

Learning from others' mistakes - Part 2

3 August 2021

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Introduction - Licensing

Learn from the mistakes of others: follow-up on webinar presented in November 2020

- Assessment of licence applications: two stages: fitness and competency
- Fitness assessed as per ss 15-17 of the Act
- Competency assessed against performance indicators contained in the Competency Standards (2016)
- If either assessment fails, licence will be refused

Scenario 1: Written agreement: PLH

Mr T is a provisional licence holder (PLH). He provides evidence of being licensed to his client. He explains that he is a PLH and what this means. Mr T does not record his PLH status in the written agreement.

Which of the following statements is correct?

A: Mr T has already explained that he is a PLH to his client, and no further action is necessary since his supervisor's details are available on the Public Register.

B: Mr T has already complied with clauses 8(c) and 14 of the Code, and including that information in the written agreement is unnecessary.

C: The agreement provided by Mr T to his client does not comply Clause 19(c) of the Code.

Scenario 2: Unlicensed advice

Mrs P is a licensed adviser. Mrs P asks her (unlicensed) secretary to calculate whether Mrs P's client has enough points to submit an EOI to INZ and to communicate the result of that assessment to the client.

Which of the following statements is correct?

A: The secretary is only relying on, and communicating, publicly available information. This is not unlicensed advice.

B: The secretary is using her knowledge of immigration instructions and tailoring that information to the circumstances of the client, which amounts to unlicensed advice.

C: The secretary is acting under the instructions of her employer and is therefore not providing unlicensed advice.

Scenario 3: Written agreement: description of services

A written agreement contains the following clause:

‘The adviser will prepare and submit a visa application for the client and his dependants.’

Which of the following statements is correct?

A: This clause complies with clause 19(e) of the Code, because it describes the services, which the adviser will be providing.

B: This clause does not comply with clause 19(e) of the Code, because the description of services is vague and has not been tailored to the clients’ specific circumstances.

C: This clause does not comply with clause 19(e) of the Code, because it does not specify the type of visa application being prepared by the adviser.

Scenario 4: Written agreement: Fees

*A written agreement with a client contains the following clause:
‘You must pay a non-refundable deposit of \$300 before any of the agreed-upon services will be rendered’.*

Which of the following statements is correct?

- A. The adviser is accepting sign-on fees, which is in breach of the Code.
- B. The adviser must ensure they maintain a client account in line with Clause 25 of the Code, because they are taking client funds in advance of providing services.
- C. The adviser is free to include such a clause in their agreement, provided they issue an invoice and receipt in accordance with Clauses 22-23 of the Code.

Scenario 5: Written agreement: Refunds

A written agreement with a client contains the following clause:

‘No refunds will be given if you have provided false information to us or Immigration New Zealand (INZ)’.

Which of the following statements is correct?

- A. This clause meets the requirements of Clause 24. It is fair and reasonable, because advisers must provide correct information to INZ (clause 31)
- B. The adviser is free to include such a clause in their agreement, because they have only charged for work that has been done.
- C. The clause does not meet the requirements of clause 24 of the Code, because a client’s eligibility for a refund must be assessed on its own merits and on a case-by-case basis, to fully comply with the Code.

Scenario 6: Client accounts

Mr J is a PLH. He takes funds in advance and maintains a client account. He pays a monthly supervision fee of \$200. This is transferred from his client account to his supervisor's business account each month.

Which of the following statements is correct?

- A: Mr J is breaching clause 25, because the money in the client account is the property of his clients.
- B: Mr J is not breaching the Code, because his supervisor is responsible for ensuring applications are properly completed. Therefore, the supervisor is entitled to receive his fee from the client account.
- C: Mr J is not breaching the Code, because paying supervision fees is a business expense.

Scenario answers

Scenario 1: Written agreement: PLH

- **C** is the correct answer, because the provisions of clause 19(c) of the Code have not been met. Clause 19(c) states that if the adviser holds a provisional licence, a written agreement must contain:
 - (i) a record that a provisional licence requires them to work under the direct supervision of a full licence holder, and that they must seek advice from the supervisor whenever necessary
 - (ii) the name and licence number of their supervisor, and
 - (iii) a record that they will disclose the client's personal information to their supervisor who is obliged to keep that information confidential
- It is not sufficient to only explain that the adviser is a PLH and must work under supervision and seek advice from the supervisor (cl 8(c)).

Scenario answers (continued)

Scenario 2: Unlicensed advice

- **B** is the correct answer. The secretary is doing more than clerical work (recording details on a form under the direction of Mrs P). She is providing advice based on the outcome of the assessment.

Scenario 3: Written agreement: description of services

- **B** is the correct answer.
- Option C is not quite correct, because ‘description of services’ refers to more than just identifying the type of application to be prepared. The description of services must describe the full scope of services to provided to the client, such as assessing eligibility and immigration instruction requirements (eg medicals, PCCs). The client should know what work will be carried out by the adviser.

Scenario answers (continued)

Scenario 4: Written agreement: Fees

- The correct answer is **A**: the ‘fee’ here appears to be a retainer for services. It is not related to specific work to be conducted. Advisers are only able to charge for work done (or to be done).

Scenario 5: Written agreement: Refunds

- The correct answer is **C**, because refunds must be assessed on a case-by-case basis.
- The other two options are incorrect, because a client should have the opportunity to request a refund of fees paid; entitlement to a refund should not be pre-determined.

Scenario answers (continued)

Scenario 6: Client accounts

- The correct answer is **A**. The funds in the client account is the property of each client until the services have been completed and invoiced. Only then should the fees be transferred to the business account.
- Supervision fees are a business expense and should be paid from the business account.
- If the supervision fee is a percentage of a client's fees, the same process needs to be followed. The client funds remain the client's property until they have been transferred. Keep supervision fees and client fees separate.

