JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTICE ACT 2003 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and FLEMING [2006] WASAT 352
MEMBER	**:**	JUDGE J CHANEY (DEPUTY PRESIDENT) MR C EDMONDS SC (SENIOR SESSIONAL MEMBER) MS C WINSOR (SESSIONAL MEMBER)
HEARD	**:**	25 AND 26 SEPTEMBER 2006
DELIVERED	**:**	7 DECEMBER 2006
FILE NO/S	**:**	VR 16 of 2006
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND DAVID GEORGE FLEMING Respondent

Catchwords:

Legal practitioner - Unprofessional conduct - Communication with other party's solicitor - Withholding disclosure of defects in will - Whether misleading - Communications in accordance with client's instruction not to disclose informality of will - Obtaining covenant not to challenge will - Covenantors not appreciating rights foregone - Duty of solicitor in conducting settlement negotiations - Whether proceedings should be stayed or struck out because communications "without prejudice" - Whether conduct unprofessional

Legislation:

Inheritance (Family and Dependants Provision) Act 1972 (WA)
Non-contentious Probate Rules 1967 (WA), r 20, r 20A
Law Society of Western Australia Professional Conduct Rules, r 3.1, r 21.1, r 12.3, r 18, r 31
Wills Act 1970 (WA), s 8, s 34

Result:

Finding of unprofessional conduct made against practitioner

Category: B

Representation:

Counsel:

Applicant	:	Mr GH Murphy SC and Ms CFM Coombs
Respondent	:	Mr LA Tskaknis

Solicitors:

Applicant	:	Law Complaints Officer
Respondent	:	HFM Legal

Case(s) referred to in decision(s):

D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1
Kyle v Legal Practitioners' Complaints Committee (1999) 21 WAR 56
Unilever plc v Procter & Gamble Co (1999) 2 All ER 691
Williams v Commonwealth Bank of Australia [1999] NSWCA 345

Case(s) also cited:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 In 2000 and 2001, Mr David George Fleming acted for a client in relation to the resolution of a dispute between the client's late husband and his siblings. The dispute concerned claims by the siblings as to the validity of their late mother's will and distribution of her estate. The husband had not executed a will in accordance with the formalities of the *Wills Act 1970* (WA), but had signed a facsimile of a draft will. His signature had not been witnessed. Mr Fleming considered that the informal document would be accepted in probate proceedings as the will of the deceased husband, notwithstanding its informality. If it was not accepted as his will, then the siblings had an entitlement to share in the estate with Mr Fleming's client.

2 The client was concerned that, if the sibling knew that her husband had not left a formally executed will, they might challenge the document's admission to probate. She instructed Mr Fleming not to provide a copy of the will to the siblings.

3 In the course of negotiations for the settlement of the dispute over the mother's will, Mr Fleming sought a covenant by the siblings not to challenge the deceased husband's will nor make any claim against his estate. He referred in correspondence to the informal document as the deceased husband's "will". He proposed (but did not disclose to the siblings) that, if the covenant was obtained, he would rely on it in support of an application to the Court to dispense with the siblings consent to a grant of probate of the informal will, or alternatively to require the siblings to give their consent.

4 The disputes were settled and the siblings signed a deed containing the covenant not to make claims on the husband's estate. They subsequently learned that no formal will had been executed. They immediately commenced proceedings to set aside the deed, on the basis that they had been misled as to the existence of a will that was valid on its face. A complaint was made to the Legal Practitioners Complaints Committee that Mr Fleming had acted unprofessionally by misleading the siblings and their solicitor.

5 The complaint was referred to the Tribunal.

6 The Tribunal examined the communications between Mr Fleming and the siblings' solicitor, Mr Atkinson. It concluded that Mr Fleming had

misled Mr Atkinson and the siblings, and that his conduct was unprofessional. It was no answer that Mr Fleming was merely acting on his client's instructions.

The complaint

7 The Legal Practitioners Complaints Committee (Committee) brings a complaint that Mr David George Fleming, a legal practitioner, was guilty of unprofessional conduct in late 2000 to early July 2001, in that in the course of professional communications with another practitioner, he made representations to the other practitioner which were, to his knowledge, misleading. The conduct is said to constitute unprofessional conduct in that it offended the obligation of a legal practitioner, reflected in r 3.1 of the *Professional Conduct Rules* of the Law Society of Western Australia (the Rules), not to attempt to further his client's case by unfair or dishonest means. With respect to that rule, the Committee relies on both "unfairness" and "dishonesty".

8 Mr Fleming denies that his communications were misleading or that, if they were, his conduct was such as to amount to unprofessional conduct.

The events giving rise to the allegations

9 In early September 2000, Mr Fleming commenced acting for a client (the client), shortly following the death of her husband (the deceased). She sought advice with respect to a continuing dispute between the deceased and his brothers and sisters (the siblings) in relation to their mother's will (the mother's will). She sought advice also with respect to an application for a grant of probate of the deceased's informal will.

10 The dispute between the deceased and his siblings concerned the validity of the mother's will, the terms of which provided for her real property, which comprised the bulk of her estate, to pass to the deceased to the exclusion of the other siblings. The dispute also involved a foreshadowed claim by the siblings to the mother's estate under the *Inheritance (Family and Dependants Provision) Act 1972* (WA) (Inheritance Act). The siblings were represented by a solicitor, Mr Alex Atkinson. Prior to his death, the deceased was represented by another solicitor, Mr Kevin Dundo.

