



Legal Practitioners

Conduct Board

**GUIDELINES FOR MAKING FINDINGS OF
UNPROFESSIONAL CONDUCT AND
UNSATISFACTORY CONDUCT
AND IN RELATION TO THE LAYING OF CHARGES
AND FINDINGS OF RELATIVELY MINOR
MISCONDUCT**

General Principles

I can do not better to introduce this topic than to quote the introduction to chapter 25 of Professor Gino Dal Pont's text book Lawyers Professional Responsibility. I do so hereunder:

Standard of Conduct Expected of Members of the Legal Profession

The integrity of the profession and its reputation with the public depend in large part upon the maintenance and enforcement of high standards of professional conduct by the profession and those employed in it. It has been said that lawyers "should discharge their professional duties with integrity, probity and complete trustworthiness" and be on their guard "to uphold and maintain the dignity of the profession". The maintenance of a high standard of conduct, in both professional and personal spheres, is critical for lawyers to be able to command the confidence and respect of the Court, fellow practitioners and clients, because the proper functioning of the legal system depends upon the manifest integrity of its members.

The standard of upmost integrity also stems from the fact that, as member of a selective profession and as officers of the Court, lawyers are entrusted with exclusive privileges in connection with the business of clients. That lawyers individually and collectively maintain upmost integrity is all the more critical given that, as a result of the duty of confidentiality and the doctrine of legal professional privilege, much of a lawyers conduct is secret. Hence, it is not unreasonable to exact that standard of honourable dealing that the public has the right to expect from lawyers.

Guidelines for the Board

1. The Board is committed to its independent role in fairly and thoroughly conducting investigations having regard to both the interests of the general public and of legal practitioners.
2. The Board recognises that its determinations in relation to misconduct cannot be the subject of a formula and that there must inevitably be discretion and flexibility in the Board making its determinations. However the Board recognises that from the perspective of members of the public and legal practitioners, it is desirable that it should articulate matters to which it may have regard in reaching its decisions.
3. The term misconduct encompasses both unsatisfactory conduct and unprofessional conduct.
4. The Board considers issues of conduct. A mistake or error of judgement will not ordinarily amount to misconduct unless it amounts to gross negligence or incompetence. Put another way, the poor handling of a matter or an act of negligence will usually not amount to unprofessional or unsatisfactory conduct. It is a question of degree.
5. The Board notes that generally conduct issues relating to a legal practitioner involve the way a lawyer carries out his or her professional duties rather than the quality or the content of any legal advice given.
6. The Board will not make a finding of unsatisfactory or unprofessional conduct unless there is admissible, reliable and substantial evidence that the misconduct has been committed by the practitioner and is sufficient to sustain a charge in the Tribunal.
7. The Board notes that issues of misconduct cannot be resolved through the conciliation process.
8. For the Board to be satisfied that conduct, either unsatisfactory or unprofessional conduct, breaches the standard of conduct observed by competent practitioners of good repute, the conduct must be in connection with or in the course of legal practice.
9. Personal conduct of a legal practitioner may amount to unprofessional conduct if it satisfies the definition of unprofessional conduct in limb (a); that is the conduct amounts to an offence of a dishonest or infamous nature for which the practitioner may be imprisoned. There is no such requirement that the offending behaviour be in connection with or in the course of practice.
10. A charge will not be laid in the Tribunal if there is no reasonable prospect of there being a finding of misconduct.

Findings of unsatisfactory or unprofessional conduct

Unprofessional and unsatisfactory conduct relate to standards of conduct.

With the exception of conduct that amounts to a breach of a written conciliation agreement, there is no behaviour or conduct that is specifically deemed to amount to misconduct.

The standard for unsatisfactory conduct and unprofessional conduct pursuant to limb (b) of the definitions is the same. The differentiation between unprofessional conduct and unsatisfactory conduct is the seriousness of the misconduct.

Conduct that amounts to unprofessional conduct pursuant to the definition limb (a) is separately discussed.

Unprofessional conduct (limb (b)) involves a substantial failure to meet the standard or a recurrent failure to meet the standard.

Generally unsatisfactory conduct is simply a failure to meet the standard.

The standard is set by the profession. It is the standard of behaviour of competent practitioners of good repute. This is, the standard of professional conduct of competent, honest and honourable practitioners.

