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Advisers, ChatGPT and legal advice - Professional Bodies and Junior's Law

by Matthew Burgess, Director, View Legal

Machine learning and AI have been at the heart of many changes in the legal industry.

With the rapid adoption - that seems certain to only escalate with ever increasing pace - of ChatGPT and analogous platforms the response of professional bodies in particular will have a significant impact on all advisers and in turn their clients.

The reaction the professional bodies is perhaps best captured by 2 axioms, namely:

(a) Junior's Law - Computers make very fast, very accurate missteaks (sic);

(b) Bernard Shaw Law - All professions are conspiracies against the laity

That is, both historical cases and more recent decisions clearly demonstrate the concerns bodies representing the legal profession have in relation to non-qualified lawyers providing legal advice.

Key cases

Arguably, at least historically, the leading decision in this area is *Legal Practice Board v Computer Accounting and Tax Pty Ltd* [2007] WASC184.

In this particular case, an accountant arranged for a trust deed to be bought for a client over the internet. The base trust instrument had been written by lawyers however, the accountant then populated the template.

In doing so, the court held that practically this meant that the accounting firm was breaching the relevant legislation. In all likelihood, the accountant would not be covered by their professional indemnity insurance in relation to any issues that arose out of the trust instrument - and also would be likely to have breached the expected standards of their professional body.

Similarly the decision in *Attorney-General (WA) v Quill Wills Ltd* (1990) 3 WAR 500 reached a similar conclusion.

In this case, the system of the (non-lawyer) business operator centred on the provision of wills.

The court held the operators were liable for the provision of legal documents, given:

(a) The business operator adopted, endorsed and identified themselves with the preparation of the will clauses.

(b) The services rendered by the legal practitioners became part of the business of the (non-qualified lawyers) business operators, who accepted responsibility for the will provided.

(c) The work done by the legal practitioners was marketed as part of the operator's business.

(d) The overall effect of the system was an attempt to apply the facts (that is, the wording of the particular clauses concerned, and the potential combinations thereof) to the law of wills, followed by the formation of a conclusion, namely that the will would be valid.

(e) That was, in essence, the process by which legal advice was given.

(f) The provider assured the client of the validity of the will, instructed the client what to do to ensure that validity, and explained the terminology used. The provider was therefore giving legal advice itself.
(g) Where an instrument has been mechanically produced by a person, without any application of their own intellect, but by using material created by the intellectual activity of a qualified lawyer, then that may not be legal advice.

(h) However where, as here, the producer of the instrument adopts, endorses and identifies themselves with the material created by the lawyer, and assumes responsibility for it, the producer, is directly or indirectly drawing or preparing a legal document - and is therefore liable for breaching the prohibition on non-lawyers providing legal advice.

Recent cases

Perhaps not surprisingly, other jurisdictions have also struggled with what amounts to the provision of legal advice, particularly as machine learning and artificial intelligence continue to become increasingly sophisticated and prevalent.

As one recent example, in the case from the US of *In re Peterson* (Bankr D Md, No.19-24045, 1 June 2022), it was held that a website (see: https://upsolve.org/) that enabled clients to complete bankruptcy applications did in certain areas of the process amount to legal advice, and overall the site was 'close' to the (unqualified) practice of law.

While the court accepted the website's promises that it would modify the offending areas of the platform, it was also blunt in its warning that Upsolve should 'review its website and software en toto for areas where the process could be moved further away from the precipice of legal advice'.

Other litigation involving Upsolve has also seen the platform successfully confirm its right 'to train professionals who are not lawyers to provide free legal advice on whether and how to respond to a debt collection lawsuit' (see *Upsolve Inc. v. James*, No. 22-cv-627 (SDNY, May 24, 2022)).

Similarly, in an Australian context the decision in *Galea v Camilleri; The Estate of Patricia Camilleri* [2023] NSWSC 206 provides current context to what is meant by the phrase 'engaging in legal practice' - that is work that any non-qualified lawyer is prohibited from engaging in. In this particular case the key issue was whether work and advice in relation to stamp duty by an accountant amounted to the provision of legal advice.

In concluding - but not determining the issue - that providing duty advice was clearly potentially engaging in legal practice, the court specifically referenced the following principles:

1. the expression 'engage in legal practice' means 'engage in legal practice as a legal practitioner' (*Felman v Law Institute of Victoria* [1998] 4 VR 324);

2. what constitutes engaging in legal practice is a question of fact to be determined objectively in each case (see *Vaughan v Legal Services Board* [2008] VSC 200);

3. there is no 'bright line' in separating the permissible legal work from the impermissible legal practice (see *Council of the Law Society of New South Wales v Australian Injury Helpline Ltd* (2008) 71 NSWLR 715); and

4. some activities (such as the giving of advice) regularly performed by legal practitioners are also frequently lawfully performed by persons who are not legal practitioners, including, accountants, financial advisors and tax agents (see *Kekatos v The Council of the Law Society of New South Wales* [1999] NSWCA 288). When so performed, these activities will only be prohibited if it is reasonable to infer clients or the public would conclude legal advice was being provided.

Furthermore, in *Legal Services Commissioner v Raghoobar* [2023] QSC 41, a person who was a law graduate from the UK, and not admitted in Australia, was held to 'on any view ... (have) engaged in legal practice'. This was despite the fact that the individual did not hold himself out as a lawyer and warned clients that he could not provide legal advice; these subjective factors were held to be irrelevant given the objective conduct such as:

A. assisted with the creation of applications and affidavits;

B. drafted other documents for use in court;

C. advised parties to litigation in respect of matters of law and procedure and assisted in the preparation of their cases for litigation;

D. drafted correspondence to be sent by the parties to their opponents in the litigation; and

E. charged clients for the work done.

Conclusion

Given the ongoing uncertainty in these areas, the conservative and recommended approach is that any adviser engaging in activities that are also performed by lawyers should first have their professional body, firm management, licensee and insurer approve the work types before offering the service.

As any lawyer would themselves advise, such approvals should be obtained in writing - and the currency confirmed regularly (eg annually).

Failure to do so may otherwise expose the adviser (and their firm and licensee) to litigation, professional misconduct sanctions and related consequences - all of which will be unlikely to be covered by insurance.