

Legalquotes *News*

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ACCOUNTANTS AND FINANCIAL ADVISERS BEWARE!

The advice you are giving your clients may be legal advice, leaving you exposed to fines, claims for damages and potentially uninsured!!

Fred is a Financial Planner and has worked in the industry for years. Paul is a wealthy Property Developer and one of Fred's loyal clients. Paul sees Fred for financial advice and while there, Paul mentions that he is seriously ill and he's not sure how much longer he'll live. Paul is worried about his grown up children. Paul's daughter Dianne's marriage to Steve is breaking down and Paul is concerned that when he dies his son-in law will get his hands on Dianne's inheritance. Fred tells Paul not to worry and that he should re-draft his Will to leave Dianne's inheritance in a Testamentary Trust, with Dianne as the Executor of the Will as well as Appointor, Trustee and Beneficiary of the Trust. Fred tells Paul that Steve "won't be able to touch assets in a Trust".

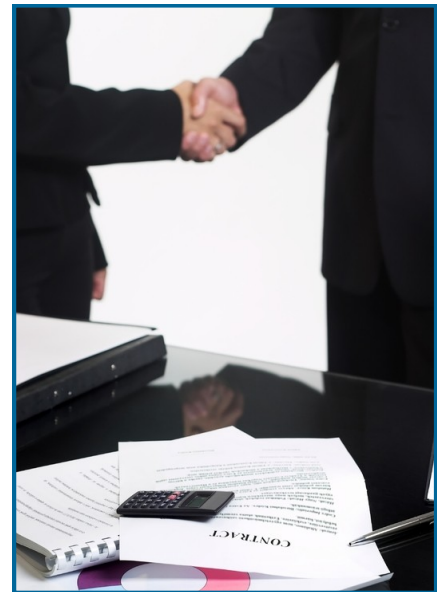
Paul thinks Fred's advice is great. He's known Fred for years and

trusts what Fred has told him. Paul writes up his Will, copying the wording from his own brother's Will. A few weeks later Paul shows Fred in passing, the Will that he has now signed. Fred looks over it briefly and he tells Paul that it all looks fine to him.

What has Fred done wrong?

Fred has unwittingly given legal advice when he is not qualified to do so. Fred has probably breached the *Legal Profession Act 2004* (NSW) and could face a string of legal actions against him. Under the *Legal Profession Act 2004* (NSW) ("the Act") people who are not lawyers are restrained from "engaging in legal practice" – See *Kekatos v The Council of the Law Society of New South Wales* [1999] NSWCA 288. This law ensures that people only receive legal advice from qualified legal practitioners. If Fred were prosecuted for breaching the Act he could face a maximum penalty of 200 penalty units, which is currently \$22,000.00.

The term "engaging in legal practice" is not defined in the Act but the Courts



have interpreted the phrase widely to include some work that may not ordinarily be considered to be "legal practice". The obvious cases are where people deliberately pretend to be lawyers or continue to work as lawyers when they have been "struck off", but not all breaches are quite so clear-cut, as in Fred's case. The Courts have held that each case will be determined on its own facts – See *The Council of the Law Society of New South Wales v Australian Injury Helpline Limited & Ors* [2008] NSWSC 627. Even if a client is told



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by their accountant or financial advisor that they are not a lawyer or legal professional, if legal advice is given by the professional and the client relies on that advice, this could still be a breach of the Act – See *Cornall v Nagle* [1995] 2 VR 188.

Paul dies shortly after making his Will in accordance with Fred's suggestion. Two weeks later Dianne and Steve separate and a Family Court case begins. Dianne sees her lawyer and learns that the Testamentary Trust in Paul's Will does not protect the assets in the Trust from being taken into account by the Family Court - See *Kennon v Spry* [2008] HCA 56. Dianne reports Fred to the Legal Services Commissioner for the legal advice he improperly gave and she talks to her lawyer about suing Fred for his negligence.

While Fred did not actually draft the Will, Paul wrote it relying upon the advice that Fred gave him. Fred faces not only a fine of up to \$22,000.00, but the possibility that Dianne will sue him for the negligent and unqualified legal advice he gave. It is also likely that Fred's Professional Indemnity Insurance will not cover the fine or the damages bill he faces, or the legal costs he will have to pay to defend himself in Court.

Many Professional Indemnity Insurance Policies contain explicit restraints against those working in the Financial Services industry giving any form of advice **under**



any law, or for that matter performing any act that is beyond the scope of the 'approved product list' set out in the insurance policy. If you directly or indirectly do any work outside the scope of the work you have told your insurer you perform in the normal course of your business, you may have no insurance cover at all!

What else could go wrong?