A dictionary search of the relevant terms used indicate that competent means adequate but not exceptional; suitable; of sufficient skill or knowledge and capable.

Good repute is a favourable reputation; a good name, and implies public respect.

It is possible for a competent practitioner of good repute to make an error or mistake. Generally this is not a matter of misconduct. On the other hand errors or mistakes of judgment that impugn a practitioner's competence may amount to misconduct.

Similarly acts of negligence are generally not misconduct. However gross negligence, implying as it does that the practitioner is not competent, may amount to misconduct.

A practitioner who is of good repute is an honest practitioner. Any act of dishonesty is likely to amount to misconduct.

It is not necessary for the Board to prove or find intention on the part of the practitioner in finding misconduct. The absence of action can also amount to misconduct; for example delay or failing to comply with directions of a Court or instructions from a client may amount to misconduct.

When considering whether there is misconduct on the part of a practitioner, the Board will consider the admissible, reliable and substantial evidence of the conduct and consider it objectively against the standard.

Subjective factors relating to the practitioner and their circumstances will be given consideration at the next step, that is in determining whether the misconduct is relatively minor or not.

Following are two lists of things the Board will and will not take into consideration in determining whether there is misconduct or not on the part of a practitioner. The lists are not exhaustive.

Factors the Board will not take into account:

A decision whether or not to make a finding of misconduct will not be influenced by:

1. the race, religion, gender, ethnicity, national origin or political associations, activities or beliefs of the practitioner or any other person involved;
2. personal feelings concerning the practitioner or the complainant;
3. the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

Factors the Board will consider:

Factors that the Board may take into account and give such weight as appropriate in determining whether or not to make a finding of misconduct are:

1. the seriousness of the alleged misconduct when considered objectively
2. how recurrent is the conduct the subject of consideration in the profession and in the practitioner's practice.
3. whether the conduct was intentional or inadvertent
4. where the alleged misconduct is a breach of a statutory rule or regulation or professional conduct rule:
 - the nature and purpose of the rule or regulation
 - the potential consequences of the breach
5. whether there is any element of dishonesty
6. whether the conduct is likely to bring the profession into disrepute
7. the staleness of the conduct relative to the seriousness of the alleged misconduct
8. whether the particular conduct is prevalent in the profession
9. the response of the practitioner to the allegation the subject of the complaint
10. the level of insight by the practitioner to their conduct
11. the intent of the practitioner when undertaking the conduct
12. the context in which the conduct occurred.

Unprofessional conduct under limb (a)

The Legal Practitioners Act also defines unprofessional conduct as an imprisonable offence of a dishonest or infamous nature committed by a legal practitioner.

It is noted that the definition does not require a conviction for the offence and arguably if no conviction is recorded but the offence is proved, then the definition of unprofessional conduct would be satisfied if all other factors are met.

Firstly the offence must be one in which punishment by imprisonment is prescribed or authorised by law.

In addition the offence must be of a dishonest or infamous nature.

Dishonesty is the easier concept to consider and imports the usual understanding of the concept as understood by the wider community in which it occurred.

An offence of an infamous nature, (being the alternative to a dishonest offence), incorporates an offence that is disgraceful or shameful, heinous or notorious or somehow wicked. These are the offences that would bring the profession into disrepute if committed by a practitioner.

For example trafficking in illegal substances (drugs), murder, assault and offences of violence would all arguably be infamous offences, although they may not be dishonest.

Is the misconduct relatively minor misconduct

Under section 77AB of the Act the Board has power to find that misconduct is relatively minor misconduct (step 1) and that it can be appropriately dealt with by the Board under section 77AB (step 2).

Under section 77AB the Board has power to reprimand the practitioner; make orders imposing condition on the practitioner's Practising Certificate relating to practice or further education or training or counselling; or requiring that the practitioner make a payment or refrain from doing a specific act in connection with practice.

The Board can only make orders and deal with a matter pursuant to section 77AB if the practitioner consents. This has been taken by the Board to mean that the practitioner must not only consent to the Board dealing with the matter under section 77AB but also to the proposed orders of the Board. Written consent is required.

If the Board is of the view that the misconduct on the part of the practitioner (either unsatisfactory or unprofessional conduct) is relatively minor misconduct, the Board will go on to consider whether it is appropriate in all the circumstances that the Board deal with the matter pursuant to section 77AB. These are closely aligned concepts, however it is a two step process to exercise the power. The question of appropriate in all the circumstances is likely to relate to factors personal to the practitioner as opposed to the factors considered when the Board finds that the misconduct is relatively minor, which are factors that relate to the conduct.