11 At the time of the deceased's death there existed an undated document, described on its title page as "draft last will and testament of [the deceased]". That document (the informal will) was purportedly

executed by the deceased, but was not attested by witnesses in accordance with the requirements of s 8 of the *Wills Act 1970* (WA) (the Wills Act). The terms of the informal will included that Mr Dundo and a neighbour of the deceased were appointed executors, the whole of the estate was left to the client provided she survived the deceased by 30 days, but subject to a grant of a right for specified relatives to use and occupy a house on property comprising part of the estate.

12 Section 8 of the Wills Act provides:

> "**8. Execution generally**
>
> Subject to the provisions of Part VI and section 34, a will is not valid unless —
>
> (a) it is in writing;
>
> (b) it is signed by the testator or signed in his name by some other person in his presence and by his direction, in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will;
>
> (c) the testator makes or acknowledges the signature in the presence of at least 2 witnesses present at the same time; and
>
> (d) the witnesses attest and subscribe the will in the presence of the testator but no publication or form of attestation is necessary."

13 While the informal will did not comply with the requirements of s 8, that did not preclude its admission to probate as the deceased's will. Section 34 of the Wills Act provides:

> "**34. Informal wills**
>
> A document purporting to embody the testamentary intentions of a deceased person is a will of that person, notwithstanding that it has not been executed in accordance with section 8, if the Supreme Court is satisfied that the deceased intended the document to constitute his will."

14 On 8 September 2000 there was a meeting between Mr Fleming, the client, Mr Atkinson, the siblings and Mr Dundo. By this time, Mr Atkinson was under the impression, by reason of a conversation he had with Mr Dundo on 14 June 2000, that the deceased had left a will, and that the siblings were not beneficiaries under that will.

15 According to Mr Fleming, at the time of the September meeting he had only limited instructions from the client and had not seen the informal will. Neither Mr Atkinson nor Mr Fleming were able to give evidence as to precisely what was said at that meeting, but Mr Atkinson's note of the meeting suggests that someone said words to the effect that the client was the sole beneficiary and executor of the deceased's estate. It was with that understanding that Mr Atkinson left the meeting.

16 The client's instructions to Mr Fleming in relation to the informal will were that in about November 1999 the deceased had asked Mr Dundo to prepare a will leaving his entire estate to his wife, the client. Mr Dundo had then prepared a draft will and faxed it to the deceased's home where it was printed on thermal paper. In about March 2000 the deceased had telephoned Mr Dundo and asked what needed to be done to finalise the will. During that conversation the deceased had, in substance, approved the draft will. Mr Dundo informed the deceased that he needed to insert the middle name of one of the executors into the draft and sign it, after which Mr Dundo would prepare an engrossed deed and make arrangements to meet with the deceased to have him execute the will. The deceased had then hand written the middle name of the executor on the draft thermal paper will. He signed it on both pages, but not in the presence of any witnesses. Mr Fleming was instructed that two of the deceased's friends had spoken to the deceased after the draft will was prepared and were told by the deceased that he had made a will leaving everything to his wife.

17 Mr Fleming said that upon receipt of those instructions, and that this was the only will left by the deceased, he formed the view that the informal will would, with or without the consent of the siblings, be admitted to probate pursuant to s 34 of the Wills Act.

18 Rule 20A of the *Non-contentious Probate Rules 1967* (WA) provides:

> "(1) Where it appears that Part X of the *Wills Act 1970* may apply to any document of a testamentary nature the applicant, in addition to any other requirements relating

to an application for a grant, shall by affidavit, accompanied by such document or documents, set forth—

(a) the gross value of the estate wherever situated;

(b) all material facts relating to the circumstances in which the document is said to have come into existence, or to have been altered, revoked or revived and of the intention of the deceased relating thereto; and

(c) the full names, ages and addresses of all persons who may be prejudiced by —

(i) the application of that Part where the applicant seeks to apply that Part; or

(ii) the non-application of that Part where the applicant seeks not to apply that Part,

and, for each such person, the reason why it is said that the person may be prejudiced.

(2) The applicant shall exhibit to an affidavit the consents of all persons who may be prejudiced as mentioned in subrule (1)(c) but the Registrar may, on such terms and subject to such conditions as the Registrar thinks fit, dispense with the consent of a person who may be so prejudiced if he is satisfied that -

(a) the person —

(i) is not of full age or is incapable of consenting by reason of mental illness, defect or infirmity; or

(ii) cannot be found;

or

(b) it is otherwise just or expedient to do so."

19 Under the applicable rules for distribution on intestacy the wife would have obtained the major share of the estate, but the siblings would have had an entitlement to share in the balance. Subject to any successful

claim pursuant to the Inheritance Act, the interest of the siblings under intestacy would have amounted to several hundred thousand dollars. The siblings were clearly "persons who may be prejudiced by" the admission of the informal will to probate.

20 Mr Fleming explained to the client that "unless the siblings agreed that they had no interest in [the deceased's] Estate, in which case [he] believed that they would not be persons prejudiced by a grant for the purposes of r 20 of the *Non Contentious Probate Rules*, their consent would be required to have the Will admitted to Probate in Non Contentious Form". Mr Fleming said in evidence that:

> "Given the acrimony between the siblings and [the deceased and the client] the client expressly instructed me not, in the first instance, to provide the Siblings' solicitors with any details of [the deceased's] Will (other than the fact that [the client] was the sole beneficiary). [The client] also instructed me not to provide the siblings with any details of the assets and liabilities of [the deceased's] estate."

