

**Regulation of admission, fitness to remain on the roll of legal practitioners and retention of rights to practise**

**Obligations owed to professional colleagues**

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This paper is a revision of a paper delivered at a continuing professional development Mini Conference on 1 May 2004. There are two components to the discussion. The first is an update on some recent judicial determinations, which highlight some of the factors relevant to admission as a legal practitioner, fitness to remain on the roll of legal practitioners, and a practitioner's rights to practise. The second is a brief discussion of one of the seemingly overlooked categories of barristers' professional obligations, namely their obligations to colleagues at the Bar and other legal professional colleagues.

**Some Recent Decisions**

Although not normally a part of the daily practice of most barristers (save, perhaps, for those specialising in advising and appearing for colleagues whose conduct is being examined by the Legal Services Commissioner, the Bar Council, the Council of the Law Society, the Legal Services Division of the Administrative Decisions Tribunal, or a court), there do occasionally arise circumstances where issues relating to whether a barrister or solicitor ought to be granted a practising certificate or continue to remain on the Roll of Legal Practitioners must be considered.

Such consideration might arise, for example, in considering some aspect of one's own conduct or that of a colleague, or in considering a problem brought to you by a colleague who has approached you with a view to obtaining your opinion about such a matter. Even more likely, a relative, friend, or person referred to you, may approach you with a view to obtaining an opinion as to whether or not they are likely to be admitted to practice despite a certain personal history.

A barrister, who is familiar with the contents of the regulatory framework of their profession and the general principles enunciated in the most recent decisions of the courts, ought to be able to provide some general guidance on such issues, even though it may be unnecessary or they might

be reluctant to provide anything in the nature of a formal advice on prospects unless they specialise in the area.

Two recent decisions, which are discussed below, are the New South Wales Court of Appeal judgment in *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320, which was delivered on 18 September 2003 and the judgment of the High Court of Australia in *A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1, which was delivered on 4 February 2004. Links to both judgments are on the Professional Conduct page of the Bar Association's website:

[http://www.nswbar.asn.au/Professional/ProfessionalConduct/content\\_pcd.php](http://www.nswbar.asn.au/Professional/ProfessionalConduct/content_pcd.php)

### The Starting Point – Requirements for Admission

The starting point in considering the broad regulatory framework is the set of criteria established for admission as a legal practitioner in New South Wales. Of course, this paper is concerned only with those issues relating to personal characteristics and not matters such as educational qualifications.

Section 11 of the *Legal Profession Act 1987 (NSW)* (“the Act”) provides:

*“A candidate, however qualified in other respects, must not be admitted as a legal practitioner unless the Admission Board is satisfied that the candidate is of good fame and character and is otherwise suitable for admission.”* [my underlining]

It is useful to note that the Legal Practitioners Admission Board (‘the Board’) is prohibited from admitting a person to practice unless it is satisfied of their good fame and character. In this regard, the availability of character references on the part of an applicant for admission is crucial.

The issue of the requirement of section 11 of the Act most often arises, at least with respect to the work of the Professional Conduct Committees of the New South Wales Bar Association, in the context of applications made pursuant to section 13 of the Act. It is in regard to the prospects of success of such applications that a barrister may be requested to provide some informal advice to a relative, friend, or other person.

Section 13 of the Act provides:

*“A person may apply to the Admission Board for a declaration that matters disclosed by the person will not, without more, adversely affect an assessment by the Board of his or her good fame or character or suitability for admission.”*

An application made pursuant to section 13 must be forthright and complete in its disclosure of all relevant aspects of the incident or conduct in question and must supply sufficient other materials (including character references) for the Board to be satisfied of the candidate's good fame and character and suitability for admission. It is not uncommon for applications for an early consideration of suitability for admission to be delayed or to be answered unfavourably by reason of a failure on the part of the applicant to provide sufficient information and supporting character references. It is, perhaps, a general rule that the more serious the disclosed incident or conduct, the greater the need to balance that by the statements of appropriate character referees. This should not, however, be interpreted in any way as meaning that the disclosure of a relatively minor incident for the purpose of a section 13 application will necessarily obtain a favourable consideration despite there being scant character evidence.

