



3.13. The Regulation of Barristers' Professional Conduct

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Introduction

The purposes of this paper are threefold:

1. To "walk through" the important provisions of the *Legal Profession Act* 1987 (including the comprehensive amendments which commenced in 1994). The emphasis will be on the complaints and discipline provisions.
2. To give readers some idea of the practicalities of the complaints procedure so far as the Bar Association and its committees are concerned.
3. To extract some important principles from the case law on professional conduct in a question and answer format.

There is one appendix to the paper, which is a copy of a comprehensive article by Jeremy Gormly which was included in a 1994 edition of *Bar News* under the heading "Ethics Report" and which deals with the practicalities of the complaints procedure. That appendix covers the second purpose referred to above.

Readers of this paper are also encouraged to read "There but for the Grace of God..." Disciplinary Proceedings Affecting Barristers by R.R. Stitt QC and G.C. Lindsay S.C. (revised 14 July 1997) and *Barwick v The Law Society of NSW C.A.*, unreported, 16 July 1998 which contains an extensive discussion of the provisions about complaints and discipline in the *Legal Profession Act*.

The *Legal Profession Act*

Radical Changes

The regime introduced by the *Legal Profession Act 1987* ("the Act") has been radically altered by the 1994 amendments. The amendments nominally eliminate the distinction between barristers and solicitors and transform the procedure relating to complaints and discipline.

The new regime institutes the general term "legal practitioner". Practitioners can no longer be enrolled or admitted as barristers or solicitors (section 17). A person is admitted and enrolled by the Supreme Court as a legal practitioner (sections 3 and 4) and becomes an officer of the Supreme Court (section 5). The practitioner then elects whether to practise as a barrister or solicitor (section 26). Applicants for admission still need to be "of good fame and character" but now also need to be "otherwise suitable for admission" (section 11).

A practitioner is not entitled to practise as a barrister without holding a current practising certificate (section 25). A barrister is entitled to become a member of the Bar Association without having to pay more than the practising certificate fee (section 57M). A practitioner may not hold at the same time current practising certificates as "barrister" and "solicitor and barrister" (section 38D). Practice as a barrister is subject to the barristers rules (section 38G). Sections



November 2002 - Examinations

32-34 deal with the issuing of certificates and conditions that may be imposed on such certificates.

Sections 30, 37 and 38A deal with the grounds upon which the Bar Council may refuse to issue, cancel or suspend a practising certificate. An important one which can affect a barrister in busy day-to-day practice is continued failure to explain to the Bar Council conduct as a barrister in respect of which the Council has called for an explanation: section 37(1)(a). (An early step after receiving a complaint about a barrister is to ask for a response to the allegation.) Section 38B provides for a right of appeal to the Supreme Court by a barrister aggrieved by the Council's decision concerning his or her practising certificate.

New Flexibility for Barristers

The 1994 amendments to the 1987 Act provide for greater flexibility to practitioners acting as barristers. Barristers may accept any clients themselves, subject to barristers' rules and conditions imposed in the relevant practising certificate (sections 38I). Barristers may enter into a contract for the provision of services with a client or with another legal practitioner; and may sue and be sued in relation to that contract, though nothing affects any law in relation to immunity to suit in relation to advocacy. They may enter such a contract with a client, even where the barrister has accepted the brief from the solicitor (section 38I).

Barristers may now advertise, in any way the barrister thinks fit (section 38J), so long as the advertisement is not false, misleading, deceptive, or in contravention of Trade Practices legislation. Barristers may also hold themselves out as specialists, or offering specialist services, so long as they are actually accredited with that expertise (section 38K).

Barristers and solicitors may act as advocates and may appear in any court as such (section 38L). A barrister may now appear together with a solicitor (section 38M) and conferences may now be held other than in chambers (section 38N). Queen's Counsel are no longer to be appointed (section 38O). Provisions are now in place for compulsory indemnity insurance for barristers (section 38R). Barristers may still not receive money on behalf of another unless authorised to do so: section 38P. Provisions are made for barristers sharing receipts of their business or being in partnership with the non-barristers as well as for community legal centres (sections 48F, 48G and 48H).

