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CONDUCT OUTSIDE THE COURTROOM – BRINGING THE PROFESSION INTO DISREPUTE

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INTRODUCTION

- 1 The scope of this paper is to explore the boundaries of conduct outside the courtroom that could lead legal practitioners to become the subject of disciplinary action for bringing the profession into disrepute. I have particularly focused on the need for courtesy in day-to-day dealings (both conduct and correspondence) with other practitioners and third parties.
- 2 On 31 January 2006 in his first speech as Chief Justice, Spigelman CJ said:

Ours is a profession of words... Civil conduct in the law is manifest in the language of advocacy, both in addressing judges with appropriate honorifics and in communication with opponents and witnesses...The tradition of civility in the legal profession goes well beyond the requirements of appearance in court. It is to be found in the full range of discourse between practitioners, both oral and in correspondence. This tradition has been maintained in the law to a greater extent than other areas of social discourse. It is recognised as a fundamental ethical obligation of a professional person.
- 3 Courtesy and civility are recognised as essential to effective advocacy:

A lawyer can be firm and tough-minded while being unfailingly courteous. Indeed, there is a real power that comes from maintaining one's dignity in the face of a tantrum, from returning courtesy for rudeness, from treating people respectfully

who do not deserve respect, and from refusing to respond in kind to personal insult.¹

...civility, which incorporates respect, courtesy, politeness, graciousness and basic good manners, is an essential part of effective advocacy. Professionalism's main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer.

...Civility is more than just good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord...²

- 4 The Office of the Legal Services Commissioner (**OLSC**) receives numerous complaints annually alleging rude and offensive behaviour by practitioners against clients; other practitioners; and third parties.
- 5 The majority of these complaints do not proceed past the investigation process. Presumably this is because the conduct is not assessed as amounting to unsatisfactory professional conduct or professional misconduct or perhaps complaints of this type are amenable to resolution by mediation or the proffering of an apology. There are, however, many examples in the decided cases where discourtesy has been found to be either unsatisfactory professional conduct or professional misconduct.
- 6 This is an area where the legal professional rules differ between the express rules applicable to solicitors and those applicable to barristers. The differences are more apparent than real between the two arms of the legal profession. Both solicitors and barristers, as legal practitioners, are bound by the obligations as to conduct that are inherent in being officers of the court and the general prohibition on engaging in conduct likely to bring the profession into disrepute or likely to diminish public confidence in the legal profession or the administration of justice.
- 7 Turning first to the express requirements in relation to courtesy in the professional conduct rules, it is noteworthy that solicitors are expressly required to be courteous to other practitioners: Rule 25 of the Revised Professional

¹ Justice M B Durant, *Views from the Bench: Civility and Advocacy*, (2001) Utah Bar Journal 35.

² **Butts v State** 546 SE 2d 472 (2001) per Benham CJ (Supreme Court of Georgia).

Conduct and Practice Rules 1995 (**the Solicitor's Rules**). Somewhat curiously, the requirement to be courteous is not expressly extended to clients or third parties. Notwithstanding that there is no express requirement, it is clear that solicitors do owe a duty of courtesy to those with whom they have professional dealings, be they members of the profession, clients or third parties.

- 8 Barristers, as most of you would already know, are not required expressly to be courteous to anyone. However, notwithstanding the absence of a particular rule mandating courtesy, barristers are subject to the conduct requirements of the inherent jurisdiction of the Supreme Court and the general law (including the law relating to contempt of court).
- 9 Case law dealing with professional misconduct, particularly where the decisions are based on the inherent jurisdiction of the Court, tends to be expressed in language that is particular to the standards of behavior prevailing at the time of the particular judgment. It is interesting to consider the extent to which the guidance afforded by the older professional standards cases will be adapted to take into account the evolution of community standards in response to modern forms of communication, such as email, twitter and blogs for example.

