

Summary of five cases determined by the Law Society Northern Territory Council over the past twelve months



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THE COUNCIL OF THE LAW SOCIETY HAS THE ABILITY TO SUMMARILY DEAL WITH CONDUCT COMPLAINTS AGAINST LEGAL PRACTITIONERS PURSUANT TO SECTION 499 OF THE LEGAL PROFESSION ACT ("LPA") IN CIRCUMSTANCES WHERE THERE IS A REASONABLE LIKELIHOOD THAT THE PRACTITIONER WOULD BE FOUND GUILTY OF UNSATISFACTORY PROFESSIONAL CONDUCT, AS DISTINCT FROM PROFESSIONAL MISCONDUCT, AND THE COUNCIL IS SATISFIED THE PRACTITIONER IS GENERALLY COMPETENT AND DILIGENT AND THAT NO OTHER MATERIAL COMPLAINTS HAVE BEEN MADE AGAINST THE PRACTITIONER. THE FOLLOWING ARE SUMMARIES OF FIVE SUCH COMPLAINTS DEALT WITH BY THE COUNCIL OVER THE LAST TWELVE MONTHS.

Engaging in legal practice whilst not holding a current practising certificate

There have been three instances of disciplinary matters before the Council for this type of conduct, ranging from a newly admitted practitioner to a very experienced practitioner. In one case the conduct was exacerbated by the practitioner's failure to respond to the Society about the complaint.

1 In the instance of the newly admitted practitioner, following admission in the Supreme Court of the Northern Territory, the practitioner engaged in legal practice for a period of just less than one month before an application was lodged with the Society for a practising certificate.

The matter came to light when the Society received notification from the approved professional

indemnity insurer, Marsh, that the practitioner had been added to the firm's certificate of insurance with a commencement date that was one month earlier, being the date of admission.

The Society's Secretariat staff contacted the practitioner to query the fact that the Society had not received an application for a practising certificate. After further inquiries the practitioner advised that the application and checklist were still sitting on the manager's desk. The documents were delivered promptly to the Society and a practising certificate was issued. An own motion complaint was then initiated by the Society and the practitioner was written to regarding the complaint. In accordance with the Society's standard practice the

letter requested a response within fourteen days and contained a caution about compliance with rule 32.2 of the Rules of Professional Conduct and Practice, which provides:

A Practitioner should respond within a reasonable time and in any event within 14 days (or such extended time as the Law Society may allow) to any requirement of the Society for comments or information in relation to the Practitioner's conduct or professional behaviour and in doing so the Practitioner should furnish in writing a full and accurate account of his or her conduct in relation to the matter.

No response was received within the stipulated fourteen day timeframe. Further follow-up correspondence was sent to the practitioner pursuing a response but still none was received. A response was ultimately provided after a principal of the practice became aware of the practitioner's lack of responsiveness to the Society and interceded to assist the practitioner.

The practitioner in their response quite properly acknowledged the practitioner had engaged in legal practice while not holding a practising certificate, and attributed this to work pressures and labouring under a misapprehension that the admission certificate issued by the Court constituted a licence to engage in legal practice. No explanation was provided for the significant delay responding to the Society about the complaint.

The Council found that the practitioner had in breach of section 18 of the LPA engaged in legal practice while not holding a practising certificate, and that breach constituted unsatisfactory professional conduct. The Council imposed a fine of five penalty units and a reprimand. Further the Council found the practitioner had breached rule 32.2 of the Rules of Professional Conduct and Practice by failing to respond to the Society in the prescribed timeframe and that this also constituted unsatisfactory professional conduct. A fine of three penalty units was imposed for this finding.

2 The second instance of unlicensed practice relates to an interstate practitioner of some experience.

The practitioner contacted the Society in October to advise that they were practising without a current practising certificate. In December the preceding year the practitioner completed the relevant application form to have a practising

certificate issued. For some reason that could not be explained, the internal administrative processes broke down and the application was not forwarded to the Society. The practitioner gave no further consideration at that time to whether or not a practising certificate had been issued.