Barristers Rules

Under section 57A, the Bar Council may make rules for or with respect to practice as a barrister. These are binding on the barrister (section 57D), subject to the Attorney General's power to declare the rules inoperative (section 57I). Joint rules may be made by the Bar Council and the Law Society (section 57C), and these will prevail over the separate barristers or solicitors rules to the extent of any inconsistency.

Provisions Regarding Professional Conduct

Part 10 of the Act deals with complaints and discipline. Sections 123, 124 and 125 set out clearly the objects of Part 10 generally as well as relating to users and providers of legal services. Section 127 creates two categories of unacceptable conduct. These are:

"Unsatisfactory professional conduct" includes conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard



November 2002 - Examinations

of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner or interstate legal practitioner.

“Professional misconduct” includes:

- (a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence, or
- (b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners, or
- (b1) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that an interstate legal practitioner is not of good fame or character or is not a fit and proper person to remain on the roll in the practitioner’s home State that corresponds to the roll of legal practitioners, or
- (c) conduct that is declared to be professional misconduct by any provision of the Act.

Note that both definitions are inclusive so that, particularly with respect to professional misconduct, the common law remains relevant and note that the less serious unsatisfactory professional conduct is limited to the barrister’s practice. By section 171M, the Act specifically preserves the jurisdiction of the Supreme Court in respect of the discipline of legal practitioners.

Under section 128 Part 10 is made applicable to any legal practitioner, including interstate legal practitioners and legal practitioners not holding a practising certificate and a person who was a legal practitioner at the time of the conduct in question but is no longer. The Part does not apply to judges of Commonwealth Courts or any “judicial officer” within the meaning of the *Judicial Officers Act 1986* regardless of whether conduct complained of occurred before or after the appointment to judicial office.

It is professional misconduct for barristers to have an associate (partner, employee or receipt-sharer) whom they know to be a disqualified person or a person convicted of an indictable offence and not holding a current practising certificate (section 48K).

Complaints Procedure

Under the 1987 regime, there were three bodies to deal with complaints against barristers’ conduct. These were: the Legal Profession Conduct Review Panel; the Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal. All three included lay members.

The 1994 regime creates the office of a Legal Services Commissioner (section 129), to act as a general overseer of the complaints system and a Legal Services Tribunal (section 162) to hear complaints against barristers. [This will become the Legal Services Division of the Administrative Decisions Tribunal when the *Administrative Decisions Tribunal Act 1997* is proclaimed, which is expected to be on 1/10/98.] The new system is a two stage one. The Commissioner or Bar Council first investigates the complaint to ascertain whether there is a reasonable likelihood that the barrister will be found guilty by the Tribunal. If they determine so, proceedings must be instituted in the Tribunal.



November 2002 - Examinations

The functions of the Commissioner are wide and are set out in section 131. They include receiving, initiating, investigating and referring of complaints, assisting complainants, monitoring others' investigations and reviewing Bar Council's decisions as well as educational, promotional and research functions.

Complaints are to be made to the Commissioner, and any person (including the Commissioner and Bar Council) may initiate a complaint about the conduct of a legal practitioner. If a complaint is made directly to the Bar Council, then it must be forwarded to the Commissioner (sections 134-136).

A complaint must be in writing, must identify the legal practitioner and the complainant and must give particulars of the alleged conduct that is the subject of the complaint (section 137). It should be made within 3 years of the alleged conduct, but the Commissioner has the discretion to accept complaints after that time, if specified conditions are met (section 138).

The complainant may request a compensation order if he or she claims to have suffered loss (section 139).

A person may also initiate a "consumer dispute" where that person seeks redress or a remedy. Such a dispute need not involve an issue of misconduct or unsatisfactory professional conduct and it may be referred for mediation (sections 143-147).

Having received the complaint, the Commissioner may:

1. Dismiss the complaint (summarily) without referring it to the Bar Council, if further particulars of the complainant are required and have not been given, or the complaint is not verified, or if the complaint is "vexatious, misconceived, frivolous or lacking in substance" (section 141).
2. Refer the complaint to the Bar Council with a recommendation that the Bar Council investigate the complaint or refer it to mediation, or both (section 142). The complaint must be referred within 21 days of being made (unless further particulars are required).