Licence application outcomes

- Approval with or without reminder(s)/CIBP condition(s)
- Cascade
- Refusal

Reasons for licence refusals

- No client file, no supervision records, no willingness to comply with the Code;
- Written agreement not tailored to the client's circumstances; invoices not clear and contradicting payment schedule in agreement; failure to keep a separate client account; failure to maintain supervision records, failure to meet CPD requirements;
- Failure to make improvements following several CIBP and improvement letters;
- Evidence unlicensed advice;
- Failure to respond to further information requests, and failure to provide information as per inspection notice (s 57 of the Act)

*Most failures are related to **competency standard 6** (maintaining business practice in accordance with the Code)*

Fitness assessments

- Sections 15, 16, 17 of the Act
- Examples of refusal on fitness grounds:
 - Non-compliance with Tribunal orders
 - Lack of rehabilitation (in combination with other factors)

Note: a fitness assessment is only carried out during a licence application assessment

Reasons for licence cancellations

- Section 27(1) of the Act:
 - if prohibited under s 12(6) and 15 from holding a licence (e.g. becoming bankrupt)
 - licence granted on the basis of false declaration (e.g. failure to disclose convictions (s 16)/disciplinary proceedings (s 17))
- S 27(2) – Cancellations by the Tribunal
- S 51(4) considerations

Common mistakes: previous complaints and disciplinary process outcomes

Tribunal's comments on when licence suspension/cancellation/prohibition is warranted:

- *"...Depriving a professional person of his or her livelihood indefinitely or even over a finite period is a sanction of last resort...". KBN v Wharekura [2020] NZIACDT 15*
- *"...the usual sanction for dishonesty is removal from the profession for a period of time... other advisers must be deterred from such conduct. The public interest requires punishment." NJUM v Vole [2020] NZIACDT 22*
- *"...the public must be protected from a dishonest practitioner without remorse...". BV v Aiolupotea [2020] NZIACDT 32*
- *"... [the adviser's] pattern of misconduct requires the public to be protected by removing her from practice while she is retraining...". IK v Tian aka Qin [2020] NZIACDT 47*

Case Study – Cancellation of Licence

INZ (Calder) v Wong [2019] NZIACDT 55:

- Complaint partially upheld by Tribunal with findings that Adviser asked a client to sign a blank visa application form, and did not provide full client files to IAA for inspection.
- Adviser produced evidence to the Tribunal that was false, and failed to attend a hearing organised by the Tribunal.
- Tribunal comments:

“[33] Mr Wong’s provision of false evidence to the Tribunal and his failure to attend a hearing to explain the variable explanations given for signing the blank form show that it is not in the public interest to permit Mr Wong to practise as an immigration adviser. He has shown himself to be a person who will be untruthful when the occasion suits him. He has shown a disregard for the disciplinary regime governing his profession”.

[34] On its own, the completion and filing of a visa form after it had been signed by the client would not usually give rise to cancellation of a licence, particularly where the adviser admits the mistake and expresses remorse. It is the aggravation of the original wrong-doing by providing false evidence to the Tribunal and then refusing to explain himself which justifies the cancellation of his licence.”

Case Study – Suspension of Licence

IK v Tian aka QIN [2020] NZIACDT 47:

- Complaint partially upheld by Tribunal with findings that Adviser breached numerous sections of the Code of Conduct relating to professional conduct such as written agreements, issuing invoices/receipts, file management, recording communications with clients etc.
- This was the third complaint against the Adviser upheld by the Tribunal for similar conduct.
- Tribunal comments:

“[46] While Ms Tian accepts not doing her job in a professional way and hence her wrongdoing, she makes no apology or expresses any remorse.... She was directed in December 2018 to undertake further training, but ignored the direction. It was only after the Tribunal had upheld the third complaint that Ms Tian enrolled in a course...”

....

[48] I find that the appropriate sanction here is to suspend Ms Tian from practice pending the retraining she critically needs. Ms Tian’s pattern of misconduct requires the public to be protected by removing her from practice while she is retraining”.

Case Study – Prohibition of applying for a licence

Registrar of Immigration Advisers v Ryan [2020] NZIACDT 13:

- The Tribunal found that the Adviser organised fake job offers for migrants through a company he directed, as well as communicating with INZ using a false employee name.
- Adviser surrendered his licence prior to Tribunal issuing sanctions decision, so the Tribunal prohibited Adviser from reapplying for a licence for maximum period of two years.
- Tribunal comments:

“[28] I agree with the description of Mr Ryan’s conduct... It is at the very upper end of seriousness of a breach by a licensed immigration adviser of his or her statutory and professional obligations. It was sustained and deliberate. There is no question that Mr Ryan has brought the licensed immigration adviser regime into disrepute. Moreover, his behaviour has harmed the integrity of New Zealand’s immigration system.

....

[33] If it was possible to prohibit Mr Ryan from reapplying for a licence for life, I would do so. Mr Ryan should never regain an immigration adviser’s licence. It is not just that his professional misconduct is of the most serious kind, but he has expressed no remorse nor stated that his conduct would be any different if allowed to practice again”.

Resources

- Code of Conduct (IAA website)
- Code of Conduct Toolkit (IAA website)
- IACDT decisions (Ministry of Justice website)
- Competency standards (IAA website)
- IAA Newsletters

Feedback? Further questions?

How can we do better? Have we done a good job? Whatever the feedback, compliments or complaints, we want to hear from you.

Email us at info@iaa.govt.nz with “**Feedback-Webinar**” in the subject line.