21 Mr Fleming further explained to the client that whilst he was content to refrain from volunteering information initially, if the siblings' solicitors requested, as he was sure they would, a copy of the deceased's will, and a copy of the statement of assets and liabilities of his estate, he would have to provide them. His client was adamant that he not provide the information unless and until the siblings made such requests.

22 It was against that background that certain communications occurred between Mr Fleming and Mr Atkinson in October and November 2000.

23 On 6 October 2000, Mr Atkinson wrote to Mr Fleming proposing a settlement of the dispute over the mother's will. In his introductory paragraphs he wrote "we confirm that you act for the estate of the late [deceased son] instructed by the executor of the estate [the client]". According to Mr Atkinson, he telephoned Mr Fleming on a number of occasions prior to 23 November 2000 seeking a response to the offer. He said that on one such occasion he recalled asking Mr Fleming "so [the deceased's] will left everything to [the client]?" to which Mr Fleming answered "yes".

24 Mr Fleming denied that such conversation took place. He did accept, however, that had he been asked that question by Mr Atkinson, that was the sort of answer that he would have given. Mr Atkinson confirmed on several occasions during the course of his cross-examination that he did

pose that question to Mr Fleming and received Mr Fleming's confirmation. He was not able to particularise the precise occasion on which the conversation occurred but it was a conversation he recalled in the context of following up his letter of 6 October 2000.

25 It was suggested that Mr Atkinson may have been confusing this conversation with some conversation he had with Mr Dundo, but Mr Atkinson denied that suggestion. It may be that Mr Fleming simply does not recall the conversation. In all the circumstances, we accept Mr Atkinson's evidence that the conversation did take place.

26 On 6 November 2000 Mr Fleming lodged an application for probate of the informal will. The application was accompanied by an affidavit by the named executors addressing the various matters referred to in r 20A. In the affidavit the executors requested that the requirement for consent of the siblings be dispensed with, essentially on the basis that good reason existed to accept that the deceased intended that the document should constitute his will.

27 On 23 November 2000 Mr Fleming wrote a letter (wrongly dated 17 October 2000) to Mr Atkinson. He first referred to earlier correspondence and confirmed that "we act for [the client], the executrix of the estate of the [deceased]". In his evidence Mr Fleming accepted that such confirmation was in error, because under the informal will the client was not named as executrix. He then comprehensively addressed the various submissions that had been made by Mr Atkinson in his letter of 6 October 2000, and concluded that the client had been advised by him that any claim to set aside the mother's will on the basis of lack of testamentary capacity would fail, but that a claim under the Inheritance Act may well, to some extent, be successful. He continued:

> "[The deceased's] Estate
>
> Finally, given that your clients have chosen to challenge [the mother's will] our client is very concerned at the possibility that your clients may, after settling this matter, attempt next to challenge [the deceased's] Will and our client's right to [the deceased's] Estate. Any settlement of this matter must be subject to your clients jointly and severally covenanting with our client that: -
>
> 1. None of your clients will directly or indirectly challenge our client's right to her husbands Estate; and

> 2. each of your clients will do everything necessary (if there is anything which is required to be done by them) to assist our client in obtaining Probate and Administering her husbands Estate.
>
> (hereinafter referred to as 'the Covenant') ..."

28 The letter then set out an offer of settlement which involved dividing the mother's estate equally between the three siblings and the client, requiring the siblings to enter into the Covenant, and providing for a formal deed of settlement to be executed to record the settlement.

29 The 23 November letter, and the earlier conversation in which Mr Fleming confirmed that the deceased's will left everything to the client, are two of the communications that the Committee relies upon as comprising the representations which it says are misleading. The representations said to be implicit in those communications were that:

> (a) the deceased had left a testamentary instrument which, on its face, had the appearance of being a valid will; and
>
> (b) his only purpose in seeking the Covenant was to ensure that his client was protected against any subsequent, unmeritorious challenges by the other siblings, to the apparently valid will.

30 Representation (a) is said to be knowingly misleading because of the formal defects in execution. Representation (b) is said to be knowingly misleading because the, or alternatively a, purpose for seeking the Covenant was to adduce the Covenant in evidence in the application by the executors for probate of the informal will, and in particular to support a request for dispensation of the requirement for the consent of the siblings otherwise required under r 20A.

31 On 1 December 2000 Mr Fleming received requisitions from the probate office in relation to the application for probate of the informal will. There were three requisitions. The first is not material. The second was that "consents from the deceased's siblings are required". The third sought further evidence regarding the execution of the will and the deceased's intentions.

32 On 16 January 2001 Mr Atkinson wrote to Mr Fleming with a counter offer. This differed in substance from the client's offer only in

relation to sharing certain expenses. The letter indicated that the siblings were agreeable to the Covenant set out in the 23 November letter.

33 On 18 and 29 January 2001 Mr Dundo and the client swore affidavits dealing with the third requisition from the probate office. Nothing was done at that stage to obtain the consents of the siblings in order to meet the second requisition.

34 Around 5 February 2001, Mr Fleming wrote further to Mr Atkinson by letter (wrongly) dated 16 November 2000. In that letter Mr Fleming advised that the client accepted the siblings' offer to settle the matter and advised that he would forward a draft deed of settlement.

35 Although Mr Fleming's offer in the 23 November letter proposed as a term of settlement that a deed of settlement be entered into, the counter offer by Mr Atkinson did not expressly specify that terms of the settlement should be incorporated in a deed.