The Bar Council must investigate each complaint referred to it by the Commissioner or initiated by itself. It may only dismiss a complaint without investigation if further particulars are not given or the complaint is not verified (section 148). In practice the Council delegates the investigatory role to one of its Professional Conduct Committees. The Commissioner monitors all investigations by the Council (section 149) and may give the Council directions on the handling of the complaint (but not on the decision to be taken) if it is in the public interest to do so. If these are not complied with, the Commissioner may take over the investigation (section 150).

3. Investigate the complaint: the Commissioner may conduct an investigation instead of referring it to Council, or may take over the investigation from the Bar Council, where considered appropriate. Where this occurs the Bar Council must provide any assistance required to the Commissioner (section 147A).
4. Arrange for an independent investigation if requested to by Council where the Commissioner decides not to conduct his or her own investigation. The complaint is referred to the independent investigator where the Council considers it is in the interests of justice or the



November 2002 - Examinations

public interest to do so. The independent investigator reports to Council and provides a copy of that report to the Commissioner (section 151).

The Commissioner and Bar Council are given wide powers over barristers when investigating complaints. A barrister complained of may be required to provide information, to produce documents or to verify information by statutory declaration. Failure to comply with such a request amounts to professional misconduct (section 152), as can misleading or obstructing the Commissioner or Bar Council.

Where relevant the Bar Council and the Law Society Council may co-operate and exchange information during the investigation of a complaint (s148(2A)).

An investigation by the Commissioner or the Bar Council must be conducted "as expeditiously as possible" (section 154). Under section 158, a complainant may apply to the Commissioner to review a Bar Council decision to dismiss a complaint or to reprimand the complainant. This must be in writing, and be made within 2 months of notification of the Council decision. The Commissioner can then: confirm the decision of Council; direct the matter to be referred to mediation; reinvestigate, or direct the Bar Council to do so; or institute proceedings in the Tribunal (section 160).

Section 155 deals with the decisions to be made after investigation of complaints. The Commissioner or Bar Council must institute proceedings in the Tribunal, if satisfied that there is a reasonable likelihood that the barrister will be found guilty by the Tribunal of unsatisfactory professional conduct or professional misconduct. The complaint is to be dismissed if there is no such reasonable likelihood. If the matter relates to unsatisfactory professional conduct only, then the Commissioner/Council has the discretion to merely reprimand the barrister, or dismiss the complaint, rather than refer the matter to the Tribunal. The barrister may still be required to pay compensation.

The Legal Services Tribunal

Note that at the time of writing, the *Administrative Decisions Legislation Amendment Act 1997* (No 77 of 1997) has not been proclaimed. This is expected to occur on 1/10/98. It effects a number of structural and procedural changes.

Division 7 deals with the constitution of the Legal Services Tribunal. Under section 162 the Tribunal consists of at least 2 barristers, at least 2 solicitors and at least 2 lay members, appointed by the Attorney General. The Attorney General may appoint either a barrister or a solicitor member as President of the Tribunal. When hearing a complaint into a barrister, the Tribunal will constitute 2 barrister members and 1 lay member (section 163). Determinations are by majority decisions (section 164) and rules of procedure may be made by a rule Committee of the Tribunal (section 166).

Division 8 provides for the Tribunal's hearings and determinations. Proceedings are instituted in the Tribunal by an information laid by the Commissioner or the Bar Council; and the barrister must file a reply to the allegations, prior to the hearing (section 167).

Parties to a hearing may include the barrister, the Bar Council, the Commissioner, the Attorney General, and the complainant (this is generally limited to a case where the complainant has requested a compensation order): section 169. Hearings are generally to be conducted in public



November 2002 - Examinations

except where the allegation is one of unsatisfactory professional conduct (held in camera unless the presence of the public is in the public interest or the interests of justice) or it is not in the public interest or the interests of justice that the hearing be public (section 170).

The use of the rules of evidence will depend upon the matter. Where the Tribunal is hearing an allegation of professional misconduct, the rules of evidence must be observed; for all other matters, the Tribunal can inform itself of any matter in any manner it thinks fit (section 168). The Tribunal also has the power to summons witnesses, to administer the oath or affirmation, and to require persons and documents to be produced (sections 171, 171A).