Fred had a quick look at the Will drafted by Paul and told him that it seemed okay. However, Paul has had his daughter Dianne, who is a beneficiary under the Will, sign the Will as a witness. This means that the gift to Dianne is void and the whole Will is invalid. Because Paul does not have an earlier Will, Paul has died intestate and a statutory scheme will apply to the distribution of Paul's assets. Paul's family can commence expensive proceedings in the Supreme Court to try and have the Will declared valid, but there is no guarantee this will be successful. If Paul is intestate, Paul's wife will receive the contents of their home, plus \$200,000.00 and one half of the remaining assets. The other half will go to Paul's children. This was not how Paul wanted his estate to be divided up!

The Courts have held that giving explanations and instructions about the meaning of the contents of a Will constitutes legal advice – See *Attorney-General v Quill's Wills Ltd & Ors* (1990) 3 WAR 500. As Fred did not know that two independent witnesses must sign a Will to make it valid, none of the Trusts and other features that Paul wanted in his Will have any effect. Fred also did not tell Paul that Dianne could not sign the Will if she was going to inherit anything under the Will.

Applying the statutory scheme to the division of Paul's assets may mean that Paul's wife faces great hardship as she may have to sell the family home to share Paul's estate with their children. Paul's wife and children could end up in a dispute over Paul's estate leading to expensive litigation in the Supreme Court. As the Executor of the Will, Dianne could commence legal proceedings against Fred seeking damages against him because of his negligence as well as reporting him to the Legal Services Commissioner.

Could things become worse for Fred?

During their meeting, Paul also told Fred that his son Sam has a gambling problem and he's worried that Sam will not be able to provide a house for



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(Sam's) wife and kids. Paul is reluctant to give Sam any money in case he puts it through the pokies. Fred tells Paul that he should loan the money to Sam and enter into a Deed of Loan Agreement with him. Fred tells Paul it will protect him if Sam defaults in making the loan repayments. Paul writes up a document following Fred's advice and puts the loan agreement into action by loaning Sam \$500,000.00. Sam buys a house in his own name with the money.

Months later (but before Paul's death) Sam defaults in making loan repayments, sells the house very quickly at a fire sale price and gambles away the money from the sale. Paul tries to stop the sale of the house, but is told by his lawyer that there is almost nothing he can do to stop the sale. Sam has no other assets that could be sold to repay the loan from Paul.

Fred's advice has resulted in Paul losing at least \$500,000.00. Because Fred is not a legal practitioner he did not know that Paul should have been told to lodge a caveat over Sam's home until the loan was repaid, or loan the money through a mortgage secured over the title to Sam's house. Either of these options could have stopped Sam from being able to sell the house without Paul's permission.

Paul reports Fred to the Legal Services Commissioner for the advice he improperly gave. Paul also commences proceedings in the District Court against Fred for his negligent advice, asking for \$500,000.00 in damages against Fred personally. Fred not only faces fines of up to \$22,000.00 and the half million dollars in damages, but also the cost of his legal fees and possibly Paul's legal fees as well. Again, Fred's insurance is unlikely to cover him so he could lose everything because of the advice he gave.

Fred is also a member of the Financial Planning Association of Australia and is bound by their Code of Ethics. The Financial Planning Association of Australia Code of Ethics requires, amongst other things, that Financial Planners have the wisdom to recognise their own limitations and consult with other professionals if appropriate, or refer clients to other professionals if necessary. If Paul and/or Dianne make a complaint to the Financial Planning Association, Fred could face disciplinary action and may lose his membership. Fred's reputation as a Financial Planner could be ruined by the simple act of giving advice when he was not entitled to do so.

How can you protect yourself?

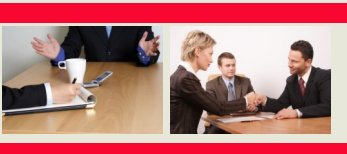
Many people who work in the Financial Planning or Accountancy industries deal with legal professionals every day. If a client comes



to you with a legal problem you should refer them immediately to a legal professional, even when you are quite certain because of your experience that you know the answer to that question. As Fred's problems detailed above show, it is far too dangerous for those in the financial industry to give legal advice, as it is also dangerous for those in the legal profession to give financial advice. By giving advice beyond the scope of your professional training you could be left uninsured and therefore personally liable for the damage that results from that advice.

If you are concerned that the advice you are giving clients may be crossing into the realm of legal work, the safest course of action to take to protect yourself by referring your client to a qualified legal practitioner. This will also ensure that your client gets the best possible service and advice.

If this article has raised any concerns for you please do not hesitate to contact Rankin Nathan Lawyers on (02) 4929 9333.



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