This time it's personal: defamation claims against solicitors

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Snapshot

- Solicitors have a duty to be courteous in the course of legal practice.
- Think carefully about what is included in correspondence. Try not to send letters or emails drafted in the heat of the moment.
- Avoid making the client's fight your own.
- Give serious thought to offering a genuine apology to resolve disputes with fellow practitioners.

There is an increasing tendency for solicitors to resort to accusations of defamation during interpersonal conflict in professional dealings. Ultimately, such accusations and any subsequent defamation proceedings bring more heat than light to the practice of law. While a solicitor's reputation is valuable, the issuing of defamation proceedings to protect that reputation from a perceived slight could have the opposite effect by publishing the dispute more widely – as well as being time consuming and, ultimately, detracting from the client's position.

Defamation or private dispute ?

Defamation proceedings used to be predominantly brought against media organisations, and would typically relate to widespread publications. The recent cases of *Wilson v Bauer Media* [2017] VSC 521 and *Gayle v Fairfax Media* [2017] NSWSC 1261 are good examples of celebrities successfully disputing media articles published about them. But a survey of decisions made under the uniform *Defamation Law* revealed that fewer than half of the decisions involved claims against media organisations (Andrew T. Kenyon 'Six Years of Australian Uniform Defamation Law: Damages, opinion and defence meanings' *UNSW Law Journal* Volume 35(1) 2012). A significant number also included publication of defamatory comments to only one or two people.

The tendency to allege defamation in order to address what could essentially be private disputes accords with our experience at Lawcover. We are seeing an increase in the number of claims being brought against solicitors by fellow practitioners alleging they have been defamed because of unfortunate comments made in correspondence about client transactions, or in the course of heated negotiations. Very often the allegations relate to comments published to only one or two other people which, even if litigated, could only lead to a limited award of damages.

Avoid making the client's fight your own

In one recent claim, two solicitors fell into dispute about the interpretation of a word in a contract. Comments were made about the reasonableness of one interpretation over another, with the relevant publication being in an email which was courtesy copied to a real estate agent. Accusations of defamation by both solicitors were leveled against the other, both notified claims and threatened complaints to the Office of the Legal Services Commissioner. Not only was the dispute time consuming and acrimonious, it did not advance either client's interests and was damaging to both law practices.

Solicitors need to be impartial about their clients' cases and not make the client's fight their own. In another recent case, a solicitor wrote to his opponent describing the client's allegations as fanciful (in more colourful language) and suggested the opponent was misinformed or worse. That led to a lengthy dispute between the solicitors with allegations of defamation again being made on both sides. This caused the primary issue to become the conflict between the solicitors, rather than the client's underlying claim. While solicitors are adept at using forceful language in prosecuting a client's case, clients must be able to rely on their solicitor to provide dispassionate advice, without becoming embroiled in a personal argument with an opposing solicitor.

These situations rarely assist a client or advance the client's case.

Look at the big picture

Fortunately, the *Defamation Act 2005* (NSW) contains provisions enabling (indeed, encouraging) parties to resolve disputes and make amends before formal proceedings are issued. The sending of a Concerns Notice pursuant to section 14 of the *Defamation Act* by the slighted party triggers a process which allows the other party to offer to make amends. When accused of defamation, a solicitor's first reaction is often to admit nothing and to not back down. But sometimes taking a bigger picture view, offering to retract statements and apologise for offence caused can save time, cost and acrimony.

Solicitors should also keep in mind that rule 4.1 of the *Solicitors Conduct Rules* requires solicitors to be honest and courteous in all dealings in the course of legal practice. A breach of that rule can lead to disciplinary proceedings and professional sanctions.

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Before sending a heated email or making a rash statement, solicitors should consider the ultimate consequence of that action both for themselves and their clients.

Lawcover also receives defamation claims against solicitors where the solicitor is merely acting on a client's instructions. In one case, for example, a solicitor set out allegations of sexual harassment by a school teacher in a letter to the principal. The letter was sent to the fax number of the front office, which meant a number of people other than the principal read the allegations. The accused teacher alleged he had been defamed by the solicitor. While a solicitor should not shy away from properly prosecuting a client's case for fear of a claim being made against them personally, care should be taken to ensure that serious allegations against other parties are made only to people who have a genuine interest in hearing them, avoiding wide publication which could lead to defamation. That situation placed the solicitor in a position of conflict which did not assist the client's case.

If, despite best efforts, you are accused of defamation as a result of something that happens in your legal practice, professional indemnity insurance is usually available to address the problem. Defamation is a specialised area and Lawcover engages a panel of experts who can assist in defending claims, and also advise you on the best approach to take to avoid proceedings being issued. It is essential to notify your insurer as soon as defamation is mentioned because steps taken early in the process, including possibly issuing a retraction and offering an apology, can save significant time and cost over the life of proceedings. A defamation expert can also provide much-needed perspective on a dispute, allowing solicitors to cool off and focus on their clients' disputes rather than their own. **LSJ**