If the Tribunal finds professional misconduct or unsatisfactory professional conduct to have occurred, then it has several options (section 171C). It may (for professional misconduct only) order that the barrister's name be removed from the roll or that the practising certificate be cancelled, and/or not issued for a specified period and (for either professional misconduct or unsatisfactory professional conduct) impose a fine of up to \$50,000 or \$5,000 (unsatisfactory professional conduct); publicly (or privately) reprimand the barrister; order a course of further legal education; or make compensation or ancillary orders. If the Tribunal finds, in addition to professional misconduct or unsatisfactory professional conduct, that the complainant has suffered loss it may order a waiver or repayment of fees, order a provision of legal services (free or at a specified charge) or order the barrister to pay an amount of compensation (not over \$10,000 unless by consent): section 171D. Costs may be awarded against the barrister. If the barrister is cleared of the allegations the Tribunal may (if it considers special circumstances warrant) order payment of such an amount by way of his or her costs from the Statutory Interest Account as it determines (section 171E).

A barrister's duty of confidentiality to his or her client can be overridden by a requirement of the Tribunal (if the client is the complainant or consents) and may be breached if the Commissioner, Council or Tribunal considers it necessary to rebut an allegation (section 171S).

A party may appeal to the Supreme Court (s171F). A complaint's right is only with respect to loss suffered as a result of the conduct.

Practicalities of the Complaints Procedure

It could well happen that you are complained about at some stage of your professional career. Even though the complaint may have no basis (and more so if there is a basis) it will be important for you to be familiar with the procedure and what the Bar Association expects of you. Jeremy Gormly's attached article (Appendix 1) is the best avenue to this information. Keep it accessible until you are appointed or retire!

SOME QUESTIONS AND ANSWERS FROM THE CASES

I do not propose to go through the barristers rules nor to cite, from cases dealing with professional conduct, particular instances of professional misconduct. However, there are certain leading cases dealing with questions of professional conduct and the discussion of principle contained in them provides guidance in dealing with questions which may arise. I propose, in this section, to pose certain basic questions and to look to the cases for direction so far as the answers are concerned. Be prepared for the "brutally gender-positive" language (a phrase borrowed from Gleeson CJ) of years past.



November 2002 - Examinations

A. How do the Courts define professional misconduct?

In *Prothonotary of The Supreme Court of N.S.W. v Costello* [1984] 3 NSWLR 201 Glass and Samuels JJ.A. say at 203 that the original formulation of professional misconduct was that it “consisted in behaviour on the part of the practitioner which would reasonably be regarded as disgraceful and dishonourable by his professional brethren of good repute and competency” and their Honours did “not doubt that it provides the appropriate test for measuring the professional conduct of a barrister when a departure from proper professional standards is charged against him”. But, in the same case, Priestley J.A. pointed out at 207 that that definition was not exhaustive. Most recently, in *NSW Bar Association v Smith* (Court of Appeal, unreported, 9.5.91) Samuels J.A. (with whose reasoning, but not conclusion, Meagher J.A. agreed) said that another test was whether conduct “would reasonably incur the strong reprobation of professional brethren of good repute and competency” (at 35). His Honour pointed out at 36 that “pejorative epithets” such as “disgraceful” or “dishonourable” and a reaction such as “strong reprobation” all had their place in formulating the relevant criteria. But Samuels J.A. went further in *Smith’s case*. His Honour thought it appropriate that professional misconduct should include “acting in a manner incompatible with practice at the Bar”. This approach must now be regarded as quite limited by the 1994 amendments to the Act.

B. Will all professional misconduct lead to striking off the roll?

Statutorily, no, because the options of the Tribunal (discussed above with regard to the Act) include a fine. But also at common law, as Priestley J.A. points out at 207 in *Costello’s case*, “not all professional misconduct requires removal from the roll”. At 205 in the same case Priestley J.A. said that a “barrister’s name will be removed from the roll when he is proved guilty of misconduct of such a character as to show he is no longer fit to remain on it”. An example is provided in *Smith’s case* where Samuels J.A., having concluded that the behaviour amounted to professional misconduct then went on, at 37, to pose the “final question” as “whether the finding of professional misconduct is such as to demonstrate that the opponent has been shown not to be a fit and proper person to be a member of the Bar”. His Honour said that in “approaching this question it is necessary to bear in mind that the disciplinary jurisdiction exercised by the Court is wholly protective, designed to protect public interest and the due administration of justice”. Bearing that in mind, his Honour was “not prepared to say that he is unfit to be a member of the Bar” (at 39). (The two other members of the court disagreed with that final step.)