#### Consideration of Suitability to Remain a Legal Practitioner

There also occasionally arise circumstances where a legal practitioner is obliged to disclose some incident or conduct on their part, usually in the nature of an offence or an act of bankruptcy, to their professional body. More rarely, there are circumstances where a matter, although not previously disclosed, is subsequently chosen to be disclosed by a legal practitioner. In all such situations, the primary rule is always honesty and candour on the part of the disclosing person. It is not unknown for circumstances to arise whereby, even though a matter disclosed by the legal practitioner would not, of itself, have warranted disciplinary action, the failure of the practitioner to deal honestly and candidly with the professional body became a sufficient basis, of itself, to warrant disciplinary action.

In this regard, it is useful to review the definitions of 'professional misconduct' and 'unsatisfactory professional conduct' as set out in the Act.

Sub-section 127(1) of the Act provides that:

*"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)*

- (c) *conduct that is declared to be professional misconduct by any provision of this Act, or*
- (d) *a contravention of a provision of this Act or the regulation, being a contravention that is declared by the regulations to be professional misconduct.”*

Of course, a breach of *The New South Wales Barristers’ Rules* can constitute such professional misconduct or unsatisfactory professional conduct.

Sub-section 127(2) of the Act provides:

*“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 of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.”*

It is in this context that the following brief discussion of the judgments of the New South Wales Court of Appeal and the High Court is set out.

*Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320

In this case, the Prothonotary commenced proceedings by summons seeking: a declaration that P, a solicitor, was not a person of good fame and character; a declaration that P was not a fit and proper person to remain on the Roll of Legal Practitioners; and an order striking P’s name off the Roll.

P was admitted to practice in 1987. From about 1994, P began using illicit substances, including cocaine and heroine, and became addicted. In 2000, P travelled overseas with an acquaintance. While overseas, P’s acquaintance obtained some cocaine and intended to bring about 200 grams of it back to Australia. P knew this prior to leaving for Australia, but did not, at that stage, intend to carry any of those drugs upon her own person.

On the flight back to Australia, P’s acquaintance convinced P to carry some 52.7 grams of pure cocaine on her body through customs. P was caught at customs and was charged with importing in Australia not less than a trafficable quantity of cocaine. In District Court proceedings, P pleaded guilty and was sentenced to 6 months imprisonment (only 3 months of which was to be served provided P entered into a recognisance to be of good behaviour for the 3 further months, which P did).

The New South Wales Court of Appeal held that, upon certain undertakings being provided by P (namely submission to regular urinalysis), there was no basis for the removal of P’s name from the Roll of Legal Practitioners.

The relevance of this case to the present discussion is that it provides one answer to the rhetorical question: “How could someone, who has been convicted of such a serious charge as drug importation, be permitted to practise law?” That is a question that legal practitioners and members of the wider community would be quite entitled to ask.

In the judgment of Young CJ in Equity, with which Meagher and Tobias JJA agreed, an answer to the above question is provided. Greater detail of the relevant background facts are set out in Young CJ in Eq’s judgment than those summarised above. Reference should be made to this judgment in full rather than relying upon any summary as set out in this paper. Importantly, his Honour commences his analysis by stating perhaps an obvious, but certainly an important, point in that:

*“The principles that we have to apply in this sort of case clearly appear from the authorities, though the application of those principles to the facts of this case are what causes the difficulty. There is no escaping from the general feeling in the community that there is no place in the legal profession for people with a serious criminal record.*

...

