in other words, (the barrister) then believed, on substantial grounds, that the state of life expectancy was critical to important parts of the claim was, very probably, no longer sound. But he did not disclaim the assumption. Instead, in effect, he asked (the opposing barrister) to have regard to the Evidex Report on which the future economic loss claim was based".

Senior Counsel for the barrister submitted that the barrister's conduct in continuing to rely on the Evidex report without disclosing 'the cancer facts' was not tantamount to some representation that he was not aware of facts that could deleteriously impact on longevity. He categorised the compromised negotiations as 'commercial', conducted on a tacit, common assumption that, in deciding whether to settle, the parties would rely exclusively on their own resources and information. There would not, it was submitted, have been a reasonable expectation that influential information communicated during the negotiations would not knowingly be false.

Not surprisingly, such submissions were rejected by the Tribunal, holding that Queensland barristers must not approach mediations "on the basis that they were entering an honesty-free zone" [29].

The Tribunal held that by continuing to refer to and rely upon the Evidex report as information supporting the claimant's claim after learning of 'the cancer facts' and recognising their significance to the validity of the life expectancy assumption, the barrister intentionally deceived the insurer and its legal representatives about the accuracy of the assumption. The Tribunal held he did so intending that they would be influenced by the discredited assumption to compromise the claim, which is what happened. The Tribunal described such conduct as a "fraudulent deception ... (which) involved such a substantial departure from the standard of conduct to be expected of a legal practitioners of good repute and competency as to constitute professional misconduct" [31].

The barrister was reprimanded, fined \$20,000 and ordered to pay the Legal Services Commissioner's taxed costs.

The duties of a legal practitioner in relation to settlement negotiations were considered in this state by the State Administrative Tribunal in *Legal Practitioner's Complaints Committee and Fleming* [2006] WASAT 352.

The case involved a legal practitioner who

acted for a client whose husband had not executed a will in accordance with the formalities required by the *Wills Act 1970 (WA)*; he had signed a facsimile of a draft will and his signature had not been witnessed.

The practitioner considered that the informal document would be accepted in probate proceedings as the will of the deceased husband, notwithstanding its informality. If it was not accepted as the deceased's will, the practitioner knew that the deceased's siblings had an entitlement to share in the estate with the practitioner's client.

The client was concerned that, if a sibling knew that her husband had not left a formally executed will, they might challenge the grant of probate. She therefore instructed the practitioner not to provide a copy of the will to the siblings.

In the course of negotiations between the wife of the deceased and the deceased's siblings, the practitioner sought a covenant by the siblings not to challenge the deceased husband's will nor make any claim against his estate. In the correspondence he referred to the informal document as the deceased husband's 'will'.

The disputes were settled and the siblings signed a deed of settlement containing a covenant not to make claims on the late husband's estate.

The siblings subsequently learned that no formal will had been executed. They immediately commenced proceedings to set aside the deed of settlement on the basis they had been misled as to the existence of a will that was valid on its face and made a complaint to the Legal Practitioner's Complaints Committee (LPCC) against the practitioner.

Before the State Administrative Tribunal, the LPCC contended that the practitioner had contravened rule 3.1 of the then applicable Professional Conduct Rules by attempting to further his client's cause by unfair or dishonest means. In upholding the complaint, the State Administrative Tribunal held as follows [66]:

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 ... in the other side's misconception, pursued by the practitioner to obtain a material advantage for the practitioner's client.



"Dishonest or sharp practice by the practitioner to secure an advantage for his client might go undetected ... A level of trust between the advisers involved is therefore essential."

The Tribunal held that if having properly advised his client the client's instructions remained not to disclose the informal will "he could not conduct the negotiations in such a way as to suggest that a formal will existed or procured the other side's consent to probate upon a false basis" [68].

The Tribunal concluded that the practitioner had contravened the then professional conduct rules as having been both:

... dishonest and unfair, giving those terms the ordinary dictionary meaning and looking at the position objectively. We note also, although such was not maintained by the committee and does not form part of our decision, such conduct was in breach of rule 18, being conduct intended to induce and foster a mistake in a fellow practitioner. [67]

The Tribunal then took the opportunity to make some general, but very pertinent, observations with respect to the obligations of legal practitioners in the context of settlements. The Tribunal noted that Senior Counsel for the LPCC disclaimed any obligation on the practitioner to positively inform his opponent of relevant matters of which he was aware. The Tribunal noted that this would seem to reflect the legal position in relation to negotiations generally. The Tribunal noted, however, that in a case such as that before it:

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. 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. [73]

The Tribunal continued (at [74] to [77]) as follows:

The public interest is served by practitioners encouraging an early settlement of their client's dispute. Indeed, practitioners are under a duty to seek such a settlement (r 5.7). But, just as in litigation a practitioner may not use dishonest or unfair means or tactics to hinder his opponent in the conduct of his case (D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1 [McHugh J at 111]), so he ought not do so in other areas of practice. Arguably perhaps, for a number of reasons, the proscription against such conduct is more important in settlement negotiations.