C. How do the Courts regard misbehaviour which is other than professional, for example, involving a conviction?

Ziems v The Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279 is the classic case where a barrister was convicted of motor manslaughter and gaoled for 2 years. The Supreme Court had removed his name from the roll upon the ground of the conviction and sentence. The barrister took the matter to the High Court. By a majority, the High Court allowed the appeal and suspended the barrister from practice only for the period of his imprisonment. However, it was generally agreed, in varying degrees, that although the fact of conviction itself is important “it is on what the man did that the case must ultimately be decided” (Fullagar J. at 288). At 302, Taylor J said that “the vital question ... in such cases, is not whether a practitioner has been convicted of an offence against the criminal law but whether his conduct has been such as to show that he is unfit to remain a member of his profession.” It should also be noted that at 290 Fullagar J expressed the opinion that, generally speaking, professional misconduct will have a much more direct bearing on the question of fitness to practise than personal misconduct. It



November 2002 - Examinations

should be noted that imprisonment (and no more) is a ground for refusing suspending or cancelling a Practising Certificate (s37(i)(g)).

D. Where is the onus and what is the standard in disciplinary proceedings?

Hope J.A. answered in this question in delivering the leading judgment in *NSW Bar Association v Livesey* [1982] 2 NSWLR 231 where at 238 his Honour cited, with approval, the judgment of the Full Court of the Supreme Court of the A.C.T. in *Ex Parte Attorney General for the Commonwealth; re a barrister and solicitor* (1972) 20 FLR 234. The answer is that the “onus of proof is upon the Association but is according to the civil standard. Hence proof in these proceedings of misconduct has only to be made upon a balance of probabilities”. *Briginshaw v Briginshaw* (1938) 60 CLR 336 is cited understandably in the context of “the clarity of the proof required where so serious a matter as the misconduct ... of a member of the Bar is to be found”.

E. What should the barrister’s attitude and approach be in disciplinary proceedings?

The Court of Appeal has been consistently clear and unswerving in answering this question. In *Livesey’s* case at 233, Moffit P. said that if “a member of the legal profession acts in a way which is a departure from the professional standards, so he is exposed to being found guilty of some professional misconduct, liable perhaps to be dealt with in a minor way, what was minor may become serious if the barrister or solicitor is unfrank about the matter or gives a false explanation concerning it.” His Honour says that an honest and frank response in the adversity of being exposed to such an inquiry “may well demonstrate that he is a person truly to be relied on”. His Honour goes further and says that “it has been a common experience in cases before this Court that professional unfitness would not have been established by the initial misdemeanour, but is revealed by the wrongful conduct which follows in an endeavour to rectify or conceal the initial wrong or error”. In *N.S.W. Bar Association v Maddocks* (Court of Appeal, unreported, 23.8.88) Kirby P said at 4 that “it is more likely, in cases of professional misconduct, that the Court will withhold disbarment or suspension where the practitioner has admitted guilt” and this is because “a barrister is more likely to be accepted by Judges and fellow practitioners if, despite lapses, he or she acknowledges frankly a recognition of the errors that led to them.” Note in particular that in *N.S.W. Bar Association v Thomas (No.2)* (1989) 18 NSWLR 193, Kirby P said that the “duty of honesty and frankness on the part of a barrister under investigation extends to the consideration of a case by the court or a tribunal appointed for that purpose.” Also, in *N.S.W. Bar Association v Kalaf* (Court of Appeal, unreported, 11.10.88), Mahoney J.A. said at 6 that a barrister “is not entitled merely to stand mute or ‘to put to proof’ the body proceeding in the matter.”

F. What is the purpose of disciplinary proceedings?

Samuels J.A. said at 37 in *Smith’s* case that it was “necessary to bear in mind that the disciplinary jurisdiction exercised by this Court is wholly protective, designed to protect public interest and the due administration of justice. No question of punishment arises. But it is legitimate to consider the possible deterrent effects upon practitioners of orders made, and thus the protection of the public by that means.” In *Clyne v The N.S.W. Bar Association* (1960) 104 CLR 186 the Full Court of the High Court said in a joint judgment at 210-202 that although “it is sometimes referred to as ‘the penalty of disbarment’, it must be emphasised that a disbarment order is in no sense punitive in character. When such an order is made, it is made from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege”.



