PROFESSIONAL INDEMNITY POLICY: WHAT CONDUCT IS CAUGHT BY THE DISHONESTY EXCLUSION?

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Lawcover's professional indemnity insurance policy indemnifies solicitors against civil liability for claims arising from the provision of legal services. While it is rare for Lawcover to decline indemnity, there are occasions in which we cannot extend cover. An important exclusion applies for claims involving dishonesty and fraud. While clause 10 operates to exclude liability in the case of dishonesty or fraud, clause 11 operates to protect innocent partners and directors of a law practice. Clause 13 provides that, where Lawcover makes a payment under the policy that arises from a dishonest or fraudulent act or omission of an insured, Lawcover has the right to recover payment from the individual responsible.

It should come as no surprise that dishonesty and fraud are excluded from cover, as this accords with public policy and is a standard feature of insurance policies. However, solicitors are sometimes unaware of the type of conduct that can be described as dishonest within the meaning of the policy, so it is worth reviewing some areas in which it can apply.

Solicitors' fiduciary duties

The relationship between a solicitor and client is fiduciary in nature. The nature of the relationship does not arise merely because of the status of the relationship, but also because of the element of confidence and influence inherent in the relationship [*Beach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408 at 189]. The fiduciary nature of the relationship can be relevant to the meaning of dishonesty under the policy.

In *McCann v Switzerland Insurance* [2000] HCA 65 the High Court considered the effect of the dishonesty exclusion in circumstances in which a client transferred more than US$8million to a solicitor in order to purchase a financial instrument. Before the transfer, the solicitor failed to provide relevant information such as his previous unsuccessful attempts to purchase the instrument, and he had given misleading statements about the extent of his previous dealings with the other party. He also failed to disclose that he would receive a secret commission worth up to $150,000 as part of the deal. After the client transferred the money to the solicitor, the money was paid into the other party's bank account. The money then became untraceable. While there was no evidence the solicitor himself received the missing funds, the High Court unanimously agreed that the solicitor's omissions to provide relevant information, his misleading statements as to his experience in dealing with the other party, the secret commission received and the preferring of his own interests over those of his client amounted to dishonesty.

Snapshot

Solicitors should always carefully consider their own position, and whether they should decline to act, where:

- they are aware of information that if concealed could amount to dishonesty under the policy;
- a client asks them to falsely witness a document that has already been signed;
- the facts of the underlying matter suggest that criminal conduct could be present in any way.

False witnessing of documents

Lawyers are frequently called upon to witness the signing of legal documents. Loan documents and transfers of real property all require that the documents be signed in the presence of a witness, who then attests that the documents were signed *in their presence*. In some Lawcover claims, the person who apparently executed a document alleged that their signature had been forged, and that the lawyer who 'witnessed' their signature should be held liable for their loss. There have been instances in which a client has persuaded a lawyer to 'witness' documents that have already been signed. While in some cases the lawyer's motives may be open to question, in other cases solicitors are persuaded to falsely 'witness' a document for reasons of convenience or on compassionate grounds. In two Lawcover cases, solicitors admitted signing an attestation clause even though the document had already been signed. In the first case, the solicitor was told that the person who had signed the document was elderly and unable to travel to the solicitor's office. In another case, a husband claimed that his wife was stricken with cancer and he did not want her to know the family's financial situation was precarious and that he needed to borrow funds against the family home.

Where a solicitor knowingly represents that s/he has witnessed the signature of another person, and this is not true to his/her knowledge, the dishonesty exclusion applies (*Yaktine v Perpetual Trustees Victoria Limited* [2004] NSW SC 1078; *Colonial Mutual Superannuation Pty Limited v Flammia (No.3)* [2007] FCA 2104; *Ginelle Finance Pty Limited v Diakakis & Ors* [2007] NSW SC 60).

While some might consider this category of claims to be less morally culpable than cases in which a person has sought to obtain a financial advantage by deception, the courts take a dim view of lawyers who falsely attest to witnessing signatures, because the lawyer is regarded as the 'gate keeper' for the integrity of the transaction, particularly where real property is concerned (*Ginelle Finance at paras 113 to 115, and Graham v Hall & Anor* [2006] NSW CA 208). In these cases, the dishonesty exclusion will apply, irrespective of whether the insured's false attestation of a document was made with the intention to deceive, or whether the solicitor intended to obtain a personal benefit or cause financial disadvantage to another.

Reckless disregard or dishonesty?

In other cases, questions arise as to whether a solicitor's conduct was so reckless to amount to dishonesty. A court sometimes will need to consider whether a decision 'not to know' could amount to dishonesty. **LSJ**