The Critical Ingredients of Mitigation in Building Misconduct Matters

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It is a truth seldom grasped in building misconduct inquiries: the goal should really not be all about denying liability at any cost. This is true across all States and Territories.

We have often surmised that this is why litigation lawyers are not best suited to misconduct advocacy, as their golden rule seems to be more akin to that of the insurer; that is to deny liability at all costs, even in the face of clear evidence.

What is always underestimated is the extent to which the trier of fact in misconduct hearings is usually very keen to hear about:

- Any changes to professional practice or greater understanding as a result of any errors;
- Any contrition or remorse for anything that has occurred;
- A genuine recognition that a wrong has occurred and a commitment to change;
- A good prior track record to demonstrate any wrong conduct is an aberration rather than a pattern

That is not to say that the trier of fact will not give you a fair hearing in regard to disputes over liability, but you need to have a good prospect of success on any charges that are to be contested. We often say to practitioners trying to defend 'line ball' charges that a disciplinary body will tend to err on the side of caution, due to the public imperative to protect the community. Charges should not be contested for speculative or purely political reasons.

While the *Briginshaw* test of 'reasonable satisfaction' should be applied to the question of whether the charge is proven, that is certainly not as hard for a prosecutor to prove as the 'beyond reasonable doubt' test in the criminal court.

Whether we are referring to misconduct hearings at first instance, such as the Building Professionals Board in NSW or the Building Practitioners Board in Victoria, or whether we are discussing appeals to higher bodies, if there is anything the practitioner wishes to say about penalty then that needs to be a key focus of the case presented.

Invariably there will be at least some charges that are not contested, even if the majority of charges are challenged. Similarly, an appeal might be against a finding of guilt on some charges but about the severity of the penalty on others.

Where there is anything at all to say on the severity of the penalty that is to be handed down, the practitioner needs to be willing to talk about such matters as:

- The size and nature of their professional practice including the number and nature of projects they are responsible for;
- What their systems were at the time of any conduct complained of;
- What they have learned about any errors committed;
- What steps have been taken by the practitioner to rectify any harm that has occurred;
- What procedures or processes have been implemented to make it highly unlikely the conduct will re-occur.

This is not merely a case of waving the white flag. A plea in mitigation takes some craft and ideally should be presented by a legal advocate. Helpful character references from at least 2-3 people who have known the practitioner for at least several years, and can attest to their knowledge, integrity and competence, should be obtained prior to hearing. The references need to be recent and should mention briefly that the writer is aware that the reference is needed for a disciplinary proceeding.

It is also extremely helpful to be able to hand up an updated or revised policy or quality assurance manual that serves to address the kind of errors that may have arisen.

You may well be asked by the trier of fact or the investigator whether the manual is a recent invention the week before the hearing and is simply

'window dressing'. So it helps if you can answer truthfully that the procedures have already been implemented and there is a commitment to put them into practice.

There is recent case law in NSW (at the ADT level) to the effect that not every professional error should necessarily lead to an "adverse disciplinary finding". In NSW for accredited certifiers, that means a finding of *'unsatisfactory professional conduct'* or the more serious *'professional misconduct'*. A discretion on point needs to be exercised by the trier of fact, looking at all surrounding circumstances, rather than taking an 'absolutist' position.

There is also recent case law in building misconduct to the effect that a practitioner needs to display some awareness of their responsibility to the public and should not take an antagonistic or unnecessarily belligerent line in defending matters. Admissions of error should be genuine rather than 'token' in nature, with a true recognition of the significance of any errors.

At one recent hearing the certifier presented a character reference that had said words to the effect that he should not be made into a 'matryr' for "venturing into areas where others had feared to tread". This attracted criticism from the Tribunal as it suggested that the certifier was also adopting the view that he was a martyr. This could obviously detract from any perception that the certifier was contrite and remorseful about any errors.

In disciplinary misconduct hearings there is not such a clear line between contesting allegations versus pleading guilty and then doing a plea in mitigation. It is rather more blurred than that, but the trier of fact will still generally not tolerate a plea in mitigation that seeks to re-litigate findings of fact (or admissions) on liability. The plea in mitigation is all about finding the right formula and hitting the right notes.

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