*However, the Court does not decide this type of case by some draconian rule of thumb, but looks closely at the facts of each individual case. The decision in this case might be devastating for the opponent; however, whether this be so or not the Court must keep its eye firmly on the basic feature of the case, which is the protection of the community and the profession should this person continue to be on the Roll of Legal Practitioners.”* [at paragraphs 14-15]

His Honour then, at paragraph 17 of the judgment, set out a number of fundamental principles, which were stated as having been established from the authorities. These principles are as follows:

1. The onus is on the claimant to show that the practitioner is not a fit and proper person. It is a civil onus: *Re Evatt; Ex parte NSW Bar Association* (1967) 67 SR (NSW) 236. However, the particular standard required when determining the civil onus of proof will be affected by the application of the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.
2. An order striking the name of a practitioner off the Roll should only be made when the probability is that the practitioner is permanently unfit to practice: *Prothonotary v Richard* (NSWCA, 31 July 1987 per McHugh JA) and see *NSW Bar Association v Maddocks* (NSWCA, 23 August 1988).

3. The fact that the practitioner has a conviction for a serious offence is not necessarily sufficient reason for an order striking that person off the Roll: see *Ziems v Prothonotary* (1957) 97 CLR 279 at 283.
4. The fact of conviction and imprisonment is, however, far from irrelevant and may be regarded as carrying a degree of disgrace itself: see *Ziems* case at 288.
5. The Court needs to consider the conduct involved in the conviction and see whether it is of such personally disgraceful character that the practitioner should not remain a member of an honourable profession: *Re Weare* [1893] 2 QB 439 at 446; *Barristers' Board v Darveniza* (2000) 112 A Crim R 438 (QCA).
6. The fact that the practitioner pleaded guilty to the charge will usually be counted in their favour: *NSW Bar Association v Maddocks*. Although not all pleas of guilty necessarily show remorse, where there is evidence of remorse, this will count in favour of the practitioner.
7. Conduct not occurring in the course of professional practice may demonstrate unfitness if it amounts to incompatibility with the personal qualities essential for the conduct of practice. There may not even have been any criminal conviction with respect to that conduct. This is particularly so where the conduct over a long period shows systematic non-compliance with legal and civic obligations: *NSW Bar Association v Cummins* (2001) 52 NSWLR 279 at 289; *NSW Bar Association v Somosi* (2001) 48 ATR 562.
8. The concept of good fame and character has a twofold aspect. Fame refers to a person's reputation in the relevant community. Character refers to the person's actual nature: *McBride v Walton* (NSWCA, 15 July 1994 per Kirby P); *Clearihan v Registrar of Motor Vehicles Dealers* (1994) 117 FLR 455 at 459.
9. The attitude of the professional association is that the application is of considerable significance.
10. The question is present unfitness, not fitness as at the time of the crime: *Prothonotary v Del Castillo* [2001] NSWCA 75 at para 71.

When applying these principles, his Honour Young CJ in Eq was of the view that there was no basis for removing the name of the practitioner from the roll in order to protect the public, particularly given the nature of the undertakings offered by the practitioner so as to ensure that the practitioner remained drug free. Their Honours Meagher and Tobias JJA agreed.

*A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1

This case involved an appeal by a solicitor against a judgment of the New South Wales Court of Appeal (in *The Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62), by which judgment the solicitor was held to be guilty of professional misconduct and found not to be a fit and proper person to be a legal practitioner.

The New South Wales Court of Appeal had found the solicitor guilty of professional misconduct in two respects. Firstly, in 1998, the solicitor was convicted of four counts of aggravated indecent assault on a person under the age of 16 years. Secondly, although the solicitor had disclosed the fact of the convictions to the Law Society, he subsequently failed to disclose to the Law Society the fact that, in 2000, he was convicted of further charges of aggravated indecent assault on a person under the age of 16 years. The solicitor had failed to disclose these further convictions to the Law Society, despite the fact that he was aware that the Law Society was considering disciplinary action against him in respect of the earlier disclosed convictions. Subsequently in April 2001, the conviction of the solicitor with respect to the further charges was quashed by the District Court.

