



## PROFESSIONAL PRACTICES ALLIANCE SEMINAR REPORT

### INVESTIGATING AND MANAGING PARTNER MISCONDUCT IN PROFESSIONAL SERVICES FIRMS

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With Additional speakers from **Buzzacott LLP** and **CM Murray LLP**.

#### **A. Introduction**

1. #MeToo: Professional Service Firms, like other sectors of our society, are not immune to the sexual, financial, tax evasion and other misconduct allegations which we have seen increasingly in the headlines. But what best practice approaches should professional service firms consider adopting when one of their partners is suspected of misconduct, such as sexual harassment? In this popular Professional Practices Alliance breakfast session on Thursday 1 February<sup>1</sup>, leading partnership, employment, regulatory and criminal specialists debated the topical and knotty issues that inevitably arise in this context and gave a practical roadmap for firms and their partners alike.

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<sup>1</sup> Following this PPA session the SRA issued its Warning Notice on the Use of Non-Disclosure Agreements and this report has been updated to reflect this.

2. The panel included John Machell QC of Serle Court Chambers, Iain Miller of Kingsley Napley LLP and Nick Querée (formerly of Peters & Peters Solicitors LLP) with additional speakers from Buzzacott and CM Murray LLP. Chairing the panel was Clare Murray of CM Murray LLP.
3. This report summarises some of the key issues that came out of the seminar. The contents of this report are for general information purposes only and are not intended to be legal advice. Specialist advice should be taken in relation to specific circumstances.

## **B. Potential Misconduct**

### *The Scenario*

4. Clare Murray began by setting out to the audience a now all too familiar scenario, which was to be the case study for exploring the issues during the seminar.
5. Senior Associate, Olive, sends the following email:

“You may know that the Corporate Department had a deal closing on Project O last week in Leeds and the legal team had to stay overnight in a hotel. I share a room with Associate, Yvette, who was on the deal, and she has been crying in the office all week. She has been saying something terrible happened in the hotel and that a partner on the deal was involved. I thought you should know. Yours Olive”

6. It is known that the deal was led by two Partners, one male (John), one female (Jane). The initial investigation suggests that Yvette and John were seen leaving the hotel bar at 4am after a long drinking session, with John holding Yvette’s hand and they were seen walking back to John’s hotel room.

## **C. Considering the key Issues**

### *The Initial Conversation*

7. So, what does the responsible Firm do, and how do you convince Yvette to speak about this with you?

8. The role for HR was outlined at this point. Where there has been an allegation of sexual misconduct, speaking with the alleged victim will need to be handled delicately. HR will likely need to follow up by email and talk to the individual. It would be important to reassure them and let them know that the matter will be looked into and that there will not be any repercussions as a result of them coming forward. It may be appropriate to give some assurance of confidentiality also, but it may not be practical or appropriate to give assurance of blanket confidentiality, particularly where HR may be required to disclose some of the details shared by the alleged victim when making follow up enquiries in the context of an investigation. Further, HR should consider offering counselling or referring the individual to the Firm's employee assistance programme, who could provide them with independent personal support during what will likely be a stressful time. Olive would also have to be handled carefully and be reassured, as well as told to keep the matter confidential. HR should ideally then have an investigation process set out in the staff handbook and should begin planning the investigation.

#### *Employment Issues*

9. Clare Murray revealed the following development in the scenario: on further questioning Yvette tells you that John tried to kiss and touch her under her clothing and initially refused to let her leave the hotel room; she seems very reluctant to speak and you suspect she is not telling you everything. John tells you they were drunk and only engaged in consensual kissing.
10. In these circumstances, what are the risks from the Firm's and John's perspective? It was noted that a claim for sexual harassment would be the major risk, which could result in vicarious liability for the Firm and/or personal liability for John. Sexual harassment is defined under the Equality Act 2010 as: unwanted conduct of a sexual nature, which has the purpose ***or effect*** of violating the alleged victim's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. The key, and often unappreciated aspect of a sexual harassment complaint, is that the legal definition takes into account the reasonable subjective perception of the alleged victim. Therefore liability for sexual harassment could

well arise as a result of misunderstandings, as what is acceptable to one person is not necessarily acceptable to another.

