



# Negligence, Professional Misconduct and Unsatisfactory Professional Conduct

What is the difference and why does it matter?

Whilst it is not uncommon or unexpected for consumers of legal services to misunderstand the distinction between negligence, professional misconduct and unsatisfactory professional conduct, there is also significant confusion amongst the legal profession.

Lawcover regularly encounters professional negligence claims made on behalf of a client against their former solicitor, which include allegations of professional misconduct. The *Legal Profession Uniform Law Act (NSW)* (LPUL) defines unsatisfactory professional conduct as conduct that falls short of the standard of

competence and diligence that a member of the public is entitled to expect of a reasonably competent solicitor (s 296). Professional misconduct on the other hand is more serious and involves a failure to reach or maintain a reasonable standard of competence and diligence or conduct that would justify a finding that the solicitor is not a fit and proper person to engage in law practice (s297). It is rare that the conduct of a solicitor that is the subject of a professional negligence claim will rise to the level of professional misconduct or unsatisfactory professional conduct which leads to disciplinary action.



### Allegations and obligations

Correspondence between parties to a dispute that also includes allegations of misconduct by one party's legal representative can result in solicitors notifying Lawcover of circumstances that may give rise to a professional negligence claim. In some circumstances, it would appear the purpose of an allegation of misconduct is strategic and does not have a genuine basis. Lawcover has observed multiple claims that include allegations of 'undue influence' in relation to:

- ▼ the entry of a client into a retainer
- ▼ purported tax avoidance as the basis of the terms of a deed
- ▼ miscalculation of stamp duty
- ▼ errors in drafting

**In each of these claims, the conduct in question did not rise to the level of unsatisfactory professional conduct or professional misconduct.**

Solicitors should carefully consider the evidentiary basis for an allegation of misconduct against another solicitor. Before making potentially unfounded allegations, solicitors should consider their obligations under the *Australian Solicitors' Conduct Rules*. Under r 32.1 a solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide, and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it. Solicitors face serious consequences where allegations are made without reasonable grounds.

Solicitors should also be cognisant of their professional duties owed to their counterparts in all communications. Cooperation and honesty between solicitors promote the efficient administration of justice and avoids unnecessary costs being incurred on both sides. Solicitors also have an important role to help inform and educate clients as to the standards the profession upholds, the value of the service it provides and the appropriate conduct that is expected.

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