The High Court, constituted by their Honours Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ, delivered a joint judgment, by which the Court allowed the appeal in part. The Court set aside the declarations of professional misconduct made by the Court of Appeal in relation to the 1998 convictions and that the solicitor was not a fit and proper person to be a legal practitioner and set aside the order for the removal of the solicitor's name from the roll. The declaration of professional misconduct in relation to the failure to disclose the 2000 convictions was not set aside.

The High Court records the relevant background details of the case at paragraphs 23 to 29 of its judgment. Relevantly, the solicitor was involved in a relationship for a number of years prior to the events in question with the woman, who was the mother of the victims of the assault. The assaults occurred in 1997. In fact, the solicitor married the mother of the children in April 2000.

Prior to the assaults, the solicitor had suffered a couple of personal setbacks, which had the result of placing a great deal of pressure upon the solicitor, causing him to suffer from depression and physical exhaustion. When the assaults occurred, a complaint was made by the children about two of the matters. The solicitor admitted the assaults and admitted to two further incidents involving the same children.

In February 1998, the solicitor pleaded guilty to the charges in the Local Court and was sentenced to 3 months imprisonment. The solicitor appealed against the severity of the sentence and, in May 1998, that appeal was allowed. The solicitor was required to enter into a recognizance to be of good behaviour for a period of 3 years in lieu of any other sentence.

In May 2000, one of the victims of the offences made further allegations against the solicitor. The solicitor denied these further allegations. In November 2000, the solicitor was convicted in the Local Court and sentenced to 2 years imprisonment. On appeal to the District Court, the conviction and sentences were quashed. The solicitor had maintained at all times that those further allegations against him were false.

In the course of its judgment in this appeal, the High Court considered the history and background of professional discipline in New South Wales and made a number of observations about the power of the Supreme Court to remove the name of a practitioner from the roll.

At paragraph 12 of the judgment, the Court indicated that “the question that arises when the power of the Supreme Court is invoked in a case such as the present is not one of punishment, but “whether the Court is justified in holding out the [appellant] as a fit and proper person to be entrusted with the duties and responsibilities of a solicitor”.” The Court also noted that not all findings of professional misconduct would necessarily warrant the removal of the practitioner’s name from the Roll (and cited the case of *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201 as an example).

In the course of this case, the High Court was required to consider both the statutory power of the Supreme Court to remove a practitioner from the roll and its inherent jurisdiction to supervise its own officers. In this regard, at paragraph 20 of the judgment, the Court stated:

*“The present case was conducted on the basis that the definition of “professional misconduct” in s 127 of the Act did not apply, because the proceedings were brought in the inherent, not the statutory, jurisdiction. The dividing line between personal misconduct and professional misconduct is often unclear. Professional misconduct does not simply mean misconduct by a professional person. At the same time, even though conduct is not engaged in directly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct. Furthermore, even where it does not involve professional misconduct, a person’s behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper person to practise. And there may be an additional dimension to be considered. It was explained by Kitto J in Ziems:*

*“It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will*

*be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.”*

Further, at paragraph 21 of the judgment, the Court stated:

*“Professional misconduct may not necessarily require a conclusion of unfitness to practise, and removal from the roll. In that regard, it is to be remembered that fitness is to be decided at the time of the hearing. The misconduct, whether or not it amounts to professional misconduct, may have occurred years earlier. At the same time, personal misconduct, even if it does not amount to professional misconduct, may demonstrate unfitness, and require an order of removal. The statutory definition in s 127 involves both concepts, and, where it applies, must be given effect according to its terms. However, when the Supreme Court is exercising its inherent jurisdiction, it has the capacity to determine, and act on the basis of, unfitness, where appropriate, without any need to stretch the concept of professional misconduct beyond conduct having some real and substantial connexion with professional practice. In a statutory context where the power of removal depends upon a finding of professional misconduct, it may be appropriate to give the expression a wider meaning, similar to that in s 127. There is no such necessity in the present case.”*

In coming to its conclusions, the High Court found that the circumstances of the conduct of the solicitor, although involving a breach of the trust reposed in him by the children and the mother of the children, “were so remote from anything to do with professional practice that the characterisation of the appellant’s personal misconduct as professional misconduct was erroneous” (at paragraph 34).