11. Additionally, it was identified that John, the partner, may have been abusing his position of seniority, which is an additional layer of concern which would need to be addressed (albeit which may not inevitably result in misconduct charges), regardless of whether or not John's advances were reciprocated by Yvette.

#### *Criminal Liability Risks*

12. In scenarios like that of John and Yvette, it was highlighted by Nick Querée that inappropriate sexual misconduct could also cross the threshold into criminal liability. Potential criminal offences identified as relevant to this scenario included: i) sexual assault, which is sexual touching without reasonable belief the touching is consensual; ii) false imprisonment, if John had held Yvette in the hotel room against her will; and iii) harassment, which is a form of conduct taking place over two or more occasions which may reasonably/objectively be seen as harassment.
13. Often, a Firm will not appreciate that the alleged sexual misconduct is in the grey area where a criminal offence may have been committed. There was a question raised around whether or not the Firm should take a proactive stance and encourage a complainant to go to the police if they think that the matter complained of amounts to a criminal matter. However, Nick Querée indicated that the position is that there is no responsibility or duty on the Firm to encourage a complainant to make a criminal complaint. It was also noted that the decision to involve the police should be led by the complainant unless there was an immediate risk of harm or danger (and even then the complainant should be told what the Firm is proposing to do).
14. Additionally, unless there is a specific statutory duty to report a potential criminal offence (for example if there is a suspicion that proceeds of crime are being laundered, then that may need to be reported to the NCA under the Proceeds of Crime Act 2002) there is no duty on the Firm to report suspected "day-to-day" criminal conduct to the police or other crime agency. It is down to the Firm's own view of their own obligations that may arise under their partnership agreement. It

may also be that the Firm or leadership team have a professional obligation to report to their regulators (as discussed below).

15. The other thing to bear in mind is that if the Firm does anything as part of its internal process to prejudice a subsequent criminal case, there may be reputational consequences for the Firm to deal with in the future. It is therefore important for the Firm to be mindful of a potential criminal matter later on, and get advice at an early stage on how best to handle the sexual misconduct allegations in a way which will avoid jeopardising any potential criminal prosecution.

#### *Practical Considerations*

16. One word of caution was that often an individual may not disclose much of the detail at the outset even if they are the alleged victim, and a Firm cannot assume at the beginning that what they are hearing from one side is the full story. There have been cases where, for various reasons, a complaint may be made many months, or even years, after the alleged incident.
17. In the mooted scenario, Yvette is reluctant to speak to the Firm about what she alleges happened. This can often be the case where an individual wants to tell someone what has happened, be it in relation to an allegation of sexual misconduct or even financial misconduct, but does not want anything done about it, perhaps for fear of reprisals, due to embarrassment, or they fear that their privacy will be infringed upon and/or their reputation will be marred. But what can a Firm do about a reticent victim or witness to misconduct?
18. Yvette could be given the opportunity to raise a formal complaint and there can be an investigation. If Yvette is reluctant to speak or partake in an investigation, but the Firm is aware of the incident/complaint, then the Firm should seek to mitigate its risk and still investigate the matter, which could lead to disciplinary action against the partner. This scenario may be more problematic in terms of evidence. Doing nothing is not a realistic option, even if Yvette is not threatening any action against the Firm or the partner. If Yvette, the victim, refuses to cooperate within the process, the risk remains that the potential perpetrator may do it again to somebody else in

the Firm. If the Firm takes remedial action and it happens again, that could be used to help to defend the Firm.

19. John Machell QC highlighted that, from a partnership law perspective, the Firm also has obligations to the whole partnership. Therefore, even if Yvette did not want anything to be done, the Firm would need to have a record of what they had done in case another allegation arose in the future. The Firm cannot simply let the matter drop just because the individual is not willing to take it forward.
20. From an HR best practice point of view the Firm may have to find a way to keep the individuals involved in the incident away from each other. This may involve suspending the partner if necessary, or actions short of suspension (such as the partner working from home or another office during the investigation period). The victim must not be subject to any adverse actions.

