Professional Regulatory and Disciplinary Bar Association Breakfast Briefing Tuesday 14th July 2015

Practical Considerations for Prosecuting Counsel in Hearings before Regulatory Tribunals

1. Preliminary stages of disciplinary proceedings

In general, a regulatory body will not retain prosecuting counsel until after the preliminary stages of the disciplinary process and, in particular, until after a decision has been made that there is a prima facie case to warrant holding a disciplinary inquiry. If you do have input at this stage some basic matters to bear in mind to avoid problems with prosecutions at a later stage:

- Does the body have jurisdiction to investigate the matter the subject of the complaint? Is it acting in accordance with the powers conferred on it in considering/investigating the complaint?
- It is vital that a registrant is given sufficient notice of the nature of the investigation that is being carried out (i.e. into possible misconduct/poor professional performance) and, in particular, of the possible outcome or outcomes of that investigation (referral to a disciplinary inquiry) *See O'Driscoll v Law Society, McMahon v Law Society* [2009] IEHC 339
- Likewise a registrant must be given sufficient opportunity to respond to the investigation and all matters which are or may be considered in deciding whether to send a matter forward (including new matters which arise during the course of an investigation).
- But remember: fair procedures at the preliminary stage do not require the full panoply of natural and constitutional rights to be afforded to a registrant in the same way that such rights will be observed at a full disciplinary hearing. The obligation is to ensure that the requirement of fairness is met and that procedures appropriate to the preliminary steps of the proceedings are afforded to the registrant bearing in mind the importance of the decision that may be made from the registrant's point of view i.e. to refer him or her for a full disciplinary inquiry but also bearing in mind this is a stepped process See: comments of McKechnie J in *O'Sullivan v Law Society* at p. 466 citing Wade & Forsyth.

2. Drafting allegations

Counsel may play a role in drafting allegations that will form the basis of an inquiry:

- Different regulatory bodies use a different format – get a precedent.
- Be familiar with the applicable legislation and codes of the profession in question, as well as the judicial interpretation of the concepts of

professional misconduct (*O'Laoire v Medical Council)*[1] and poor professional performance post *Corbally*[2]. There is some variation e.g. solicitors – misconduct includes: contravention of a provision of the Solicitors Acts or Regulations and "conduct tending to bring the profession into disrepute". For solicitors see the recent case of *Sheehan v Law Society* 26.6.15 Kearns P.[3] The conduct will be judged according to standard/test applicable at the time of the conduct.

- The allegations must come within the scope of the referral made by the preliminary/investigatory committee and within the jurisdiction of the body to consider. Once a registrant is registered he/she is arguably subject to regulation (for public interest reasons) in respect of conduct 1) committed in another jurisdiction and 2) prior to the date of registration. There are however no direct Irish authorities on territorial/temporal jurisdiction.

- What facts are being alleged? What wrong is being alleged (PM/PPP).
- Will there be sufficient evidence to 1) prove the allegations as a matter of fact and 2) to prove that they amount to PM/PPP.
- Do you need an expert opinion *before* the allegations are drafted?
- Remember: allegations will be construed narrowly and in favour of the registrant. They must therefore be sufficiently particularised. So, for example: 1) If you are alleging dishonesty or fraud this must be spelled out; 2) If you are alleging that a registrant has been guilty of PM/PPP not as a result of something they personally did but as a result of a failure to supervise another party or by virtue of responsibility for the act/omissions of another party, make it clear; 3) If you are alleging a breach of a specific statutory provision identify it.
- But also remember: a notice of inquiry is *not* a criminal summons or indictment. *See O'Laoire.*
- Avoid duplication but make all appropriate allegations and if the same conduct could amount to a failure on a different basis – allege them separately e.g. where the conduct could amount to a dishonest act but might even absent such dishonesty be sufficient to ground a finding.
- Avoid the temptation to 'throw in the kitchen sink' – lesser allegations, which may not ultimately meet the threshold for PM/PPP, can distract from the 'real' allegations and unnecessarily complicate and prolong proceedings.

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[1] Infamous or disgraceful conduct; conduct falling seriously short of the expected standard of conduct.

[2] [2015] IESC 9

[3] Rejecting the suggestion that in the context of breaches of the Solicitors Accounts Regulations there would need to be evidence of dishonesty before a finding of PM could be made: at p. 16 "*the Court is satisfied, that while there was no dishonesty or any attempt to defraud, conspire, mislead, or to personally benefit by engaging in untoward accounting practices, the conduct of the appellant is sufficiently serious to amount to professional misconduct"*. See also *Law Society v Curneen* [2012] IEHC 358

3. Pre-hearing matters

Your first involvement may be in advising proofs either directly or indirectly. What witnesses need to be called? What records needs to be obtained?

'Core books' – can material be agreed in advance of hearing? Is it being admitted as truth of its content?

Production of Documents – statutory provisions to secure production of relevant documentation may need to be exercised.

Witnesses:

- Issue of summons to compel attendance *with* relevant documentation – *do* not assume you can rely on the co-operation of witnesses. Many will not want to attend unless under legal compulsion to attend;
- Do they understand that they will be giving *oral* evidence;
- Are they worried about their *own conduct/own position* – remember it is not your job to legally advise witnesses, you may need to make it clear that you do not represent them and, in the case of complainants, that this is not their prosecution.

NB- most bodies have powers expressly equivalent to the High Court in relation to compelling witnesses and production of documents.