Both unsatisfactory conduct and unprofessional conduct can be considered to be relatively minor misconduct.

Following is a non exhaustive list of considerations in determining whether misconduct is relatively minor and appropriately dealt with under section 77AB of the Act;

1. Seriousness of the misconduct
2. The disciplinary history of the practitioner
3. The containment or extent of the misconduct in the practitioner's practice or in the profession
4. Any personal mitigating circumstances relevant to the practitioner.
5. Any mitigating circumstances relevant to the context in which it occurred.
6. Any aggravating circumstances surrounding the conduct.
7. The assessment of risk of recurrence of the misconduct.
8. The insight of the practitioner into their own misconduct.
9. The level of co-operation of the practitioner with the Board and the disciplinary process
10. The level of contrition shown by the practitioner.
11. Consideration of the remedies offered or undertaken by the practitioner to address the situation.
12. The relative seniority of the practitioner at the time of the misconduct.
13. The basis for the practitioner's conduct ie if he or she relied on advice and the reasonableness of so doing in the circumstances.
14. The protection of the public and the maintenance of public confidence in the profession.
15. The appropriateness of the orders available to the Board under section 77AB(1).
16. The future professional plans of the practitioner for example imminent retirement.

It is to be remembered that in the event that the practitioner does not consent to the Board dealing with the matter pursuant to section 77AB of the Act, the Board will then consider whether it will lay a charge before the Tribunal or whether it will take no further action on its own finding of unsatisfactory or unprofessional conduct by the practitioner.

The decision to lay a charge before the Tribunal

The Board may lay a charge alleging unsatisfactory conduct or unprofessional conduct against a practitioner.

If the Board charges unprofessional conduct the Tribunal is at liberty to find unsatisfactory conduct on the facts alleged (section 82(8) of the Act).

If the Board finds that there is misconduct on the part of a practitioner and that the misconduct is not relatively minor or it is not appropriate for the Board to deal with the misconduct under section 77AB of the Act, then the Board must consider whether it will lay a charge before the Tribunal.

In most cases, in the event that the Board finds that there is misconduct and does not exercise its power under section 77AB, it will lay a charge before the Tribunal. It does not have to do so and in fact it is not a precondition to laying a charge before the Tribunal that the Board make a formal finding that there is unsatisfactory or unprofessional conduct by the practitioner.

As a matter of logic, although there is no requirement under the Act, the Board finds misconduct in the first instance and then resolves to lay a charge.

The Board as a model litigant

The Board conducts all its litigation as a model litigant. The Board has a separate and specific policy in relation to its role as a model litigant.

Pleading of particulars of the charge

The particulars of the unprofessional or unsatisfactory conduct alleged are set out in the Board's charge document.

Some of the Board's charge documents are complex and long, as the Board can allege a course of misconduct and will set out all the circumstances and allegations of fact that amount to the misconduct.

The primary purpose of the Board's charge is to set out the facts upon which the Board relies and can prove and alleges amount to unprofessional conduct, so that the practitioner knows the case against them.

The Tribunal in the matter of Heaney, found that the Board could plead a course of misconduct in what is colloquially referred to as a "*rolled up charge*", if there was a suitable nexus in the matters pleaded as the course of misconduct.

The Tribunal went on to provide some examples of a suitable nexus but specifically indicated that their list was not intended to be exhaustive. A suitable nexus can occur where there is conduct of a similar type eg delay, or conduct that is linked in time or for a specified period.

Plea bargaining and off the record discussions

The Tribunal conducts an inquiry into the conduct of the practitioner subsequent to the charge being laid.

The practitioner has a positive obligation to assist the Tribunal Inquiry. There is no right of silence for a practitioner before the Tribunal.

Accordingly the practitioner or those representing him or her cannot have "*off the record*" discussions with the Board or its representatives.

Agreements between the Board's solicitors and the practitioner's representatives cannot bind the Tribunal in relation to the Inquiry it wishes to conduct.

The Board's role is to assist the Tribunal to find the truth of the matter in relation to the conduct of the practitioner before it.

As stated the Board conducts all its litigation as a model litigant.

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