#### *Regulatory Issues*

21. Often misconduct allegations against partners may raise questions of the individual partner's and the Firm's own regulatory reporting obligations, be it to the Solicitors Regulation Authority ("SRA"), the Financial Conduct Authority ("FCA") or another professional services regulator. Iain Miller noted that in the legal industry the SRA would be interested in looking at the individual partner's alleged misconduct, but also would be looking at the Firm's culture as a whole. Therefore, if there had been prior incidents and there had been no appropriate response by the Firm at that time, then that would lead the SRA to ask questions. Remedial action is a way for Firms to show that they are doing what they should be doing. It was considered that we are getting to a stage where going to a hotel and drinking to 4 AM with work colleagues, is a culture that the SRA would not accept.
22. Clare Murray suggested that one way to implement remedial action and also proactively identify any risks of potential sexual harassment, was for Firms to conduct risk assessments for sexual harassment, categorising the potential risks into low, medium, and high risks of sexual harassment in their particular businesses. Then the Firm would have to consider the actions that they need to take to address those risks, and how they modify their policies and training to reflect this. That way,

if the SRA does investigate, the Firm would be able to point to their risk assessments and demonstrate the steps that were taken to address particular risks. This could also be relevant in assisting a Firm with a potential reasonable steps defence (set out in discrimination legislation) to a claim for unlawful harassment.

23. A further step for the relevant individuals with the knowledge of the allegations in the Firm to take, would be to inform the Firm's COLP who the SRA would expect to be involved.

#### *PR Issues*

24. By the time an email has come in from Olive, it would not be a stretch to imagine that rumours of the allegations could already have spread around the Firm and may be being discussed by members of staff on WhatsApp or other communication platforms. From there a journalist call from someone at RollOnFriday may not be far off. It was noted that usually journalists would call a Firm who were caught up in misconduct allegations rumours for comment. It was highlighted by a PR specialist who was a member of the audience that the best strategy in these circumstances, was usually to develop a tight script and appoint one person to speak to the media, preferably emphasising that they are treating the matter seriously. However, the Firm would have to accept that they would never be able to satisfy a journalist's enquiries.

### **D. The Investigation and Disciplinary Process**

#### *Handling of the Accused Partner*

25. If the LLP agreement is silent on what the Firm should do in respect of carrying out an investigation and disciplinary against a partner, what would be considered a procedurally fair process? John Machell QC noted that, from a partnership point of view, this is a topical issue, namely the extent to which good faith requires a partnership to follow a fair process. It was expressed that post *Braganza v BP Shipping Ltd and another* [2015] IRLR 487 a fair process was required in the context of a partnership investigation/disciplinary. This would mean two things. Firstly in the common sense of natural justice, it would require that the accused partner is

told who the decision-maker is that is considering exercising their powers (which could potentially affect the accused partner's interests) and why; that the partner is given information and details of the charges against them; and the partner is given a chance to respond both in writing and orally and to make representations to the relevant decision-maker.

26. Sometimes a Firm will want to consider suspending the relevant partner who is the subject of an investigation and disciplinary process, if it is considered necessary for example to allow a fair investigation to be undertaken. However, where there is no express right to suspend a partner there was a question around whether or not a partnership could in fact suspend. John Machell QC stated that as a matter of partnership law it is not possible to suspend a partner where there is no power in the partnership deed to do so. The partnership would need to have a power either in their disciplinary procedures or the LLP agreement. Nonetheless in practice, an innocent partner may be so concerned and keen to preserve their own reputation with the Firm, that they may agree to a voluntary suspension in any event.
27. Additionally, as it was decided in the case of *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) that there is no concept of repudiation within a LLP, arguably there is no risk that a suspension (without the contractual powers to do so) could be treated as a repudiatory breach by the partner. The primary recourse for a partner in such circumstances would be to claim for damages for breach of contract. So, although for the LLP there may be a risk of suspending without a power to do so, the LLP would probably balance that against the risk that they run in relation to reputational issues depending on how serious the allegations are against the partner.
28. Clare Murray highlighted that the situation can be stressful for the accused and sometimes it can affect their family life; there was discussion about the level of support that a Firm should be seeking to give to the accused partner. It was suggested that the first thing to do would be to give the partner an opportunity to respond to the allegations. From an HR perspective, the Firm should consider the reputational risk for the individual as, even if they are found to be innocent, this could have a serious impact on them both personally and professionally. It would



therefore be important to consider giving the partner counselling and ongoing HR support.

