

# Pointing the Finger



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*Circumspection is needed in making allegations of misconduct against other lawyers*

It has been observed that “it is essential to the maintenance of professional standards and the confidence of the public in the (largely) self-regulated legal profession, that where professional standards are not met, and the matter cannot be resolved, the issue be referred to the appropriate authority”, and that “[p]ractitioners have a professional obligation to do so”.<sup>1</sup> There is limited recognition of this obligation in the legal profession legislation, which requires lawyers to report other lawyers’ dishonesty or irregularity in accounting for trust money,<sup>2</sup> and to self-report, *inter alia*, their conviction for serious offences or tax offences and their insolvency.<sup>3</sup> Fulfilling these obligations presents a means, beyond client complaint and judicial referral,<sup>4</sup> whereby regulatory authorities are apprised of matters going to lawyers’ professional conduct. The South Australian and Victorian professional rules contain an ostensibly more encompassing obligation in this regard,<sup>5</sup> but it remains unclear whether it extends beyond reporting of a lawyer’s own misconduct.<sup>6</sup>

Be that as it may, it is hardly unprofessional to report another lawyer’s misconduct to the appropriate body. Leaving aside the difficult ethical issues arising out of any prescriptive general obligation to report others’ misconduct – in particular, how any such duty is to be enforced and the consequences of its breach<sup>7</sup> – lawyers are, after all, well positioned to identify and report misconduct, which can, in turn, perform a valuable quality assurance role for the profession.

Without downplaying the importance of the profession’s self-policing in this regard, it must be remembered that, as a matter of principle, any serious allegation against any other person should not be made lightly or upon flimsy evidence. The point is recognised in the relevant professional rules, which in the context of court proceedings, proscribe a lawyer alleging criminality, fraud or other serious misconduct unless there is a proper basis for this allegation.<sup>8</sup> Frequent statements can be found in the case law to the same effect.<sup>9</sup> The more serious the allegation, the more circumspect its maker should be.

Because allegations of misconduct against a fellow legal practitioner are serious – if proven, they can potentially threaten his or her livelihood and, at the least, his or her reputation – there are good reasons for prospective lawyer-reporters to exercise the said circumspection. It stands to reason that allegations made without proper cause and unsubstantiated by the evidence can turn the disciplinary tables the other way. On more than one occasion in recent times, lawyers shown to have made unjustified allegations of misconduct against other lawyers have themselves been subjected to professional discipline.

In *Legal Profession Complaints Committee v de Braekt*<sup>10</sup> the Western Australian State Administrative Tribunal, finding that the respondent lawyer had, without any reasonable foundation, made a number of allegations of impropriety, including allegations of misleading the court, against the opposing practitioner, declared her guilty of unsatisfactory professional conduct. In so ruling, it cautioned that “[l]egal practitioners should be slow to make allegations of impropriety against other legal practitioners”.<sup>11</sup> Though accepting that there are occasions where it may be necessary for a lawyer to allege that another has made a statement that is misleading, or even untruthful, assuming there is a reasonable basis for this assertion, it added that the starting point for any lawyer “is an expectation that other practitioners will tell the truth”.<sup>12</sup>

Eighteen months earlier the Northern Territory Legal Practitioners Disciplinary Tribunal in *Law Society of the Northern Territory v McLaren*<sup>13</sup> found the respondent to have engaged in professional misconduct arising out of unfounded allegations of dishonesty made against three solicitors. She was found guilty of professional misconduct, a finding upheld on appeal, in view of “the seriousness of the allegations against the individual solicitors, the maintenance of those allegations and the practitioner’s knowledge of the absence of instructions and the absence of evidentiary material to support the allegations”.<sup>14</sup>

That each of the above cases involved somewhat extreme behaviour by the lawyers in question, who appeared to let perceived grievances upset their professional judgement, is no licence for an unconsidered approach to making any allegation of impropriety. To this end, lawyers may need to exercise careful professional judgement in treading what may prove a fine line.

## NOTES

1. *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352 at [78].
2. *Legal Profession Act 2008* (WA) s227(2).
3. *ibid.*, s62.
4. See, for example, *Spector v Ageda* [1973] Ch 30 at 50 per Megarry J; *Zelino v Budai* (2001) 47 ATR 488 at [238] per Palmer J.
5. Rules of Professional Conduct and Practice (SA) rr30.1, 31.1; Professional Conduct and Practice Rules 2005 (Vic) rr30.1, 31.1.
6. See GE Dal Pont, “Reporting for Duty” (October 2005) 79 LJ 78.
7. See GE Dal Pont, *Lawyers’ Professional Responsibility*, 4th edn, Lawbook Co., 2010, [24.15]–[24.25].
8. Legal Profession Conduct Rules 2010 (WA) rr36(3), 36(5).
9. See, for example, *Saltoon v Lake* [1978] 1 NSWLR 52 at 58 (CA); *Y v M* [1994] 3 NZLR 581 at 586 per Temm J; *NIML Ltd v MAN Financial Australia Ltd (No 2)* [2004] VSC 510 at [6] per Harper J.
10. [2011] WASAT 1.
11. [2011] WASAT 1 at [107].
12. [2011] WASAT 1 at [136].
13. NT Legal Practitioners Disciplinary Tribunal, 24 June 2009.
14. *McLaren v Legal Practitioners Disciplinary* (2010) 26 NTLR 45 at [152] per Martin CJ.