As a result of a practising certificate not having been issued at the time the practitioner commenced employment, the practitioner was not included in the Society's annual mailout of practising certificate renewal forms the following year.

The event that triggered the discovery of lack of practising certificate was the practitioner's attempt to register attendance at a CPD seminar at which time the employer's database revealed the practitioner was not listed as holding a practising certificate.

The Council found that the practitioner had engaged in legal practice without holding a practising certificate for a period of ten months due to a combination of inadvertence and administrative oversight. The practitioner was found to have engaged in unsatisfactory professional conduct and was fined five penalty units and publicly reprimanded.

3 The final instance relates to a senior practitioner whose application to renew their practising certificate was

not processed due to lack of compliance with their Continuing Professional Development (CPD) obligations.

All legal practitioners are required to submit a CPD declaration regarding their compliance with these obligations. The declaration is due on 31 March each year.

This practitioner failed to submit a CPD declaration for the relevant CPD year by the due date. In May the practitioner provided a CPD declaration that purported to satisfy the declaration obligations, but the practitioner was immediately notified by the Society that it did not comply as it disclosed less than the required twelve points, and lacked critical detail such as the dates and other details about the CPD activities.

A number of letters and emails had been sent to the practitioner regarding compliance. There had also been telephone communications between at least three different Secretariat staff with the practitioner about the need to attend to the CPD compliance declaration, but the practitioner still failed to do so.

Prior to 30 June letters sent to the practitioner also advised that a renewal of the practising certificate would not issue until a compliant CPD declaration was provided to the Society. No practising certificate was issued to the practitioner for the year commencing 1 July as a result of the outstanding CPD declaration.

A letter was sent to the practitioner on 11 July but it later transpired that the practitioner was absent from the jurisdiction at this time. On 2 August the practitioner attended at the Society to discuss the CPD declaration and attention was drawn to the fact that the practitioner had been without a practising certificate since 1 July.

Two grounds of complaint against this practitioner were

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considered.

- Firstly, that the practitioner failed for a period of four months to comply with the obligation to complete the requisite twelve points of CPD and to provide the Society with a declaration regarding compliance with the Regulations, and
- secondly, engaging in legal practice for one month while not holding a current practising certificate.

Information was provided that made it clear that the practitioner did not engage in legal practice between 1 and 18 July.

The Council found that the practitioner was guilty of unsatisfactory professional conduct for negligently failing to comply with the CPD obligations for the year ending 31 March, and further found the practitioner inadvertently engaged in legal practice without being a holder

of a current practising certificate between 19 July and 2 August. Due to extenuating circumstances detailed in the practitioner's response as well as character references provided the Council was satisfied that special circumstances existed to warrant a private reprimand. ●

Failing to diligently carry out instructions

This complaint was received from a party about their own legal representative in family law proceedings. The initial complaint contained eight separate grounds, however, seven of those grounds were summarily dismissed by the Society.

The remaining ground of complaint that was considered related to failing to file a consent parenting order as instructed. The complainant was initially self-represented in proceedings for both property settlement and parenting orders before the Federal Magistrate Court.

Initially the practitioner was retained to represent the complainant around the time of the court ordered conciliation conference. That retainer ended but later the complainant again retained the practitioner to act as barrister only for the final hearing of the matter. That retainer did also extend to providing advice to the complainant about the affidavit material to be filed in accordance with the court's usual trial directions.

The case was listed for a two day hearing but it was not able to be heard on the date as initially listed.

Negotiations took place at court on the first day that the matter was scheduled for hearing, and emails were exchanged between the practitioner and the complainant that evening in relation to the proposed parenting orders that the complainant wanted to seek. The following day at court there were further negotiations between the parties in relation to the parenting matters. The complainant's proposed parenting order document was used as a template for these negotiations.

At the end of the day the practitioner submitted a revised "parenting orders by consent" document to the complainant via email and it was returned with some minor cosmetic changes tracked in the document.