November 2002 - Examinations

G. How does one classify the different rules of conduct applying to a barrister?

The classic answer is that provided by the Full Court of the High Court in *Clyne's* case at 199-200. The passage is so often cited that it should be set out in full. I have left the examples in because they are illustrative, though now dated.

“The rules which govern the conduct of members of a body of professional men, such as the Bar of New South Wales, may (though there is, of course, no logical dichotomy) be divided roughly into two classes. In the one class stand those rules which are mainly conventional in character. To say this is not to deny their importance from the point of view of the client. But they are designed primarily to regulate the conduct of members of the profession in their relations with one another. Many of these rules are reduced to writing, and they are from time to time interpreted, and perhaps modified to fit specific cases, by resolutions of the governing body of the profession. Examples of this class in the case of the Bar are the rule which forbids advertising, the rules with regard to retainers, the rule that one of Her Majesty’s counsel must not appear without a junior. A breach of any of these rules is treated seriously, but would not warrant disbarment - at least unless it were shown to be part of a deliberate and persistent system of conduct.

Rules of the other class are not merely conventional in character. They are fundamental. They are, for the most part, not to be found in writing. It is not necessary that they should be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness. To the Bar in general it is more a matter of ‘does not’ than of ‘must not’. A barrister does not lie to a judge who relies on him for information. He does not deliberately misrepresent the law to an inferior court or to a lay tribunal ... He does not, in cross-examination to credit, ask a witness if he has not been guilty of some evil conduct unless he has reliable information to warrant the suggestion which the question conveys.”

H. What if a barrister misleads the court in the conduct of a case?

In *Smith's* case, Samuels J.A. said that where a barrister “had no belief in the truth of the statement he made to the magistrate, and that he deliberately misled the court by making them” then such statements amounted to professional misconduct. Over 40 years ago, in *Re John Cameron Foster* (1950) 50 S.R. (N.S.W.) 149 Street C.J., delivering the judgment of the Court, said at 152 that “it is essential that counsel should always bear in mind the obligation resting upon them of complete candour in regard to any statements made by them to the Court.”

I. Some incidental observations

(a) What is the difference between a profession and a trade?

Street C.J. in *Re John Cameron Foster* said at 151 that in both one may pursue pecuniary gain but “in a profession pecuniary success is not the only goal. Service is the ideal, and the earning of remuneration must always be subservient to this main purpose.”

(b) Snarling counsel



November 2002 - Examinations

“Bickering” between counsel is not a good thing because a barrister is a helper in the administration of justice and is there to assist the judge or jury to arrive at a proper result in the dispute between the parties: *Beevis v Dawson* [1957] 1 Q.B. 195.

(c) The heat of the battle

But compare the encouragingly realistic remarks of Priestly J.A. in *Costello's* case at 208-209 where his Honour discusses the fact that the ‘courtroom is a place where conflicts of many kinds are intended to take place’ and that it ‘is inevitable that expressions of view sometimes become very forceful and, when met with opposition cause heat between the people putting the different views forward.’ They are, his Honour said in the majority of cases, part of the due process of administration of justice. His Honour concludes that “whether behaviour in court goes so far beyond a tolerable degree of heat and conflict as to justify the description of interference with the proper administration of justice will be a question of fact in each case.”

(d) But when does it become contemptuous behaviour?

The power of a court to fine a barrister for contempt is well recognised but must be exercised in accordance with the rules of natural justice and be used sparingly only in serious cases. The words or actions must be such as to interfere or intend to interfere with the course of justice. Necessity at the Bar for “courage and firmness” but “courage and courtesy should go hand in hand”. In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to the State, and a duty to himself. To maintain a poise amidst these various and sometimes conflicting claims is (understandably!) no easy feat. *Ex Parte Bellanto: Re Prior* (1963) 80 W.N. (N.S.W.) 616. Twenty years later, the High Court in *Lewis v Ogden* (1984) 153 CLR 682 referred to that decision with approval and made three concluding remarks at 693 about contempt -

“The first is to recall that the contempt power is exercised to vindicate the integrity of the court and of its proceedings; it is rarely, if ever, exercised to vindicate the personal dignity of a Judge.... The second is that the summary power of punishing for contempt should be used sparingly and only in serious cases....The final comment is that the charge of contempt should specify the nature of the contempt, ie. that it consists of a wilful insult to the Judge, and identify the alleged insult.”

