

Honesty is the best (way to make sure you are covered under the) policy

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Solicitors must act honestly in all dealings in the course of legal practice. That obligation arises because of the special role solicitors play in the administration of justice. If solicitors and counsel were permitted to be economical with the truth, much of what we take for granted in the conduct of litigation or transactions, would be undermined. Dishonest solicitors also risk the coverage provided under their insurance policy and the Professional Standards Scheme. In some cases, the line between a genuine mistake and dishonest conduct is not immediately clear. There may be hidden risks for practitioners whose conduct could be found to amount to unknowing or inadvertent dishonesty, or where steps are taken to cover up an honest mistake.

The hidden risks of dishonesty

Some of these issues were highlighted in a recent case in the Federal Court in Victoria. *Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd* [2018] FCA 2098, involved a firm of accountants and a simple error in calculations that turned out to have significant consequences. The accountants' client was a bus operator which successfully tendered for a bus contract with the New South Wales government. Unfortunately for the bus operator, its tender was based on a miscalculation of the cost of the leased buses which it was taking over under the contract. Instead of amortising the purchase price of the buses over a 15-year period, the accountants inadvertently used a figure called the Vehicle Termination Payment, which seems to have been akin to the balloon payment at the end of the bus lease. This led to erroneous calculations which significantly understated the cost of the leases to the operator, meaning the operator was stuck with a contract which cost more to service than expected.

After contracts had been entered into, the accountants prepared cash flows to assist the client in obtaining finance. The Court found that the accountants became aware of the earlier error when preparing the cash flows and concealed it from the client by making adjustments in the cash flows for that purpose. That problem was further compounded when the client noticed that the lease payments on the buses were \$71,000 higher per month than the tender calculations indicated. The accountants prepared further spreadsheets to explain away that discrepancy by suggesting

Snapshot

- The dishonesty of a professional can jeopardise insurance cover and limitation of liability under the relevant Professional Standards Scheme.
- Attempting to cover up a mistake can amount to deceit.

there was no inconsistency. The accountant eventually conceded (when giving evidence at the trial) that in providing the further spreadsheet he was 'deliberately not telling him [the client] the whole story' and 'deliberately trying to mislead him, [the client] at least in some way' (at [116]).

This was a straightforward mistake that could have been resolved. Further, if the

facts had been examined dispassionately by someone independent of the individual who had made the initial error (e.g. another partner of the firm) much of what followed may have been avoided. Instead, it was compounded by deceit and dishonesty and rather than being held liable for the original calculation error in the tort of negligence or for breach of the implied contractual obligation to take reasonable care, the accountants were held liable for the tort of deceit, which did not affect the client's entry into the bus contract, but did induce the client to enter into the financing arrangements.

The finding had one known consequence for the accountants: they were not able to limit their liability under the applicable *Professional Standards Act* scheme, which does not apply to damages arising from fraud or dishonesty (damages were in excess of \$5 million). It could have had another consequence: professional indemnity policies typically contain an exclusion for liability arising from any dishonest or fraudulent act. The Lawcover policy excludes claims arising directly or indirectly from dishonest conduct. If this finding had been made against a solicitor, it is likely that it would not be covered.

Honesty is the best policy

The message for practitioners is simple: honesty is the best policy. If a claim arises from a lack of honesty at any stage, professional indemnity insurance cover may be in jeopardy (as might the protections of the *Professional Standards Act* scheme).

We are all fallible. Mistakes happen, perhaps more commonly than we might think, but they should be confronted and addressed – not covered up. Misleading a client or rushing to immediate acceptance of responsibility when the facts may not be clear is not the right response. If a problem arises which causes concern, tell the client that they may need independent advice. Notify Lawcover if you think a claim may result and most importantly enlist someone you trust to help; don't try to solve the problem alone. **LSJ**