- Experts – do you always need one? Not necessarily. See comments of Kearns P in *MacManus v Fitness to Practise Committee of the Medical Council* [2012] IEHC – some matters may be regarded as being "of such basic importance…that no expert evidence on this topic would have been required".
- BUT – if you do call an expert and that expert does not come up to proof you will have to "accept the consequences of the expert not 'swearing up'" per Kearns P– see again *MacManus.*

Disclosure – all relevant material should be disclosed to the other side: not just the material the prosecutor is going to rely on – but also material which may be of assistance to the defence. It must also be disclosed in a timely manner so that the Defence has a proper opportunity to decide how and whether to utilise it. See *Rajan v GMC*[4]

[4] [2000] UKPC J0119-1. Late disclosure to a doctor of a diary entry of a Complainant which appeared to record consultations with him at times when his surgery was closed. The Court held at p. 8: *the entry in Ms. B.'s diary was clearly relevant and material and…under the principle established in cases such as Reg. v. Maguire 94 Cr. App. R. 133 and Reg. v. Ward 96 Cr. App. R. 1 it should have been disclosed to the appellant's legal advisers on a date well before the date of the hearing, and that the failure to disclose in proper time rendered the finding of the Professional Conduct Committee in respect of Ms. B.'s complaint unsafe, because that failure denied to the appellant and his advisers a proper opportunity to advance a case which might have succeeded, namely, that the examination of which Ms. B. complained had never taken place. Their Lordships desire to make it clear that their decision that the finding was unsafe involves no criticism of the counsel and solicitor representing Dr. Rajan at the hearing on* 14th April 1999*: the*

Defence must also know the basis upon which a particular witness is being called – *MacManus* i.e. are they being called as a witness as to fact or as an expert witness.

Do allegations need to be amended or withdrawn?
Inquiry may now be statutorily mandated but what if evidence does not support the case/part of the case alleged?

Remember: the obligation is to be fair and to fairly lay the relevant evidence before the decision making body – not to try to secure findings at any cost. There is a public interest in effective and proper regulation as well as a public interest that registrants are not unnecessarily subjected to inquiry.

Does the issue of a stay on the proceedings arise pending the outcome of civil/criminal proceedings, which relate to the same subject matter?
- Registrant should be required to show real risk of prejudice/injustice if the disciplinary proceedings were to go ahead – much easier to do in the context of criminal proceedings and in particular if they are imminent.
- Public interest in disciplinary proceedings not being delayed: see by analogy – Clarke J *Wicklow County Council v O'Reilly* [2006] 3 IR 623, stay on enforcement proceedings under Waste Management Act refused notwithstanding parallel criminal proceedings.

4. The hearing

- Open (and close) the case: Don't assume the Committee/Tribunal doesn't need it! Direct the Committee to key documents – make sure they can read them (especially medical records)
- Burden of proof – 1) as to the facts 2) as to misconduct/PPP: beyond a reasonable doubt
- The application of the criminal standard of proof does *not* turn the inquiry into a criminal trial and, in particular, the rules of evidence do *not* apply as strictly as they would in the courts: *Kiely v Minister for Social Welfare, Borges v Fitness Practice Committee; Barry v Medical Council* [2007] IEHC 74; *MacManus v FTPC*
- But requirements of natural and constitutional justice will be observed so e.g. unsworn or hearsay evidence may not be allowed and a full right to cross-examine will be afforded where there is a material conflict of fact/dispute.
-The legal assessor: is not the judge and sometimes you may need to disagree but don't do it lightly. It is important that the Committee give reasons for diverging from legal assessor's advice. *See Corbally* – no 'clear and cogent reasons' for departing.
- Public v Private inquiries: is there 'reasonable and sufficient cause' for holding the hearing in private. Do you have a role beyond directing the Committee to the relevant legal principles to be taken into account: is it satisfied that it would be appropriate to hold the hearing or part of it in private. Can names be anonymised? Post *Corbally* – Committees will be very alive to the possible

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most experienced legal advisers, may, on occasions, fail to make appropriate use of a document handed to them at the last moment just before the hearing begins"

consequences of publicity on the practitioner/their livelihood. BUT remember: the default position in most new legislation remains for public hearing.
- Proceeding in the absence of registrant – not to be done lightly but remember there is a right not to attend proceedings. Is the registrant deliberately absenting himself/herself/trying to obstruct or simply *cannot* attend in which latter case the matter may need to be adjourned.
- Unrepresented registrants: obligation to ensure no unfairness to a registrant by virtue of him/her not having legal representation.
- In general: obligation to call/tender all relevant witnesses who have relevant direct evidence to give.
- Depending on the statutory format issue of undertakings[5] may arise.

- At the conclusion of the case for the prosecutor there may be an application for a direction in line with *Galbraith* principles but remember the same principles do not apply exactly – per *MacManus v FTPC "The fact that the Committee rejected a request for a direction at the conclusion of the CEO's case might transgress the rules of a criminal trial but in the context of an inquiry does not strike me as an objectionable course for the Committee to have adopted."*

5. Sanction
- Make sure you know where your involvement ends. Do you need instructions as to a position on sanction/publication? Does the CEO/Registrar make submissions/can they?
- Is there previous disciplinary history?

NEASA BIRD

[5] Not to repeat conduct, to be referred to professional competence scheme, to be censured.