It should be added that the High Court had earlier said at 689 -

“However, mere discourtesy falls well short of insulting conduct, let alone wilfully insulting conduct which is a hallmark of contempt. The freedom and the responsibility which counsel has to present his client’s case are so important to the administration of justice, that a court should be slow to hold that remarks made during the course of counsel’s address to the jury amount to a wilful insult to the judge, when the remarks may be seen to be relevant to the case which counsel is presenting to the jury on behalf of his client.”

(e) An indiscreet remark

Where an out of court remark made by a District Court Judge on circuit made its way into an affidavit in the Court of Appeal, Street C.J., said at 232 in *Zanatta v McCleary* [1976] 1 NSWLR 230 that “it is a departure from the dictates of good taste, and a regrettable



November 2002 - Examinations

repudiation of the privilege of professional intimacy for counsel and solicitor, made privy to a confidential, albeit indiscreet, disclosure by a judge, to publish to the world at large the sentiments and information thus confided in them.”

(f) What are counsel’s duties in opening?

Once again, the full court of the High Court in Clyne’s case provides the answer at 201-

“It is grossly abused if counsel, in opening a case, makes statements which may have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence. It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make statements unless he definitely intends to adduce, evidence to support them. It cannot, of course, be enough that he thinks that he may be able to establish his statements out of the mouth of a witness for the other side.”

(g) Where a barrister gives evidence

If a barrister is required to give evidence in any proceedings as a witness, it is “essential that the Court should make it entirely plain that such evidence must be given honestly and candidly and that barristers have a special duty not to mislead a court, being themselves privileged participants in the administration of justice within the courts”: *Thomas’* case per Kirby P at 34.

(h) “Good Fame and Character”

Dixon J (as he then was) said in *re Davis* (1947) 75 CLR 409 at 420 -

“The Bar is no ordinary profession or occupation. The duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the person confidence, not only of lay and professional clients, but of other members of the Bar and of judges. It would almost seem to go without saying that conviction of a crime of dishonesty of so grave a kind as housebreaking and stealing is incompatible with the existence in a candidate for admission to the Bar of the reputation and the more enduring moral qualities denoted by the expression, ‘good fame and character’, which describe the test of his ethical fitness for the profession.”

It should be added that the position was aggravated in that case by the candidate failing to disclose the previous conviction to the Barristers’ Admission Board. After quoting part of the above passage from *Re Davis*, Moffitt P said in *Re B* [1981] 2 NSWLR 372 at 381-381 –

“It is to misconceive the duty of a barrister to relate it to some subservience to judges or the court, as if to an elite class. The duty is of a different nature. The duty is owed to the public, in that in exchange for the legal privileges which the law confers on the barrister or on his relationship with his client, his duty in the public interest is to conduct himself in relation to those privileges and otherwise in a manner which will uphold the law and further its pure administration. By reason of the privilege which the law attaches to the communications between barristers and client in relation to litigation, a barrister, by being a barrister, is in the unique situation that he does much of his work in secret protected by his client’s privilege. However his duty to his client is tempered and indeed overridden by his public duty to



November 2002 - Examinations

uphold the law and neither break the law himself nor participate or encourage its breach and in other well known ways to conduct himself in a manner which will serve the proper and fair administration of the law.

Because of privileged secrecy, departure from his duty may not be discoverable and if suspected may be incapable of proof. The proper performance of his duty and hence the pure administration of the law depends on his being able to be trusted unsupervised to do what is right.”

(i) A final comforting word

Always remember what Gleeson C.J. said in *R v Birks* (1990) 19 NSWLR 677 at 685 –

“In the present case the inexperience of trial counsel gave rise to an unusual and extreme situation. This is not merely because he forgot to ask some questions in cross-examination. That happens to the best and most experienced of advocates

[T]here were various ways in which the problem once it became apparent during the cross-examination of the appellant, could have been dealt with. In the running of a trial, counsel often have cause to regret things they have done or left undone. Damage control is part of the art of advocacy.”