RELEVANT LEGAL PROVISIONS

- 10 Section 496 *Legal Profession Act 2004* (**the Act**) defines ***unsatisfactory professional conduct*** for the purposes of the Act as:

conduct of an Australian legal practitioner 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 Australian legal practitioner.

- 11 Section 497 of the Act defines ***professional misconduct*** for the purposes of the Act as:

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence, and
- (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the

practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

12 Section 498 of the Act lists specific conduct capable of being unsatisfactory professional conduct or professional misconduct. Subsection 1(a) includes conduct consisting of a contravention of the legal profession rules.

13 Rule 25 of the Solicitor's Rules provides:

A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive and provocative language or conduct.

14 Rule 25 of the Solicitor's Rules is to be construed by reference to the underlying principles and objectives outlined in the statement of general principles relevant to:

14.1 Rules 25-31A headed "Relations with Other Practitioners"; and

In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.

14.2 Rules 32-36 headed "Relations with Third Parties";

Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.

15 Rule 5(b) of the New South Wales Barrister's Rules (**the Bar Rules**) provides that an underpinning principle of the Bar Rules is that barristers must maintain high standards of professional conduct.

16 Rule 10 of the Bar Rules provides that:

These Rules are not intended to be a complete or detailed code of conduct for barristers. Other standards for, requirements of and sanctions for the conduct of barristers are found in the inherent jurisdiction of the Supreme Court, the Legal Profession Act 2004 (NSW) and in the general law (including the law of contempt of court).

- 17 Rule 12 of the Bar Rules provides that barristers must not engage in conduct which is:
- (a) ...discreditable to a barrister;
 - (b) ...
 - (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.
- 18 Regulation 175 *Legal Profession Regulations 2005 (the Regulations)* provides that legal practitioners must not engage in conduct³ that constitutes unlawful discrimination⁴ in connection with the practice of law. Unlawful discrimination includes discrimination on the basis of race, sex, sexual preference, marital status, disability, age and sexual harassment.

LESSONS FROM THE DECIDED CASES

Dealings with other practitioners

- 19 An obvious starting point for this discussion is the decision in ***Law Society of New South Wales re Constantine Karageorge*** Solicitor's Statutory Committee (15 July 1987). It is perhaps unsurprising that the solicitor was censured for referring to another solicitor as "you fucking Arab" and another as "you fucking Jew". Mr Karageorge did not reserve his ire only for other solicitors but was also liberal when it came to advising members of the public where they fitted in racially and socially. The Committee observed "the use of insulting language or behaving offensively towards members of the public is not conducive to the good name of the profession". Karageorge was found guilty of professional misconduct and fined \$5,000.
- 20 In a similar vein, assaulting fellow practitioners in the courtroom has been thought to diminish public confidence in the legal profession and otherwise bring it into disrepute, see ***In the matter of Trevor McLean***.⁵ McLean, a barrister, was fined \$2,000.

³ By act or omission

⁴ As defined in *Anti-Discrimination Act 1977*.

⁵ Legal Profession Tribunal of Victoria T 34 of 2001.