29. It is important that the Firm and whoever is responsible for the investigation agrees a formal process before they start it, so that everybody knows what is going to happen at what stage and the timing. It might also be advisable to provide a designated friend for the partner, to whom they could speak and who could be a sounding board and provide support to them on a confidential basis.

### *The Investigation*

30. In relation to the investigation itself, it was indicated that the general principles that would apply in an employment investigation should be applied in a partner misconduct investigation. That would mean that the scope of the investigation should be identified and made as precise as possible. It should not be widened out beyond the issues that need to be addressed. However, it was acknowledged that it could be more difficult to do this where dealing with sexual misconduct, as the investigation may become fluid as more information becomes available.
31. In terms of who should conduct the investigation, there is usually the choice between appointing an internal or external investigator. The benefit of doing it internally is that there may be less risk of leaks about the allegations and it could be more effectively controlled by HR/management. However, a disadvantage is that it may look like a less objective process. If the investigation is contracted to external specialists, then the benefit of that is that the specialists would have had experience dealing with similar cases and they would be aware of the relevant sensitivities. However, one thing to keep in mind is that at the end of the matter being investigated, the external specialist would probably provide a report. The Firm would not be able to suggest what goes into the outcome of that report or try to amend it as the report (including previous drafts) would likely be disclosable in court in later related proceedings and also potentially in a response to a data subject access request.
32. The Firm cannot assume that any communications arising from the investigation would be covered by legal privilege, indeed much of the documentation that may be

generated would be disclosable. However, if a Firm has obtained legal advice from a lawyer in relation to an investigation, then communications with the lawyer for the purposes of receiving that advice would be legally privileged. In the circumstances, it would be important for the pool of members of senior management instructing the lawyer to be kept small, in order to try and protect as far as possible such privileged communications. It was suggested that it may also be wise for the Firm to ring-fence its general counsel, to ensure as far as possible that advice received from the general counsel was legally privileged, so that they were only involved in legal matters and they did not get involved in wider discussions within the business.

33. Additionally, any report that might be produced by an investigator (internally or externally) could eventually be used by police who may be considering a prosecution against the accused. It might be that the report, and any notes, etc, made by the investigator could be the subject of compelled disclosure to the police following an application for a production order. The investigator themselves could become a witness.
34. However, the focus should be on ensuring that there is a fair process generally, and if a Firm does this then that should protect them as far as possible. For example, the way that the relevant witnesses are interviewed (that could be third parties or the accused partner themselves) should be fairly conducted and should not allow the contamination of evidence. There should be no suggesting facts to witnesses, and witnesses should not be given the account of other witnesses so that they know what other witnesses are saying before they give their own evidence.
35. There is also the risk of unconscious bias in internal investigations, because of gossip that may be going around. It was emphasised that to combat against this risk, the confidentiality of the matter and their confidentiality obligations should be impressed upon members of staff when they are being interviewed as part of the investigation, including the fact that a breach of confidentiality would be treated as misconduct and could lead to the interviewee themselves becoming the subject of disciplinary proceedings. It was noted that such an approach could potentially be viewed as heavy-handed. The risk of gossip and unconscious bias may be another reason to conduct the investigation by an external investigator. Additionally, if the

matter is reported to the SRA and an external investigator has been appointed, this may be something that can be used in support of showing that the Firm is dealing with the issue appropriately. The Firm may also wish to get its COLP involved in the investigation.