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 co-operative 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. If everything a practitioner says in negotiations must be checked and verified, many of the benefits and efficiencies of a settlement will be lost or compromised.

Honesty, fairness and integrity are also of importance in such negotiations because they are conducted outside the court and are beyond the control which a judge hearing the matter might otherwise exercise over the practitioners involved. Outside the trial process, there is no impartial adjudicator to "find the truth" between the opposing assertions. Dishonest or sharp practice by the practitioner to secure an advantage for his client might go undetected for some considerable time or for all time. A level of trust between the advisers involved is therefore essential.

*The fact that, in the normal course, a practitioner's improper conduct might be exposed, and the harm avoided by a "due diligence" undertaken by his opponent, does not alter the impropriety in any respect. In the same way that practitioners owe duties to the court, such as drawing unfavourable authorities to the attention of the judge, irrespective of the work (or neglect) of their opponents, so in settlement negotiations or other dealings with their opponent, or indeed (and particularly) with a litigant in person, a practitioner must be perfectly candid. It was no answer to the complaint of unprofessional conduct by misleading the court in *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56 that the practitioner acted on the expectation that the true position would be revealed in the course of the case.*

The implications of the decisions in *Mullins* and *Fleming* are not always fully appreciated. For example, this writer has recently heard it suggested that a statement by a lawyer along the lines that "this is my client's first and final offer" is inherently unobjectionable (even if a further offer is intended) because such a statement is regarded as mere puffery or posturing which is never taken seriously. It is apparent from the decisions in *Mullins* and *Fleming* that it would be unwise to proceed on such a basis. Of course, it is

perfectly in order for a lawyer to say that an offer is his or her client's first and 'final' offer, if that is in fact the case. However, if the client has not decided whether the first offer would be final, or has already decided that there is further room to negotiate if the first offer is rejected, then the lawyer's description of the first offer as 'final' is misleading and deceptive. Any agreement based on acceptance of the first offer would be liable to be overturned, the lawyer is likely to have breached his or her professional obligations and would be exposed to a damages claim, possibly calculated by reference to the difference between the earlier offer and the client's true final position.

An example where a practitioner was found to have acted in contravention of the relevant professional conduct rules for taking advantage of another practitioner's mistake which the first practitioner did not induce is the decision of the Full Court of the Federal Court of Australia in *Chamberlain v Law Society of Australian Capital Territory* (1993) 118 ALR 53.

In that case, the appellant was a barrister and solicitor of the Supreme Court of the Australian Capital Territory. He was assessed for income tax for the years 1975 to 1983 in the sum of \$255,579.20. The appellant lodged an objection to the assessment with the Taxation Board of Review. The Deputy Commissioner of Taxation commenced proceedings against the appellant in the ACT Supreme Court claiming, in error, only \$25,557.92. Realising the Commissioner's mistake, the appellant arranged, through his employee, to have terms of settlement, and a consent judgment against himself, signed and filed by the Commissioner's officers and he paid the amount of the judgment. The appellant also withdrew his objections to the assessment. The Commissioner subsequently failed in 2 separate sets of proceedings to obtain orders for the payment by the appellant of the balance of income tax owed, in the first proceedings because the principal of *res judicata* and in the second proceedings because the Commissioner's impeachment of the consent judgment was a matter which should have been raised in the first proceedings in accordance with the principal of *Port of Melbourne Authority v Anshun Pty Ltd*.

The Law Society of Australian Capital Territory then commenced proceedings against the appellant for professional misconduct. The ACT Supreme Court found the appellant was guilty of such misconduct in procuring the Commissioner's officers to sign the terms of settlement and procuring the judgment for \$25,557.92. The ACT Supreme Court ordered the appellant be suspended from practice for six months.