- 21 In ***New South Wales Bar Association v Jobson*** [2002] NSWADT 171 the barrister was found guilty of unsatisfactory professional conduct as a result of heated exchange following a directions hearing in the Supreme Court. There was a significant dispute on the facts as to the extent of the altercation. The complainant solicitor alleged that the barrister used a number of expletives in verbally abusing him, grabbed the solicitor on the shoulder and then grabbed the lapel of his suit jacket. The complainant's evidence was corroborated to some extent by a solicitor for another party to the proceedings that had been before the Court. The barrister admitted to once using the term "smartarse" in reference to the solicitor and touching him in the area of his lapel, in a gesture intended to bring the conversation to an end. The Tribunal did not accept that all of the allegations made by the solicitors had been made out to the requisite standard set down in ***Briginshaw***. Without making findings of fact as to what actually happened the Tribunal concluded at [21] that there was an aggressive confrontation initiated by the barrister in which he used unseemly and unprofessional language at the same time as there was physical touching. The Tribunal was satisfied that the conduct amounted to unsatisfactory professional conduct. The barrister was publicly reprimanded.
- 22 In ***Legal Practitioners Complaints Committee v Quigley*** [2005] WASAT 215 the practitioner was found guilty of unprofessional conduct for intimidating and threatening behaviour towards the Complaints Committee whilst they were investigating a complaint against him. In short the practitioner unjustifiably alleged that the Committee, its members and the Complaints Officer were maintaining disciplinary proceedings against him for an improper purpose or at the dictation of the head of the Anti-Corruption Commission. The Tribunal found at [149] that the conduct of the practitioner would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence.
- 23 In ***Anissa Pty Limited v Parsons*** [1999] VSC 430 the solicitor, Mr Parsons owned rural land, contiguous to rural land occupied by his parents and owned by the plaintiff company. Mr Parson's parents each held one share of the plaintiff company and he held 2 shares. There had been a falling out between Mr Parsons and his parents and the land belonging to the company was listed for auction by the appointed liquidator. To ensure that no potential purchasers or the liquidator were in any doubt as to where the boundary was, the solicitor instructed that a bulldozer be driven down the boundary 1 hour after the

allotted auction time. During the carnage, 47 trees on the boundary and some fences and gates were destroyed. Beach J granted an urgent telephone injunction. Another solicitor, present on instructions of the liquidator, spoke to Mr Parsons to read to him the terms of the order made by Beach J. At the conclusion of the reading of the orders Mr Parsons said to the other solicitor, "...Justice Beach has got his hand on his dick...tell him because if you don't I will". On resumption of the injunction proceedings the solicitor informing Mr Parsons of the order, properly informed the Court of what Mr Parsons said. Beach J referred the matter to the Prothonotary to commence proceedings against Mr Parsons for contempt.

24 In dealing with the contempt charge Cummins J found that there were 8 relevant contextual matters:

24.1 the words were in a curial setting, ie the time of service of an Order of the Court;

24.2 the Order was being formally pronounced by the solicitor to Mr Parsons whom he knew was also a solicitor;

24.3 the words uttered were deliberate;

24.4 the words uttered were directional towards the solicitor reading the Order;

24.5 the words were persistent (if you don't tell him I will);

24.6 the words were uttered in derision;

24.7 the words were uttered about a judge who was enforcing the law;

24.8 Mr Parsons was a solicitor and an officer of the Court.

25 Cummins J then referred to 3 basal principles relevant to this type of contempt proceedings:

25.1 proceedings for contempt of court are not and must not be in diminution of free speech;

25.2 proceedings for contempt of court is to preserve the administration of justice, in that public confidence in the administration of justice should not be undermined;

- 25.3 proceedings for contempt of court is not to protect the individual person of the judge.
- 26 Cummins J held at [22], in application of contemporary Australian standards that the words spoken were gratuitous and offensive but it was not contempt of court to describe a judge as a wanker. Mr Parsons crucially did not prevent oral service of the order on him and thereafter complied with it, and his words alone did not constitute contempt.
- 27 In **Legal Services Commissioner v Winning** [2008] LPT 13 the Legal Practice Tribunal of Queensland found the solicitor guilty of unsatisfactory professional conduct over the content of a “private conversation” at the Bar table before the commencement of proceedings before the Supreme Court in Rockhampton. The solicitor made grossly offensive and insulting remarks about a Crown prosecutor and a listings clerk employed by the Office of the Director of Public Prosecutions (**DPP**) to the barrister he was instructing. The conversation was spoken in a “sufficiently loud voice” to be audible to the court staff and another employee of the DPP. The Tribunal decided at [56] that it was inappropriate abuse of the prosecutor and the listings clerk.