36 By a further letter, again wrongly dated 16 November 2000 but received by Mr Atkinson on 12 March 2001, Mr Fleming sent a draft deed incorporating the terms of settlement. That deed contained the following recital:

> "C. Pursuant to the terms of the Will, the Deceased, in clause 2 of the Will bequeathed [a specified property to the deceased] and, by clause 3 of the Will, made [the deceased] one of the Residuary Legatees of the Deceased's Estate. By his Will [the deceased] left the whole of his Estate to [the client]."

37 The draft deed contained the Covenant referred to in the 23 November letter in the following terms:

> "3.3 [The siblings] jointly and severally covenant with [the client] that:
>
> 3.3.1 Subject to the provisions of Clause 3.2, none of them will directly or indirectly challenge [the client's] right to [the deceased's] Estate and that each of them will do everything necessary (if there is anything which is required to be done by them) to assist [the client] in obtaining Probate and administering [the deceased's] Estate.

> 3.3.2 [The client] shall be solely responsible for paying all legal and other costs, GST and disbursements incurred in connection with obtaining a Grant of Probate and administering [the deceased's] Estate and nothing in Clause 3.3.1 shall necessitate either or any of [the siblings] having to incur any expense in this respect at all."

38 The draft deed then provided that the siblings accept the terms of the deed in full and final settlement of "the claim" and that the deed might be pleaded as an absolute bar to any proceedings issued by any or all of the siblings in respect of or in any way related to "the claim".

39 "The claim" was defined to mean and include certain claims in relation to the mother's will, but also:

> "(iv) any claim which [the siblings] or any of them has or may have against [the deceased's] Estate to challenge the validity of [the deceased's] Will
>
> (v) any other claim which [the siblings] or any of them has or may have against [the deceased's] Estate which, if successful, would result in they *[sic]* or any of them receiving a share of [the deceased's] Estate."

40 On 5 April 2001, Mr Atkinson wrote to Mr Fleming suggesting certain changes to the deed. Those changes included that Mr Dundo should be joined as a party to the deed in his capacity as the sole executor of the mother's estate and that the client be joined as a party in her capacity as the executor of the deceased's estate. He also suggested, importantly, a further recital:

> "By his will the late [deceased] left the whole of his estate to [the client] and appointed [the client] as executor of his will. A copy of the will of the late [deceased] is annexed to this deed."

41 On 20 April 2001 Mr Fleming replied to that letter. He advised that Mr Dundo had taken the view that he did not wish to be directly involved and would not be a party to the deed, but that he would comply with the terms of any agreement reached between the parties in dispute. He also pointed out that the client was not the executrix of the deceased's estate. He then added:

> "The recitals as drawn clearly state that [the client] is the sole beneficiary of [the deceased's] Estate. [The client] is not the Sole Executrix. Accordingly the paragraph suggested by you is not agreed."

42 The effect of that paragraph was to reject Mr Atkinson's request that the deceased's will be annexed to the deed. Some of the other suggested amendments were agreed, and at some time prior to July 2001, a fresh deed incorporating the agreed amendments was prepared by Mr Fleming and sent to Mr Atkinson. Recital C set out above (at [36]) remained unchanged as did the provisions barring the claim and the definition of claim. The deed was executed by all parties some time around July 2001.

43 Mr Fleming submitted the deed to the Probate Registry to support his contention that the siblings were no longer "persons prejudiced," given that they had disavowed any claim to the deceased's estate. The Registrar apparently did not accept that argument and maintained the requirement for the provision of consents by the siblings.

44 On 23 August 2001, Mr Fleming wrote to the siblings' solicitors confirming that the deed of settlement had been received and advised that an application for the grant of probate in relation to the mother's estate was proceeding. He continued:

> "Accordingly, we are now turning our attention to the Application for a Grant of Probate in the Estate of [the deceased] in [*sic*] this respect we will require the consent of your clients to the Application by [the executors]."

45 The letter then enclosed forms of consent to be executed by each of the siblings. Those consents recited that the deceased had died "leaving an informal will ('Will') undated but which was signed by the Deceased sometime between the 19th day of November 1999 and the date of his death" and attached a copy. It further recited that the siblings and the client would have been entitled to the estate but for the provisions of the informal will.

46 The effect of the Covenant contained in the deed of settlement was, of course, that the siblings were contractually bound to execute those consents, notwithstanding that, up until then, they had no knowledge of the fact that the informal will had not been regularly executed and witnessed in accordance with the requirements of s 8 of the Wills Act.

47 We mention for completeness that the parties, acting through new solicitors, resolved the issue of the enforceability of the deed. The siblings thereafter opposed the application for a grant of probate of the informal will, but probate was granted.

48 The Committee relies upon:

- the sending of the draft deed of settlement on 12 March containing the Covenant and the recital referring to the deceased's will,
- the response of 20 April 2001 declining to annex the deceased's will to the deed of settlement, and
- the provision of the amended version of the deed containing the Covenant and recital,

as implied repetitions of the representation that the deceased had left a testamentary instrument which, on its face, had the appearance of being a valid will.

Mr Fleming's intention

49 The complaint against Mr Fleming is that the representations that he made were, to his knowledge, misleading.

50 In relation to the 23 November letter, Mr Fleming was questioned about his description of the document as a "will" rather than an "informal will". That led to the following exchange:

"MR MURPHY: And the reason you didn't use the word 'informal' will is that you were seeking to create an impression that it was a will that had been validly executed on its face.

MR FLEMING: My client had given me instructions not to specify or provide any details of the will or the assets and liabilities of the estate, because she felt that there may be an issue.

MR EDMONDS: Is that why you chose that word, because of those instructions?