In dismissing the appeal Black CJ, Lockhart, Whitlam and Beazley JJ, Jenkinson J dissenting, held that the effect of the ACT equivalent of rule 23 revealed (at pp60/61 per Black CJ):

... an approach that is generally discouraging of an advantage being taken of an opponent's procedural mistake, and in some circumstances there is a positive obligation to draw the attention of an opponent to a mistake, except where to do so might prejudice the practitioner's own client. Thus a balance is sought to be achieved between a desire to avoid unnecessary expense and delay occasioned by mistakes or oversights on the one hand and interests of a practitioner's client on the other. Paragraph 20.2 does not therefore rule out that, in appropriate cases, advantage may properly be taken of a procedural mistake or oversight that may involve the other practitioner's client in unnecessary expense or delay, but it does speak against a practitioner doing or saying anything to induce or foster a mistake that may have those consequences, and it speaks without qualification against that conduct.

In a system of adversary litigation, in which it is accepted that advantage may be taken of an opponent's mistake in some circumstances, it is easy to see how notions of fairness and common decency would point to the drawing of the line where it is in fact by paragraph 20.2. Whilst in some circumstances it may be in order to take advantage of the mistake, in other circumstances the intention of the practitioner should be drawn to a mistake or oversight. But, in any event, where there is a mistake that may involve the other practitioner's client in unnecessary expense or delay a practitioner should not do or say anything to induce or foster that mistake. To induce or foster such a mistake would be detrimental to a relationship characterised by courtesy and fairness that ought to exist between members of the legal profession. A relationship of that nature ... has its justification not merely social and ethical mores; it has an additional justification referable to the public interest, in that courtesy and fairness contribute materially to the effective and expeditious performance of legal work ...

Another vice of conduct that induces or fosters a mistake is that it may easily involve, or in practical terms be close to, misrepresentation. In this way such conduct is, of its

nature, liable to be in tension with the overriding duty of honesty that practitioners owe to the courts, their clients and to their fellow practitioners.

It was submitted on behalf of the appellant that it was only in the most attenuated sense that the appellant 'induced' the Deputy Commissioner to execute the terms of settlement or 'procured' the Deputy Commissioner to enter judgement. The court accepted that the appellant did not cause the Deputy Commissioner's initial error and did not do anything to force the Deputy Commissioner to sign the terms of settlement or to agree to judgment being entered by consent for the amount incorrectly claimed. The court held, however, that the only reason the Deputy Commissioner's mistake:

... turned out to be fatal (was) as a consequence of the appellant having put into operation a plan that was designed to get him to do what he in fact did. Whether or not, in a technical sense, the appellant induced the second and fatal mistake, he fostered the first mistake by his own deliberate actions created a set of circumstances that brought about the second mistake. ... The practical effect, and the object, of what was done was to use the Deputy Commissioner's original mistake as an element in a trap into which, if the original mistake was fostered, the Deputy Commissioner might fall. (page 61)

Whilst the court upheld the Supreme Court's finding of professional misconduct, it set aside the penalty of six months suspension and substituted an order that the appellant be reprimanded.

CONDUCT WITH RESPECT TO YOUR OWN CLIENT

Ethics in negotiating settlements does not only focus on the practitioner's conduct as regards opposing parties, but also governs the practitioner's conduct with respect to the practitioner's own client. In *Studert v Boettcher* [2000] NSWCA 263, in the context of a negligence action, the New South Wales Court of Appeal had to consider the general obligations upon a legal practitioner when acting for a client in settlement negotiations.

The Court of Appeal held that a practitioner's advice to a client to make or reject an available compromise is commonly not concerned only with the client's rights, obligations and hopes. Other matters which the court identified as being matters usually considered included the following:

- the difficulty in predicting the outcome of litigation with a high degree of confidence;
- disagreements on the law;
- whether evidence will be accepted at trial;
- the delay in obtaining finality (including appeals from any favourable judgment);
- factors personal to a client and inequality between the client and other parties to the dispute;
- the stress and expense of litigation;
- the exposure to pay the costs of the other party if unsuccessful; and
- time spent by parties and witnesses which cannot otherwise be devoted to productive activities.

The court held that although it is in the public interest for disputes to be compromised whenever practical, a legal practitioner is not entitled to coerce a client into a compromise even if the compromise is objectively in the client's best interests:

"the client, not the lawyer, is entitled to decide whether to compromise or to litigate" [74].

The court identified a legal practitioner's duty to the client with respect to compromise in the following terms (at [75]):

... broadly, and not exhaustively, a legal practitioner should assist a client to make an informed and free choice between compromise and litigation and, for that purpose, to assist what is in his or her own best interests. Respective advantages and disadvantages of the courses which are open should be explained. The lawyer is entitled, and if requested by the client obliged, to give his or her opinion and to explain the basis of that opinion in terms which the client can understand. The lawyer is also entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interests. The advice given and any attempted persuasion undertaken by the lawyer must be devoid of self-interest. Further, when the client alone must bear the consequences, he or she is entitled to make a final decision.