In considering the question whether the misconduct of the solicitor demonstrated that he was not a fit and proper person to be a legal practitioner at the time of the Court of Appeal decision (that is, it is a question of *current* fitness), the High Court found the Court of Appeal appeared to have given insufficient weight to the isolated nature of the 1997 offences and the case made on behalf of the solicitor as to his character and rehabilitation, the exceptional circumstances in which the 1997 offences were committed, and the solicitor’s efforts to obtain professional advice and assistance.

The Court then considered the combined effect of the personal misconduct in 1997 (which gave rise to the convictions) and the lack of candour on the part of the solicitor towards the Law Society in 2000 for the purpose of assessing whether or not the solicitor was demonstrated to be not a fit and proper person to be a legal practitioner. Although it considered such matters to be very serious, the High Court concluded that such matters did not render the solicitor not fit to

practise, particularly in light of the evidence provided on behalf of the solicitor as to his character and his rehabilitation.

Although allowing the appeal by the solicitor, the High Court noted that this would have been a matter where an order for suspension of the right to practise would have been appropriate. However, given that the solicitor had, in effect, been unable to practise for more than 5 years, the High Court was of the view that any order of suspension would not have extended beyond that period of time. Therefore, no further order was made.

It was common ground that the definition of professional misconduct in sec 127 of the Act (which specifically includes conduct occurring otherwise than in connection with the practice of law), did not directly bear on the proceedings, because it was the inherent jurisdiction of the Supreme Court, not the special statutory scheme for dealing with complaints and discipline, that had been invoked.

### Conclusion

The two cases discussed above illustrate just how difficult it can be to assess the nature and degree of protection of the public and the profession that might be appropriate in any given case. The greatest concern for any practitioner facing such a situation would, it is presumed, be the loss of their ability to practise.

Three separate mechanisms, by which a practitioner may be prevented from practising law, were identified and discussed by the New South Wales Court of Appeal in *New South Wales Bar Association v Murphy* (2002) 55 NSWLR 23 (including by Spigelman CJ at paragraph 2 of the judgment). Firstly, there is a power under Part 3 of the Act to cancel a practising certificate. Secondly, there is the availability of an order pursuant to s 171C of the Act for the removal of the practitioner's name from the roll or for an order cancelling a practising certificate. Thirdly, there is, under the inherent jurisdiction of the Supreme Court (which jurisdiction is confirmed by s 171M of the Act), a power to remove a practitioner's name from the roll.

Sub-section 37(1) of the Act relevantly provides:

*“A Council may refuse to issue, may cancel or may suspend a practising certificate if the applicant or holder:*

- (a) is required by the Council to explain specified conduct (whether or not related to practice as a barrister or solicitor) that the Council considers may indicate that the applicant or holder is not a fit and proper person to hold a practising certificate and fails, within the period specified by the Council, to give an explanation satisfactory to the Council, or*

...”

As is apparent from the wording of sub-s 37(1), the Council is able to consider the fitness and propriety of the person as a holder of a practising certificate generally and without limitation to matters related to practice as a barrister or solicitor. Further, a decision to refuse to grant or renew a practising certificate under this power can be based upon an unfitness to practise, which unfitness need not necessarily be associated with any personal failing on the part of the practitioner or applicant for admission. (See the discussion by Giles JA in *New South Wales Bar Association v Murphy*, supra, at paragraph 60ff.)

Sub-section 171C(1) of the Act relevantly provides:

*“If, after it has completed a hearing relating to a complaint against a legal practitioner, the Tribunal is satisfied that the legal practitioner is guilty of professional misconduct or unsatisfactory professional conduct, the Tribunal may do any one or more of the following:*

(a) *order that the name of the legal practitioner be removed from the roll of legal practitioners if the legal practitioner is guilty of professional misconduct,*

...