MR FLEMING: Yes.

MR MURPHY:	And indeed, the truth is that the very last description of this document that you wanted to provide Mr Atkinson was 'informal will'. That was the last thing you wanted to convey to him, wasn't it?
MR FLEMING:	I had no problems in telling Mr - - Mr Solomon - - sorry, Mr Atkinson, that the will was an informal will. I had - -
MR MURPHY:	Well why didn't you tell him that?
MR FLEMING:	- -positively formed the view that this was going to be a will which would be admitted to probate. My client had reservations about that. My client believed, rightly or wrongly, that any possibility of challenging [the deceased's] estate would be taken up by the siblings. I explained to my client as firmly as I could and on the basis of the information before me, this will was going to be admitted to probate. There was no need to worry about not *[sic]* mentioning that it was an informal will. It would have been perfectly in order to do that. My client said, 'No, I don't want you do that. I don't want you tell them it's an informal will and I don't want you to provide them with a copy of it.' I could see nothing at that time which would necessitate my having to override those instructions. You must understand I saw that document. I assessed it. I made inquiries about it. I was absolutely satisfied that that will was going to be admitted to probate. My client came to me or - - and we discussed it. I said to her in no uncertain terms, 'In my opinion this will is going to be admitted to probate. There is no reason why we should not tell Mr Atkinson that it's an informal will.' She said, 'If the siblings see any possibility of challenging the will, they will do so. So I am instructing you - -

notwithstanding your advice about the likelihood of success or otherwise, I am instructing you not to provide a copy of the will and the statement of assets and liabilities to Mr Atkinson.' I saw nothing at that time which would have necessitated my overriding those instructions.

MR MURPHY: So - - you would agree, wouldn't you, though that if you wanted to describe the document as accurately and as succinctly as you could, you'd call it an informal will?

MR FLEMING: And I would have done."

51 Mr Fleming also gave specific evidence that but for his client's instructions, he would have described the will as an informal will.

52 It is reasonably apparent that the client's purpose in not wishing to disclose to the siblings the status of the informal will, and the size of the estate, was that she wanted to deny them the argument that the will should not be admitted to probate because of its lack of formality. For so long as the siblings believed the will was valid on its face, there was no apparent basis to oppose the grant of probate and no reason to suppose their consent was required for it. So the strategy was to withhold that knowledge and to secure the siblings' agreement both to waive and bar any right to challenge the will and to do everything necessary to assist in obtaining probate. That agreement might then be disclosed to the Court as the basis for proceeding without their express consent to the application or (although it would require disclosure of the matters kept secret) as the basis to require the siblings to give consent.

53 The siblings were therefore misled into waiving and barring a right (to challenge the grant of probate) and granting assistance (to the application for probate) in circumstances where the nature of that right and the necessity and reason for that assistance was kept secret from them.

54 In acting upon his client's instructions not to provide a copy of the will or the statement of assets and liabilities unless asked, Mr Fleming actively pursued his client's purpose. That purpose could only be achieved if the siblings, or their solicitor, did not ask to see, and insist upon seeing, a copy of the informal will. We accept that Mr Fleming expected that Mr Atkinson would request and insist upon seeing a copy of the informal will before his clients agreed to the proposed deed. It is

clear, however, that so long as no request was made and enforced, Mr Fleming was content to pursue his client's objective. His correspondence and his drafting of the terms of the Covenant and of the deed were tailored to meet that objective. The terms of the deed relating to the deceased's estate were designed to support an application to dispense with the siblings consent as required under r 20A. The possibility that that application might not be successful was accommodated by the Covenant which required the siblings to "do everything necessary (if there is anything which is required to be done by them) to assist … in obtaining probate".

Were the documents misleading?

55 Mr Fleming contends that his correspondence, and the deed, were not misleading because the description of the deceased's document as a "will" did not necessarily carry with it the connotation that the "will" was valid on its face. We reject that contention. In the circumstances and in the context of the documents where Mr Fleming made reference to the will and the deceased's estate, we find it did carry the connotation that it was valid on its face. We mention, in relation to this point, that we did not find the evidence of the legal expert called by the practitioner of assistance in this regard. She expressed an opinion as to the connotations of the word "will" as understood by practitioners practising in the probate jurisdiction. However, she was not briefed with the full background and context of the correspondence in this case, both of which are important to the proper construction of expressions used.

56 Mr Fleming also contends that his conduct was not misleading and constituted merely an error of judgment because, at all times, he expected that he would be asked to provide a copy of the will and a statement of the assets and liabilities. He said that he believed any competent lawyer would ask to see those documents before advising his clients in relation to the proposed Covenant. One answer to that contention, discussed further below, is that when Mr Atkinson asked that a copy of the will be annexed to the deed, Mr Fleming rejected that contention for reasons which were entirely unconvincing and constituted a guise to refuse the request. The true position was that, having got to that point without the siblings' appreciating the informal nature of the will, the practitioner was prepared to further advance the client's strategy by declining the request to have the will annexed.

57 Mr Fleming also suggested, in evidence, that he did not know whether the siblings, or any of them, may have seen the informal will.

We accept that Mr Fleming could not have known that fact. It is clear however, that he proceeded on the assumption that they had not. He was pursuing his client's instructions which were predicated on the fact that the siblings were not aware of the status of the document. Nor was there any reason to think that, even if at some point, one of the siblings had seen the document lying around the deceased's house, he or she would have thought it to have been anything more than a draft version of a properly executed will.