Dealings with witnesses

- 28 **Re a Solicitor ex parte the Prothonotary** (1952) 69 WN (NSW) 356 was a case where a solicitor, Mr Brindley, was called to answer a disciplinary hearing before the Court of Appeal, following his conviction on the charges of use insulting words to a constable on a public street and behaving in an insulting manner. The solicitor pleaded guilty to the charges and the magistrate dealt with them pursuant to s556A *Crimes Act 1900*. Street CJ said at 357-8:

It is deplorable in the extreme that a solicitor of this Court should go to a country town and, after conducting the defence of some person who was prosecuted, should subsequently in a hotel bar, enter into a verbal conflict with the police officer who was the prosecutor and the principal witness in the case which the solicitor had been earlier conducting...Such conduct is calculated to degrade the profession of which he is a member.

It is expected from solicitors of this Court that they will conduct themselves in a manner which will not bring disgrace and discredit upon the profession, and

will behave with that propriety and decorum expected from members of the profession.

- 29 Mr Brindley was censured and ordered to pay the costs of the Law Institute.
- 30 In the matter of ***Basil Stafford***⁶ a Victorian barrister was found guilty of misconduct and fined \$1,000 following an angry confrontation with a police witness in the precincts of the Court. The Tribunal described the barrister's behaviour as "aggressive and threatening" and "very serious" and found that it was conduct likely to diminish public confidence in the legal profession and otherwise bring the profession into disrepute.

Dealings with third parties and members of the public

- 31 In ***Lander v Council of the Law Society of the ACT*** (2009) 168 ACTR 32 the Full Court was dealing with an appeal against a finding of unsatisfactory professional conduct against Mr Lander arising from the tenor of his correspondence to the Department of Education and Training (**the Department**), such correspondence being sent on behalf of his client. Mr Lander made allegations of "malpractice" and "maladministration" against the department and described various of its officers and employees as "rude", "unhelpful", "obsessive and compulsive" and "bearing grudges against people who engage lawyers". The ACT Solicitors Rules were in the same form as the rules set out in [12]-[13] above. The Legal Practitioner's Disciplinary Tribunal adopted the Law Society's submission to the effect that "there is a fundamental ethical obligation upon a practitioner to maintain due courtesy and civility when dealing with, inter alia, the other party and the broader members of the public, particularly in course of conducting one's practice". The Full Court did not agree. At [43] the Full Court accepted the Law Society's submission to the extent that the solicitor owed all persons with whom he dealt the same obligation of honesty and fairness, but stated that the requirement for courtesy depended on the circumstances. The Full Court reasoned that a solicitor's letter of demand alleging fraud, may be offensive and provocative to its recipient, particularly if the allegation is untrue, but if the solicitor had received apparently reasonable information supporting the allegation then he was duty

⁶ Legal Profession Tribunal T 603 of 1997.

bound to put it and even the fact that the allegation was robustly put was not a cause for complaint.

- 32 At [52] the Full Court rejected the proposition that there is a general obligation on a solicitor to refrain from correspondence that a recipient might find to be discourteous, offensive or provocative. If the comments were soundly based, a matter not considered by the Tribunal, and they were at least fair comment as understood in defamation law, it could not be unsatisfactory professional conduct or professional misconduct for the solicitor to make them to superior officers within the Department, in furtherance of representing his client. In comparison to **Karageorge** the solicitor's comments were not gratuitously insulting or offensive, but perhaps confrontational and thereby not particularly persuasive. The distinction highlighting again that maintaining courteous expression tends to enhance the power of the advocacy whereas gratuitous confrontation or rudeness tends to detract from the submission.
- 33 In the matter of **Paul Reynolds**⁷ the Victorian Legal Profession Tribunal suspended the barrister for 6 months for making sexual advances to his client during the course of a pre-trial conference. The Tribunal found that the barrister had willfully or recklessly engaged in conduct discreditable to a barrister (see rule 12(a) of the Bar Rules) and had engaged in conduct likely to bring the profession into disrepute.
- 34 In **Legal Services Commissioner v Johnson**⁸ the practitioner was found guilty of unsatisfactory professional conduct for using insulting and offensive language to another party in a property dispute. In the course of retrieving her client's belongings from the complainant's home the practitioner said, "You are a grotesquely ugly man. I can't believe that Caroline would have been with someone as ugly as you". The Legal Practice Committee found the comments were offensive and fell short of acceptable behaviour expected from a legal practitioner.
- 35 In **Legal Professional Complaints Committee v de Braekt** [2012] WASAT 58 the Tribunal found at [5] that the practitioner sent 6 e-mails to a police officer in charge of an investigation, "the tone and content of which was so grossly offensive and discourteous to constitute professional misconduct". In addition

⁷ T 30 of 2004.