(b) *order that the legal practitioner’s practising certificate be cancelled,*

...”

With respect to the application of the powers under s 171C, a practitioner’s name can only be removed from the roll if the practitioner is guilty of professional misconduct. This highlights the significant difference between a finding that a person is not a fit and proper person to remain on the roll of legal practitioners and a finding that a person is not a fit and proper person to hold a practising certificate. If a practitioner is found to be permanently unfit to practice, the appropriate order is one under section 171C(a) of the Act or pursuant to the inherent jurisdiction of the Supreme Court for the removal of the practitioner’s name from the roll.

Sub-section 171M of the Act simply provides that “[t]he inherent power or jurisdiction of the Supreme Court with respect to the discipline of legal practitioners is not affected by anything in this Part or Part 2” of the Act. That inherent jurisdiction has been exercised in a number of cases, including *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 408 and *New South Wales Bar Association v Somosi* [2001] NSWCA 285.

When looking at particular conduct by a practitioner, it is important to note that there will be some conduct and some offences, which are so incompatible in their nature with the practice of the law, that they do not allow for any prospect of the practitioner retaining their right to practise.

Such conduct or offences would be, by their very nature, evidence of a permanent unfitness to practise. In those circumstances, removal of the name of the practitioner from the roll would be the appropriate remedy. This was the order made by the Court of Appeal in the *Cummins* case, in which the Court held that the failure of the barrister to lodge any taxation returns (for professional income or any other personal income) for 38 years was such as to bring the entire legal profession into disrepute. It was further held that the removal of the practitioner's name from the roll served a public interest in "assuring the public that conduct of this character cannot be and is not tolerated in the profession" (per Spigelman CJ at paragraph 32).

However, where conduct falls into a grey area, which may or may not require the permanent prevention of the ability to practise law, it is perhaps useful to identify the points raised in the submissions by counsel for the practitioner in *Prothonotary of the Supreme Court of NSW v P* as being matters constituting compelling mitigating circumstances. These matters were submitted as identifying the inappropriateness in this case of an order for removal of the practitioner's name from the roll. Those ten points, from which his Honour Young CJ in Eq did not demur, were set out at paragraph 24 of the judgment and are:

1. absence of prior disciplinary record or criminal record;
2. absence of motive for personal enrichment;
3. honesty and cooperation with the authorities after detection;
4. the offences being unrelated to the practice of the law in that the conduct has not compacted on the practitioner's professional duties and have not resulted in harm to the practitioner's clients or other people;
5. the ignominy of having suffered a criminal conviction and the deterrent element;
6. the absence of premeditation with respect to the commission of the crime;
7. evidence of good character;
8. any voluntary self-imposed suspension or court imposed temporary suspension from practice;
9. delay in commencing disciplinary proceedings; and
10. most importantly, clear and convincing evidence of rehabilitation.

In factual circumstances where most or all of the above 10 points are satisfied, there may be significant reasons for the practising certificate of the practitioner to have conditions attached, be

suspended, or be cancelled, but with no order for the removal of the practitioner's name from the roll of legal practitioners.

### **Obligations Owed to Professional Colleagues**

In the course of ethics seminars and papers, there is often a great deal of emphasis given to the ethical obligations, which members of the Bar owe towards the courts and their clients, but seemingly less attention is given to obligations owed to professional colleagues.

As Kitto J observed in the course of his judgment in *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 298, a barrister is “in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community”.

Although describing the status of a barrister in the legal system in such terms may not accord closely with the day-to-day reality of life at the New South Wales Bar, there is much to be said for maintaining such traditional conceptions of legal practice, even in the current more commercialised context of legal practice. This issue, amongst others, is discussed by the Honourable Justice Michael Kirby in his paper *Legal Professional Ethics in Times of Change* (23 July 1996). A copy of this paper is available via the Bar Association's website at the Professional Conduct page.