58 That the siblings had in fact been misled as to the status of the document is apparent from their reaction to Mr Fleming's letter of 23 August 2001 when they first learned of the nature of the deceased's will. They (or rather Mr Atkinson) initiated a complaint about Mr Fleming's conduct to the Legal Practitioners Complaints Committee and the siblings shortly thereafter commenced legal proceedings to set aside the deed on the basis of misrepresentation.

59 The erroneous belief which the siblings had as to the form of the deceased's will resulted from a series of communications. These appear to have started with a conversation between Mr Atkinson and Mr Dundo in June 2000 as to the existence of the deceased's will and that the siblings were not beneficiaries under it. The next was the comment, possibly again by Mr Dundo, made at the meeting on 8 September 2000, that the client was the executrix and sole beneficiary. Mr Fleming's contribution to the error commenced between 6 October 2000 and 23 November 2000 by his affirmative response to Mr Atkinson's enquiry as to the deceased's will having left everything to the client. These communications were however informal in nature.

60 Mr Fleming's letter of 23 November 2000 spoke of "the executrix of the estate" and of the deceased's "Will" and the "client's right to the estate". In the context in which the letter was written, and by its terms, it conveyed the imputation that there existed a properly executed will.

61 That impression was further and strongly reinforced by the recitals and provisions of the draft deed, as repeated in the amended, executed, deed.

62 The practitioner's letter of 20 April 2001 in answer to the request that a copy of the deceased's will be annexed to the deed, was conduct which served to avoid disclosure of the informal nature of the will and thus maintain the misleading impression that the deceased had left a testamentary instrument which, at least on its face, was a valid will. The

facts relied upon by Mr Fleming to refuse annexure, namely that a mistake had been made about the identity of the executor of the will and the fact that Mr Dundo apparently did not wish to be a party to the deed, provided no good reason for refusing to annex a copy of the will to the deed. Mr Fleming's position was that he had advised his client that, eventually, the siblings would ask for a copy of the will. Mr Atkinson's letter of 5 April 2001 was, in substance, such a request. It provided Mr Fleming with the opportunity, consistent with his client's instructions, to make appropriate disclosure so that the siblings could appreciate the nature and extent of the release, bar and undertaking which they were granting through the covenant. It must have been obvious by that time that Mr Atkinson and his clients had no appreciation of the status of the informal will.

63 The 23 November letter was also misleading in that it conveyed the impression that the client was concerned about possible challenges to the deceased's will of the same nature as the siblings' challenge to the mother's will. The mother's will had been challenged on the basis of testamentary capacity and pursuant to the Inheritance Act. The sense and context in which the reference in the letter to the deceased's will was made suggested that claims of that nature were of concern to the client. The reality was, of course, that the client was concerned with claims of quite a different nature relating to the formal requirements of wills. Mr Fleming accepts that it was always his view that if the siblings were to relinquish their claims to the deceased's estate, then their consent to admission of the informal will to probate would not be required. It was a clear purpose of obtaining the Covenant that it be used to support an application to dispense with the siblings' consent. To suggest, as the 23 November letter does, that the reason for seeking the Covenant was to avoid challenges of the nature pursued against the mother's will, misstated the true purpose. It was, in that sense, misleading.

64 It follows that we find that there were representations to the effect particularised by the Committee in the communications referred to and that such representations were, to the practitioner's knowledge, misleading.

The professional duties of practitioners in settlement negotiations

65 Our findings may be summarised as follows. The practitioner, on his client's express instructions, engaged in a course of conduct over some months which was intended to mislead the opposing party (the siblings), and which did so, as to (1) the existence of a will held by the client which,

at least on its face, was valid and (2) the reasons why that party should waive and bar their rights to challenge the validity of what was in fact an informal will.

66 This is not a case where the opposing party acted under a misapprehension to which the practitioner had not contributed, but which he subsequently took advantage of. Neither is it a case where the subject of the validity of the informal will was not affirmatively raised by the practitioner. Rather, the practitioner, on instructions, was the moving force (even if not the initiating force in one respect) in the other side's misconception, pursued by the practitioner to obtain a material advantage for the practitioner's client. Were it not for the position taken by the Registrar (rejecting the claim that consent be dispensed with and requiring that the other side give their consent to the application for probate), the deception might never have been discovered. That ultimately the application for probate of the informal will was successful is irrelevant to a consideration of the practitioner's propriety in acting as he did.

67 For the purposes of the Rules (r 3.1) we find the practitioner's conduct in the negotiations to have been dishonest and unfair, giving those terms their ordinary dictionary meaning and looking at the position objectively. We note also, although such was not maintained by the Committee and does not form part of our decision, that such conduct was in breach of r 18, being conduct intended to induce and foster a mistake in a fellow practitioner.

68 The practitioner's obligations upon receipt of his client's instructions to keep secret the informal nature of her deceased husband's will and to proceed to obtain probate without the consent of the other party, were clear. He ought to have advised his client that the proposed course of conduct was likely to reflect poorly on the client's credit and honour (the Rules r 12.1). Moreover, he ought to have advised against her proposed course as, in due course, an ex parte application was proposed to be made to the Court for probate of the will. In respect of that application he was under a stringent legal and professional obligation to disclose to the Court all relevant circumstances, including the other party's interest in and rights to challenge the grant of probate (and probably also the fact that the parties were in dispute). If, notwithstanding that advice, she insisted he proceed and he was prepared personally to do so, he ought to have advised her that, whilst arguably there was no legal duty (as opposed to a moral duty) to disclose the informal will, he could not conduct the negotiations in such a way as to suggest that a formal will existed or procure the other sides' consent to probate upon a false basis. Further, in

relation to the application to the Court, to the extent that it could properly proceed at all, he would be obliged to advise the Court that, by reason of his client's instructions, he could not assure it that all relevant matters which ought to have been revealed had been disclosed. If she insisted nevertheless that he proceed with such negotiations and application contrary to that advice, he should, as he was entitled to (r 12.3), have declined to act further.

