

# Honesty is the best policy

For many solicitors, the ability to negotiate and settle disputes is a honed skill and a fundamental part of their practice; one which can be exercised effectively under the “cloak” of without prejudice privilege.

Often, negotiations and alternative dispute resolution processes do not unfold as expected, and the risk of unfair tactics might arise. For example, a client may instruct a solicitor to advocate an incorrect fact or misrepresent an issue in the dispute to gain an advantage or better outcome. Solicitors should be mindful of their duties, potential professional liability and even disciplinary consequences that can flow from the use of unfair tactics, and that without prejudice privilege over communications made in negotiations may be lost in such circumstances.

## A claims perspective

Recently a claim was made against a solicitor concerning a critical liability issue about whether the client made telephone calls to the solicitor giving certain instructions, and the timing of those calls. Telephone records would be important to proving the facts. Representations were made by the client’s solicitor in negotiations noting that the client’s telephone records existed and would be relied upon in threatened legal proceedings. However, the client refused to produce the records and when pressed, conceded they had been lost and then quickly consented to settlement.

## Misleading and misrepresentations

Doubts can arise as to the integrity of the representations made in negotiations.

Misrepresentation in negotiations can provide a legal basis for avoiding or challenging a settlement agreement and can possibly lead to both civil and disciplinary action against a solicitor who has negotiated an agreement.

Further, evidence of without prejudice communications in the negotiations may not be protected from being adduced in evidence. Misrepresentation is one of the key exceptions to the without prejudice privilege rule provided at both common law and under section 131 of the *Evidence Act NSW* (see *Pihiga Pty Ltd v Roche* [2011] FCA 240).

One qualification to this involves Court ordered mediations in NSW. Section 30 of the *Civil Procedure Act NSW* provides a much broader statutory protection to confidential communications in mediations than under the common law and *Evidence Act NSW*. This however should not be an invitation to solicitors and their clients to be tempted to push the boundaries of conduct in Court ordered mediations.

In *Legal Practitioners Complaint Committee and Fleming* [2006] WASAT 352, the Tribunal upheld a complaint against a solicitor over his conduct in without prejudice negotiations, which was found to have been intended to mislead opposing parties about the existence of a valid will, which was a key issue in the dispute. The Tribunal considered that without prejudice privilege ought not prevent the examination of solicitor conduct in disciplinary proceedings brought against them, to uncover unprofessional conduct in the course of negotiation, observing that:

‘There is no room for unfairness or deception in negotiations for the compromise of litigation...’  
(*Legal Practitioners Complaint Committee and Fleming* [2006] WASAT 352 at [83])...and

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'Where an allegation of unprofessional conduct is made in relation to conduct taking place in the course of without prejudice negotiations, the public interest demands that those allegations be properly considered and dealt with. A solicitor is not entitled to be shielded from the allegations simply by asserting the existence of without prejudice privilege.' (*Legal Practitioners Complaint Committee and Fleming* [2006] WASAT 352 at [84])

### Legal and ethical obligations

In the conduct of negotiations, a solicitor's legal and ethical duties at common law and under the *Australian Solicitors' Conduct Rules 2015* include:

- ▼ Acting in the best interests of a client
- ▼ Following a client's lawful, proper and competent instructions

- ▼ Being honest, fair and courteous in dealings with clients, other solicitors and other persons involved in legal matters
- ▼ Delivering legal services competently and diligently
- ▼ Avoiding the compromise of the solicitor's integrity and professional independence.

Whatever the forum of negotiation, where a misleading statement is made by a client, or a solicitor acting on instructions, the client should be advised to instruct the solicitor to correct the statement without delay. Otherwise, the solicitor may be obliged to refuse to continue to act in the matter and correct or qualify the statement without instructions, to avoid an action for misleading and deceptive conduct, and/or potential disciplinary proceedings.

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