⁸ Legal Practice Committee of Queensland 006/2005.

the Tribunal found that the practitioner sent an e-mail to the police officer's superior that was significantly discourteous and offensive and contained a threat, sufficient to warrant a finding of professional misconduct. The Tribunal at [137]-[138] noted that the statements were particularly unacceptable when made by a legal practitioner to a police officer as:

The maintenance of a civil and constructive relationship between legal practitioners and police officers is essential to the proper functioning of the criminal justice system.

36 On the subject of e-mail correspondence the Tribunal said at [138]:

...the Tribunal recognises that e-mail communications are both a blessing and a curse; they enable instantaneous communication that, on more mature reflection, the sender would rather not, and should not have sent.

37 As a result of these finding of professional misconduct together with a number of other matters Ms de Braekt was stuck off.

38 In *Winning*⁹ the solicitor was also found guilty of unsatisfactory professional conduct for using offensive and insulting language towards officers of the Australian Crime Commission (**ACC**) relating to the execution of a search warrant at his client's premises and towards administration staff of the ACC relating to payment of travel expenses to him. The Tribunal found at [41] that the language used at the search warrants was disgraceful and tended to bring the legal profession into disrepute and a serious example of unprofessional conduct. The Tribunal found at [44] that the solicitor's comments to the administration staff were gross and ought not to have been used by a legal practitioner and that it constituted unprofessional conduct.

CONCLUSION

39 As legal practitioners we should make every effort to be civil and courteous in all our professional dealings with others. To do so is in accordance with our professional obligation. Observing the dictates of courtesy also enhance the efficacy of professional communications and advocacy on behalf of our clients. There is real power in being firm and tough-minded in the message but unfailingly courteous in the delivery.

⁹ See [26] above.

- 40 Correspondence (including informal correspondence by email for example) should always be drafted as if it will be seen and scrutinised by the court. Similarly, communications (even if in informal discussions) in a professional context should be informed by an appreciation that the communication could end up being recounted before the court. The tenor of correspondence and communication is as important as observing the formal civility required in appearances before the Court. Practitioners should take care to avoid heated exchanges made in haste, whether by way of email or outburst.

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BIOGRAPHY

Andrew Scotting was called to the Bar in 1996. He practices predominantly as an advocate in trials and appeals in commercial, insurance and succession matters. Andrew's commercial practice has included a significant proportion of briefs for hoteliers and other licensed businesses involving all aspects of their operations, including disciplinary matters, partnership disputes, leasing disputes and poker machine entitlement litigation. He was briefed to appear in the Supreme Court Commercial List for a consortium of 37 hotels against a merchant bank arising from a failed initial public offering. Andrew has appeared in the Supreme Court in a €4 million commercial fraud matter alleged to have occurred in Romania, with associated conflict of law issues between employment contracts signed in New South Wales but governed by the Labour Code of Romania and the question whether fiduciary duties exist under civil law.

Andrew has recently argued an appeal in the Full Federal Court relating to a solicitor's accessorial liability for the fraud of his client, pursuant to the principles in *Barnes v Addy* and section 52 *Trade Practices Act 1975*.

Andrew maintains a broad general liability practice for a number of insurers involving matters relating to professional indemnity, product liability, public liability and occupier's liability.

In May 2005 Andrew appeared in the Supreme Administrative Court of Lithuania, in Vilnius, to take evidence pursuant the Hague Convention in the first application of the convention between Australia and Lithuania, in product liability litigation.