### *Obtaining Evidence*

36. Obtaining and preserving relevant evidence will be key to the effectiveness of an investigation. Often there will be electronic evidence like text messages and emails on the Firm's systems, which may form part of the material to be reviewed as part of the investigation and the Firm may have to consider putting in place potential protections in relation to accessing and preserving that material. Nick Querée noted that from a potential criminal proceedings perspective, it would be important for the Firm to get an IT specialist to "lockdown" evidence in a way that is forensically secure. This would potentially be useful for police, as well as the SRA or disclosure in any future relevant civil proceedings.
37. Given the rapid developments in communication technology, and the fact that people often use more than one device, the question was raised as to whether the Firm would need to secure personal WhatsApp messages for the purposes of a potential future criminal investigation. Nick Querée stated that if the relevant communications are on a personal account and were not accessible to the Firm, then that would be a non-issue. However, if there is work data being processed on a partner's personal device, then there is likely to be a Data Protection policy or retention policy that may be relevant and could potentially allow the Firm to request access to that personal device.
38. It was further discussed whether the Firm may be able to rely on the accused partner's duty of good faith and/or to render true accounts and full information of all things affecting the partnership (under section 28 of the Partnership Act 1890 ("PA")) to compel the partner to disclose relevant messages on their personal devices. However, John Machell QC considered that such disclosure would not necessarily fall within section 28 PA, as the information would not be related to the business of the partnership as such. It was highlighted that the Firm could ask the complainant for copies of the relevant messages, which would also contain the other

side of the conversation. It was noted that in this regard the Firm would have to consider potential risks and sanctions that may arise due to GDPR issues and value judgements would have to be made. Practically, the Firm may also tell the partner that if they do refuse to disclose a potentially relevant personal message, then the Firm (or independent investigator) may draw negative inferences from such refusal. John Machell QC suggested that failure to disclose could also be a potential rational reason relied upon by the Firm to effect a “no-fault” removal.

39. It was also highlighted that in cases involving financial misconduct, personal messages could also include references to client confidential information. One potential way to deal with this could be by ensuring that for the purposes of the investigation the client names are redacted to protect confidentiality. Additionally, it may be necessary to disclose client data to other third-party professionals as part of an investigation, for example accountants who may be instructed to analyse certain financial information. It was therefore suggested that it would be advisable for professional services firms to include appropriate express consent provisions in their client engagement letters that allow them to process client confidential information for the purposes of investigations.

#### *The Disciplinary Process*

40. Following the investigation, should the Firm conclude that there is a case to answer, then the matter may proceed to a formal disciplinary process. In these circumstances the partner would want to protect their job, but if there are criminal proceedings on foot then they would also potentially be fighting for their liberty. It may therefore be necessary for the accused partner to consider how much to engage with the process. Nick Querée highlighted that the extent to which the accused partner prioritises their partnership or employment position as against their criminal position, would depend on the strength of the account that they give of the incident and would need careful consideration. The accused partner may wish to put together an agreed statement, which could then be given to the Firm. However the partner would also need to be careful, as such a statement could incriminate the partner and could later be used by the police should the allegations develop into criminal matter.

41. If the partner decides not to engage with the disciplinary process, then the Firm may decide to take a decision on the partner's position in any event. John Machell QC highlighted that in this regard provisions enabling expulsion with cause or for misconduct may be of use to the Firm to try and remove the partner. However as noted above, the Firm would still need to consider whether it is appropriate to exercise its power under the partnership deed or an LLP agreement. It may also need to consider whether making a decision will prejudice criminal proceedings.
42. There was discussion around whether or not the accused partner could insist that he be allowed to cross examine the alleged victim (in the scenario, Yvette) and call other witnesses in support of his defence. John Machell QC highlighted that the investigation and disciplinary process would usually be inquisitorial, meaning that if the investigator wanted to hear from a witness then they would do so. However, from a partnership perspective, there does not seem to be any legal right for a partner to be able to require the Firm to allow him to call a witness. There may be circumstances where an accused should be allowed to put questions to witnesses during an investigation, but they should not be allowed to do so directly, instead the questions should go by way of the investigator who will put the question to the witness. At the second disciplinary proceeding stage, after the investigation, the Firm should not be rerunning the investigation and therefore Yvette would not be cross-examined at that time.
43. In respect of whether or not the accused partner would have a right to be accompanied by a lawyer at a disciplinary hearing, John Machell QC expressed the view that there was no such right, however Firms should be sensitive about this matter and should seek to accommodate a request to be accompanied by a lawyer where possible. The role of the lawyer at the hearing would be to make representations on behalf of the accused partner, but they should not be involved when the committee is making its decision.