The reality is that the conduct and behaviour of other barristers, both in their role as opponents in specific cases and generally, affects each of our own experiences of life at the Bar. Most barristers will recall specific incidents that will remain in their memory as being particularly pleasant or unpleasant experiences involving dealings with fellow legal practitioners. Inevitably, we all register those memories in our catalogue of professional experience and draw upon them if and when we next come into contact with those same practitioners.

It is not the intention of this commentary to promote an atmosphere as would not allow for the forceful and passionate advocacy with which many pieces of litigation must be fought. However, for example, rudeness only for rudeness' sake cannot conceivably have any positive impact upon the outcome of litigation so as to warrant its acceptance. Further, what long-term benefit is achieved by such conduct if the ability of two practitioners to communicate effectively about a case is obstructed or prevented by the distaste each has for the other? In those circumstances, it is quite possible that the clients, the practitioners themselves, and the “service of the law to the community” would suffer.

### **The New South Wales Barristers' Rules**

The New South Wales Barristers' Rules ("the Rules") set out a number of obligations on the part of barristers, which obligations relate to conduct and relations with professional colleagues. As identified in Rule 9, "[t]hese Rules are not, and should not be read as if they were, a complete or detailed code of conduct for barristers". This same point is identified by the Honourable Sir Gerard Brennan in his paper *Ethics and the Advocate* (3 May 1992) (a copy of which is available via the Bar Association's website at the Professional Conduct page), wherein it is stated (at page1):

*"The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. ... If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion. There is no really effective forum for their enforcement save individual acceptance and peer expectation."*

It is, perhaps, this notion of 'peer expectation' that is most crucial. If, over time, the ethical and courteous nature of the conduct of barristers deteriorates, even if strictly speaking in accordance with the written rules of ethical conduct, then it becomes inevitable that subsequent generations of barristers will be inclined to adopt lower and lower standards of professional conduct. It is difficult to comprehend any benefit that would be achieved by such a change over time.

More importantly, once conduct has reached a particular point, even an express amendment and tightening of the written ethical rules will face great difficulty in altering the standard of behaviour, which would, by then, have become established over time and have become accepted as the norm.

Of course, it must be recognised that there is a vast range of personalities represented at the New South Wales Bar and that there is an even wider range of circumstances that arise daily in the conduct of litigation, not all of which can be predicted and accommodated by ethical rules.

There are a number of Rules that bear upon this discussion. They include:

- Rule 2: "As legal practitioners, barristers must maintain high standards of professional conduct."
- Rule 3: "The role of barristers as specialist advocates in the administration of justice requires them to act honestly, fairly, skilfully, diligently and bravely."
- Rule 4: "Barristers owe duties to the courts, to other bodies and persons before whom they appear, to their clients, and to their barrister and solicitor colleagues."
- Rule 18: "A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the

case independently, after appropriate consideration of the client's and the instructing solicitor's desires where practicable."

- Rule 51: "A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise)."
- Rule 52: "A barrister must take all necessary steps to correct any false statement unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false."

Rules 51 to 58, inclusive, deal generally with the duty to an opponent.

### Conclusion

The purpose of this brief section of this paper is to provide a reminder that a barrister's obligations in practice reach beyond merely doing all that is required, within the terms of the written ethical and professional rules, to provide a client with access to justice. There is a large collaborative network between the Bench, the Bar, and solicitors. This network is largely (though not wholly) sustained by reason of the goodwill, trust, and professional courtesy between members of the legal community.

In many circumstances, personal issues may cause us to act in a way that does not relate in any way to the conduct and promotion of the cause of our immediate client. Pressures of personal life often intrude upon the professional arena and, being human, it must be conceded that this result is inevitable.

However, it is perhaps worthwhile, every now and then, to consider the extent to which our own conduct towards professional colleagues is really necessary for and directed towards obtaining the best possible outcome for our clients, or whether it is, in reality, unnecessary and undesirable.