69 In this case the practitioner said that had he not been acting under direct instructions in this respect, he would have described the document to Mr Atkinson as an "informal will". We believe him. Had he followed such course none of the unfortunate consequences for his client (who upon disclosure of the true nature of her husband's will and the reasons for the Covenant was required to engage new solicitors and defend legal proceedings to set aside the deed) and for the practitioner (who was required to cease to act for her and face these proceedings) would have followed. So the appropriate conduct we have outlined ought not to be seen as burdensome to a practitioner in this position, but one more likely to conform to generally accepted (and his own) ethical standards.

70 Both in respect of litigation and in providing legal advice and assistance generally, a practitioner is not a mere agent and mouthpiece for his client, but a professional exercising independent judgment (exclusively in many forensic areas) and providing independent advice. Moreover, where practitioners give advice to a client that their professional responsibilities do not allow them to act in accordance with the client's preferred course, and that should the client insist they must therefore decline to act, it seems unlikely the client would reject that advice and go elsewhere. Apart from issues of dependence and cost, the client would, in the usual case, be faced with the same response from the new lawyer.

71 The lesson from a case such as this, is that where the client's instructions may run counter to normal ethical principles and a practitioner's own personal standards, he or she should think seriously before proceeding in accordance with those instructions. Practitioners who engage in misleading conduct or sharp practice can hardly expect to receive the trust and respect of their colleagues (much less of the Court). Yet such trust and respect is a fundamental requirement of a practitioner's practice if he or she is properly to play his or her part in the administration of justice and adequately to serve the interests of his or her client. Where in this type of situation the practitioner seeks guidance from the Rules, he or she ought to bear in mind that it is both the letter and the spirit of such

rules which govern their conduct. (As made explicit in the Foreword to the applicable *Professional Conduct Rules* (January 1997 edition) and in the preamble to the 2005 Rules.)

72 A practitioner's duties to his client, and his duties to the Court, do not exhaust his professional responsibilities. The duty to the Court may be seen as a duty to the community in the proper administration of justice. Moreover, as an officer of the Court concerned in the administration of justice, a practitioner owes duties also to the standards of his profession, to the public and to his fellow practitioners. The duties of fairness and honesty owed to the Court in relation to the conduct of litigation are also owed to fellow practitioners in other areas of practice. So much is made clear by the *Professional Conduct Rules*.

73 In the present case senior counsel for the Committee disclaimed any obligation on the practitioner positively to inform his opponent of relevant matters of which he was aware. This would seem to reflect the legal position in relation to negotiations generally. What constitutes professional conduct must be judged in the light of all the circumstances. However, in both this case and others (see for example ***Williams v Commonwealth Bank of Australia*** [1999] NSWCA 345), the conduct of a practitioner might be regarded as misleading because an affirmative statement is made in circumstances which required some qualification. In this context, misleading and unprofessional conduct might also be made out where a practitioner states a partial truth, or in the context of making statements of fact, omits relevant information. It might extend to statements which are literally true but where a qualification is called for, or where a statement initially true becomes false in the course of the negotiations. And in some circumstances the duty to not bring the legal profession into disrepute and fairness to an opponent may require that the practitioner draw attention to a particular matter, even where the opponent's misapprehension is not induced by that practitioner.

74 The public interest is served by practitioners encouraging an early settlement of their client's dispute. Indeed, practitioners are under a duty to seek such a settlement (r 5.7). But, just as in litigation a practitioner may not use dishonest or unfair means or tactics to hinder his opponent in the conduct of his case (***D'Orta-Ekenaike v Victoria Legal Aid*** (2005) 223 CLR 1 [McHugh J at 111]), so he ought not do so in other areas of practice. Arguably perhaps, for a number of reasons, the proscription against such conduct is more important in settlement negotiations.

75 In seeking to settle a matter pursuant to his client's instructions or the procedures of the Court, the practitioner, in some senses, gives up his "adversary" role in favour of a "negotiating" role. In that co-operative role it is important that practitioners may be relied upon by the other party and his advisers to act honestly and fairly in seeking a reasonable resolution of the dispute. If everything a practitioner says in negotiations must be checked and verified, many of the benefits and efficiencies of a settlement will be lost or compromised.

76 Honesty, fairness and integrity are also of importance in such negotiations because they are conducted outside the Court and are beyond the control which a judge hearing the matter might otherwise exercise over the practitioners involved. Outside the trial process, there is no impartial adjudicator to "find the truth" between the opposing assertions. Dishonest or sharp practice by the practitioner to secure an advantage for his client might go undetected for some considerable time or for all time. A level of trust between the advisers involved is therefore essential.

77 The fact that, in the normal course, a practitioner's improper conduct might be exposed, and the harm avoided by a "due diligence" undertaken by his opponent, does not alter the impropriety in any respect. In the same way that practitioners owe duties to the Court, such as drawing unfavourable authorities to the attention of the judge, irrespective of the work (or neglect) of their opponents, so in settlement negotiations or other dealings with their opponent, or indeed (and particularly) with a litigant in person, a practitioner must be perfectly candid. It was no answer to the complaint of unprofessional conduct by misleading the Court in ***Kyle v Legal Practitioners' Complaints Committee*** (1999) 21 WAR 56 that the practitioner acted on the expectation that the true position would be revealed in the course of the case.