#### *The Disciplinary Decision*

44. The investigation and disciplinary hearing are over: now what test does the decision-making body have to satisfy in order to take a lawful decision on the potential expulsion of the partner? It was stated that it will first be necessary to

identify the basis of the decision to be taken. Often there will be a power in the partnership deed or LLP agreement to remove the partner without cause on notice or to expel for misconduct. However, John Machell QC expressed the view that post *Braganza* (*Braganza v BP Shipping Ltd & Anor [2015] UKSC 17*) even where there is a power to remove without cause, the Firm would still need to identify a rational business reason to remove the partner. That reason may not amount to a finding of actual guilt of misconduct (for example the touching allegation) and it may just be that it is concluded that it is not acceptable for the partner to be in a hotel room with an associate after a drinking session at 4am in the morning. If the Firm decided to expel the partner for misconduct, then they would have to make their decision based on the permissible grounds for expulsion expressed in the LLP agreement or partnership deed.

45. It was highlighted that there are various other potential alternative outcomes, aside from expulsion from the Firm, that could be appropriate in less serious cases, including requiring an apology, financial penalties, demotion from management roles, implementing quality and harassment training, and counselling for the accused partner.

#### *SRA Obligations post-Expulsion*

46. Should the Firm decide to expel the partner, then it was considered by Iain Miller that it is likely that the Firm would have to report this and the misconduct to the SRA. At the same time the Firm would have to show that it had taken the right steps and demonstrate what it will be doing on a wider cultural basis to address the causes of the misconduct. The difficulty for the SRA is that without the cooperation of the complainant, they would have difficulty evidencing the misconduct and if the matter is referred to the Solicitors Disciplinary Tribunal panel, it may be difficult to prove the allegations to the criminal standard. If the SRA are unable to take the allegations forward against the accused partner, then they may start asking wider culture questions of the Firm and may want to know what the Firm has done by way of remedial action.

### *Remedial Action*

47. Once the investigation and disciplinary processes are completed, thought should turn to remedial action that could be taken by the Firm to avoid a recurrence of similar allegations of misconduct in the future. One option for the Firm is to review and update their policies and processes. Usually LLP agreements and partnership deeds are silent on disciplinary processes, and there was a plea on behalf of HR professionals for Firms to first look at this going forward.
48. It would also be important to build a good culture in the organisation. This will inevitably involve leading from the top, with senior management having to walk the talk and display zero tolerance for misconduct. Information awareness campaigns could also be useful to highlight to partners what behaviours would not be acceptable and emphasise that engaging in such behaviours could result in personal liability for themselves and the Firm. The Firm should consider publicising within the Firm the various avenues they have available for employees and partners to report misconduct (highlighting there would be no retaliation and that confidentiality would be maintained as far as possible). Particularly there should be emphasis on the fact that it is not just about the complainant making a report of misconduct against them, but that there should also be a responsibility on colleagues who may observe misconduct to report.

### **E. Conclusion**

49. It was clear from the variety of questions that came from the audience at this PPA seminar that partner misconduct and how to address it is very much a current issue facing law firms and other professional practices. The sometimes conflicting issues that arise when dealing with potential partner misconduct can be difficult for firms to handle correctly. Getting it wrong could have a significant effect on the complainant's, accused's and the Firm's legal, regulatory, criminal, financial, and PR position, as well as on Firm morale and culture, just to name a few. One consistent theme that shone through from the panel was that in this climate where the spotlight has firmly settled on those at the top, it is incumbent upon senior management within Firms to set a good example and to be as prepared as possible to detect and deal with misconduct situations when they arise, by having in place

appropriate infrastructure and partnership agreements that are fit for purpose, as well as investigation and disciplinary plans and policies. The final warning remark to Firms from Clare Murray was that '#lawmetoo is coming quickly' and Firms needed to get their house in order so that when RollOnFriday or the lawyer came knocking, they would have a plan.

If you would like further information from any of the speakers, please see their contact details below:

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