ACTING ON INSTRUCTIONS

It is always prudent for a lawyer to make it clear whenever he or she is merely passing on instructions from client, and to avoid saying anything that might be taken as vouching for the accuracy of

the statement or otherwise adopting the statement. However, the mere fact that a lawyer has been willing to make a claim or statement on behalf of a client arguably brings with it the inference that the claim has substance. This means that lawyers who pursue exaggerated, inaccurate or unfounded claims for clients risk being in breach of their professional and legal obligations regardless of the fact that they are merely reflecting their instructions.⁴ For this reason, it is suggested that, whenever a lawyer is asked to make a statement or pursue a claim on behalf of a client (including in the context of settlement negotiations) they should first satisfy themselves that there is some foundation for the statement or claim, as well as using appropriate qualifying language in describing the statement or claim.

SOME PRACTICAL GUIDELINES

With the above in mind, some practical guidelines for lawyers can be proposed –

- Do not (in any context) make a statement which you know to be untrue or which might be false or misleading. This includes statements that are exaggerated, inaccurate or unfounded, amount to a half truth or which otherwise omit information which should properly be disclosed;
- If a statement requires qualification, clearly set out the qualification;
- If you are merely passing on instructions from your client, make that clear. Do not say anything that indicates you are personally adopting or vouching for the accuracy of the information. Regardless of that, you should also satisfy yourself that there is some foundation for the information;
- Do not say 'in our view' or 'in our opinion' unless that view or opinion is honestly held. If you do not hold the view or opinion, the most you should say (subject to the above observations about unfounded claims) is something along the lines that 'our client contends' for the position being taken;
- Do not make an absolute statement about a legal proposition or claim unless the proposition or claim is clear beyond doubt. Instead, qualify your statement by saying 'in our opinion' or 'in our view', 'it is arguable that', 'our client contends that' or some other appropriate qualification (and provided, as noted above, you actually do hold that view or opinion and there is some foundation for the opinion or statement);

- Correct any statement which you have made or which, to your knowledge, your client has made, including any statement prefaced on the basis that it was a statement of your instructions, should you subsequently learn that the statement was when made, or has subsequently become, false or otherwise requires qualification so as not to be misleading;
- Do not say or do anything that may reasonably induce the other side to proceed on the basis of a fact or legal proposition which you know to be incorrect;
- Whilst it is generally acceptable in the context of adversarial litigation (including settlement) to take advantage of an opponent's mistake:-

- It is not acceptable where you or your client have caused the mistake or where you do anything which constitutes an affirmation of the fact or legal proposition in respect of which the opponent is mistaken;
- If the mistake is palpable, taking advantage of it may be so unfair as to constitute unprofessional conduct;
- Whilst it is appropriate to seek to persuade your own client to accept your advice regarding settlement, the advice given and any attempted persuasion undertaken by the lawyer must be devoid of coercion or self-interest.

Practitioners are generally well aware of their obligations of honesty and integrity, even where they are under pressure to advance their client's case. However, it is an error to think that these obligations are somehow relaxed in the case of settlement negotiations. Indeed, as is apparent from the examples discussed above, the obligations of honesty and integrity are of particular importance in the context of such negotiations.

NOTES

1. *Rosebanner Pty Ltd v Energy Australia* [2009] NSWSC 43 at [411] where Ward J held that '... I do not consider that statements made in a without prejudice meeting (or without prejudice correspondence) entered into between the parties (not as part of any compulsory or court-ordered mediation process) for the purposes of trying to resolve a dispute arising out of or of critical relevance to the business functions of a corporation, are not made in the course of trade or commerce for the purposes of the Trade Practices/Fair Trading legislation.'
2. See for example *Argy v Blunts* [1990] 26 FCR 112, *ACCC v Sampson* [2011] FCA 1165.
3. *Quad Consulting Pty Ltd v David R Bleakley & Associates Pty Ltd* [1990] FCA 455, and see also *Pihiga Pty Ltd v Roche* [2011] FCA 240, and *Rosebanner Pty Ltd v Energy Australia* [2009] NSWSC 43.
4. See G E Dal Pont, 'Being Demanding', *Brief*, vol. 41 Number 10 November 2014.