The next day the complainant sent a further document to the practitioner which was a very different document from the earlier consent document. There then appears to be some confusion as to whether or not the draft consent order document was put to other party's solicitor for approval, or if so, which version of the document was submitted.

The complainant chased the practitioner about one week later regarding the filing of the parenting order. In a subsequent email sent another week later, the complainant asks if further evidence is required in relation to the parenting issues, and again the status of the parenting consent orders and when they will be filed in court is queried. It was clear that the document the practitioner held could not have been filed as a consent order as it had not been signed by the respective legal practitioners to enable it to be filed.

The practitioner acknowledged that the work to try and get consent parenting orders filed in court had been accepted but that the practitioner had failed to chase up the other practitioner in relation to either agreement to the proposed order, any further amendments to them or alternatively an acknowledgement of the other party's refusal to agree to any of the orders.

While the Council found it was unlikely that the practitioner could have promised to file the consent orders in court the practitioner certainly did give the complainant

the impression that the practitioner was going to try and get the document agreed to by the other side, and if agreement was obtained to then file the document. It was determined that the practitioner, by having accepted the job to attempt to obtain signed consent orders reflecting the agreements reached at Court on the first scheduled

hearing dates so they might be filed with the court, failed to carry out that work with due diligence.

The Council determined that the practitioner was in breach of rule 1.1 of the Rules of Professional Conduct and Practice in that the practitioner failed to diligently or at all pursue consent orders to be

filed in the court, even though it had been agreed with the complainant to do so and that breach constituted unsatisfactory professional conduct. The practitioner was fined five penalty units and privately reprimanded. ●

Lack of diligence and competence: failing to advise of any time limitations

The complainant attended upon the practitioner initially by telephone to seek advice in relation to concerns about the distribution of proceeds from the sale of properties seized under a criminal forfeiture provision. An appointment was scheduled for about one month later. The law practice's file for this client contained bundles of documents that appear to have been delivered by the client containing bank statements and correspondence from the public trustee to the mortgagee's solicitors. Nothing further happened on the file for a number of months until a telephone conversation occurred some four months later. The practitioner's file note of this conversation was very brief: "Get me all details – all accounts – not estimates and the copy of mortgage accounts / copy of all mortgage documents". The complainant contacted the firm again about six weeks later to query the progress of the matter. There was then no further contact until five months later. By this time the practitioner was absent from the practice due to health reasons. The firm wrote to the complainant indicating they could not provide the services required and returning the documents received from the complainant.

Initially there were three grounds to the complaint. Two of the grounds of complaint were dismissed. The second ground of complaint was that the limitation expired while the practitioner had conduct of the matter and this had prevented the complainant from making a compensation claim. A finding of unsatisfactory professional conduct was made out in relation to this ground.

There was some question as to whether or not the time limit for the complainant to take action had expired prior to the complainant even attending upon the practitioner. On one interpretation the complainant's cause of action did not arise until three years after a particular property was sold and the monies returned by the public trustee. Alternatively a two year time limit may have applied. Regardless, the practitioner did not provide any advice at all to the complainant about the existence or application of any limitation periods that may have affected the complainant's rights.

It was found that a reasonably competent legal practitioner would ordinarily be under an obligation to advise a client about the existence of any limitation periods. The practitioner responded to

the complaint by asserting that given the complainant's lack of commitment to the process, nothing was thought of the complainant's failure to respond. The practitioner stated they simply waited, knowing the complainant had ample time to commence litigation. The client had not been diligent in providing documents or information, but a lack of awareness of any time limits may have impacted on the client's perception of any urgency to attend to these matters. It was considered uncontroversial that the failure to advise the existence of a limitation period was a clear example of a failure by a legal practitioner to exercise reasonable care and skill in giving advice.

The Council was of the view that the conduct, being an omission on the part of the practitioner, fell within the concept of a lack of the expected level of diligence and competence that could be categorised as unsatisfactory professional conduct. The practitioner was found to have engaged in unsatisfactory professional conduct on that basis and fined seven penalty units. ●