78 There is one final matter in this context we wish to mention. The complaint against the practitioner in this case was made by Mr Atkinson (or his firm) personally. It is no light matter to raise a complaint against a fellow practitioner. From the evidence given before us, it is apparent that relations between these practitioners are now poor. We hope that once this matter is resolved they will improve. However, 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. Practitioners have a professional obligation to do so. Mr Atkinson is to be commended for doing so in this case.

Abuse of process

79 In answer to the allegations the practitioner asserted that the complaint should be struck out or permanently stayed as an abuse of process. That submission was based upon the proposition that the communications, said to comprise the misleading representations, occurred in the context of without prejudice correspondence or statements. It was submitted that the public interest in fostering the comprise of disputes requires that such communications not be disclosed or relied upon outside of the settlement discussion, except in cases of "unambiguous impropriety". That proposition is said to be supported by the decision in ***Unilever plc v Procter & Gamble Co*** (1999) 2 All ER 691.

80 The decision in ***Unilever*** concerned an action for a declaration, concerning certain patents, the foundation for which was a statement, made by the defendant to the plaintiff, in the course of a without prejudice meeting concerning other proceedings in France against a third party. Laddie J referred to a statement by Hoffmann LJ in an earlier case where he had said "the without prejudice rule would be seriously impaired if its protection could be removed for anything less than unambiguous impropriety". Counsel for Mr Fleming argued that Mr Fleming's conduct could not be construed as "unambiguous impropriety" and accordingly the interest in protecting without prejudice communications requires that the correspondence in this case should not be relied upon outside of the settlement negotiations and in particular in the context of this complaint of unprofessional conduct.

81 Consideration of what Laddie J subsequently said in the decision demonstrates that, in the context of this case, the respondent's contention on this point is misconceived. Laddie J said (at [34]):

> " … it appears to me that where a party wishes to rely on without prejudice correspondence or statements outside the settlement discussions, the onus is on him to show that there is a public interest in favour of such use which outweighs the public interest in fostering the non-litigious compromise of disputes. Where one party is relying on some alleged wrongdoing by the other, as *Unilever* does here, it must show that it is substantial. A party who does no more that put forward his case strongly but honestly and fairly in the course of discussions does not thereby destroy the without prejudice privilege …"

82 He then discussed examples of where the public interest in encouraging compromise might outweigh the public interest in discouraging patentees from threats, and cases where it might not.

83 The public interest in practitioners acting professionally both in the conduct of litigation and in matters ancillary to it is extremely important. The proposition which the practitioner appears to advance is that unless the wrongdoing can be categorised as "unambiguous impropriety", a solicitor can engage in some minor impropriety in the course of without prejudice dealings with impunity. That proposition is clearly untenable. There is no room for unfairness or deception in negotiations for the compromise of litigation, or otherwise in dealings between solicitors.

84 Where an allegation of unprofessional conduct is made in relation to conduct taking place in the course of without prejudice negotiations, the public interest demands that those allegations be properly considered and dealt with. A solicitor is not entitled to be shielded from the allegations simply by asserting the existence of without prejudice privilege.

Was the conduct unprofessional?

85 Unprofessional conduct is conduct which would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or that, to a substantial degree, falls short of the standards of professional conduct observed or approved by members of the profession of good repute and competence: ***Kyle v Legal Practitioners' Complaints Committee*** (1999) 21 WAR 56 at 71-72.

86 Moreover, appropriate standards of professional conduct are reflected in the *Professional Conduct Rules*, such that if these are breached in a material respect, as here, it will likely follow that the practitioner is guilty of unprofessional conduct.

87 The respondent contends that given that he expected that he would be required to provide a copy of the will but was not, his conduct amounted to an error of judgment, rather than conduct fitting the description of unprofessional conduct. We do not accept that submission. When the opportunity arose for Mr Fleming to provide a copy of the will, he continued the misleading course of conduct by putting forward ingenious reasons to avoid doing so. Moreover, as has been observed, practitioners owe important duties to the administration of justice, to the public and to one another. Legal practitioners are entitled to expect, in their dealings with other practitioners, that they will not be misled. To imply the existence of a valid will and to procure a covenant from a third

party to the advantage of a client by concealing from the third party the status of the will and the significance and effect of the Covenant, is to act dishonestly and unfairly.

88 In our view, the conduct of Mr Fleming fell short of the standard of professional conduct observed by members of the profession of good repute and competence and amounts to unprofessional conduct.

89 The Tribunal will hear from the parties in relation of the question of penalty.

90 Following further submissions by the parties the Tribunal makes the following orders:

1. The Tribunal find that the practitioner David George Fleming was guilty of unprofessional conduct pursuant to the *Legal Practitioners Act 1893* (WA) in late 2000 to July 2001, in that in the course of professional communications with another practitioner, he made representations to the other practitioner which were, to his knowledge, misleading.

2. Having made these findings in respect of the practitioner pursuant to the *Legal Practitioners Act 1893* and the *Legal Practice Act 2003* (WA) it is ordered that:

   (i) the practitioner pay a fine in the sum of $7500.00 to the Legal Practice Board within 21 days;

   (ii) the practitioner pay the Legal Practitioners Complaints Committee's costs fixed at $25 224.00 within 60 days.

I certify that this and the preceding [90] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE J CHANEY, DEPUTY PRESIDENT