Ethics Report

Conduct of Complaints Against Barristers

Most barristers, through fortunate want of experience, know little about the professional conduct procedures of the Bar Association or how to respond to a complaint. Jeremy Gormly seeks to give some guidance to those matters.

The changes brought about by the *Legal Profession Act* 1987 and subsequent amendments have led to a much greater likelihood that any barrister can be the subject of a professional conduct complaint. Furthermore, the procedures under the Act have meant that barristers are far more likely to find themselves facing full, formal hearings to defend complaints than occurred prior to the Act.

The dictates of the Act are such that all complaints must be investigated and dealt with. This article concerns:-

(a) the procedure used to deal with complaints;
(b) the best methods for responding to a complaint if one is received.

Procedure

Under the *Legal Profession Act*, the Legal Services Commissioner is the person to whom any person may direct a complaint about a barrister. On 1 July 1994 Mr Steve Mark was appointed as this State's first Legal Services Commissioner. The Act requires the Commissioner to assist complainants to formulate their complaints. The Commissioner may investigate the matter himself or refer the complaint to the Bar Council for investigation or mediation. The Commissioner may take over the Council's investigation if he considers it appropriate.

The Commissioner also has a wider public role in promoting community education and enhancing professional ethics and standards and to this end the Council will also play its part.

The Council can and does act of its own accord if some possible misconduct comes to its attention other than as a complaint.

Complaints are made, in rough order of frequency, by clients, solicitors (from either side), opposing clients, Judges, other barristers and others.

Complaints sent to the Council for investigation are distributed by the Professional Affairs Director (Helen Barrett) to one of the four Professional Conduct Committees (PCCs) of the Bar Council. Those Committees consist of one Queen's Counsel who is a member of the Council and seven to nine other barristers ranging in seniority, who may or may not be members of the Council. Each PCC also has two lay members who rank equally in the decision making process with other members of the Committee.

The Committees meet fortnightly. They investigate complaints, generally by obtaining written versions from the complainant, the barrister and any possible witnesses, being usually instructing or opposing solicitors or other Counsel, interpreters, etc.

When all of the material constituting the investigation has been gathered, gaps in the material may be dealt with by way of obtaining transcripts and court documents or requests for further particulars from the barrister or any other person.

After the investigation process, one member of the Committee will prepare a report and, after discussion and alteration to the report reflecting the view of the Committee, the report is referred to the Bar Council. The report, almost invariably, includes a recommendation to the Bar Council as to what should be done with the matter. Conduct matters are treated with priority by the Council.

Conduct complaints are usually the subject of considerable analysis both by the PCC and by the Council and if there is not a clear view, then there is extensive debate. Periodically, where a Committee is divided in its view, a minority report will be presented by the dissenting member or members of a Committee which usually has the effect of provoking further debate. Most matters, however, involve a reasonably clear course of action.

Having considered the matter, the Council has, under s155 of the Act, a number of options:

(a) To dismiss the complaint (sometimes the barrister may also be counselled).
(b) To find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty by the Legal Services Tribunal of unsatisfactory professional conduct but that a reprimand is the only penalty required.
(c) To find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty of either unsatisfactory professional conduct or professional misconduct and refer the matter to the Legal Services Tribunal for hearing.

If the Council decides that a reprimand only is appropriate, then the Act requires that the person to be reprimanded give consent to the reprimand. Consent to a reprimand is, in effect, an acceptance of the Council's finding of a breach of conduct. The practice has been for the reprimand to occur orally in chambers delivered personally by the President.

Complainants now have a right to seek a review of a decision to reprimand, as well as a decision to dismiss a complaint.

Where a matter is too serious to be dealt with by way of reprimand, then the matter must be referred to the Legal Services Tribunal (which now hears matters of both unsatisfactory professional conduct and professional misconduct). The definitions of "unsatisfactory professional conduct" (a lesser breach) and "professional misconduct" (a serious breach) are set out in s127 of the Act. The definitions are as follows:

"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.

"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;
(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 barristers or the roll of solicitors; or

(c) conduct that is declared to be professional misconduct by any provision of this Act.

Appeals & Review

A decision of the Tribunal may be the subject of an appeal to the Supreme Court, by any of the parties to the hearing. The Legal Services Commissioner hears applications by complainants for review of a decision by the Bar Council to dismiss a complaint or to reprimand the barrister.

Penalties

The Legal Services Tribunal may, by way of penalty:

(a) cancel the barrister's practising certificate;
(b) order that a practising certificate not be re-issued after expiration;
(c) order that the barrister's name be removed from the roll;
(d) fine the barrister $50,000 (in the case of professional misconduct) or $5,000 in the case of unsatisfactory professional conduct;
(e) publicly reprimand the barrister;
(f) order that the barrister undertake further legal education;
(g) make a compensation order (see section 171D).

Responding to a Conduct Complaint

The real purpose of this article arises from the experience of many persons sitting on Professional Conduct Committees and reading numerous first responses by barristers to a complaint.

It has been observed by one senior member of the Council that responses to complaints fall into two general categories. The first is to write a short, uninformative, dismissive letter of denial as though the matter ought not to be taken seriously. The second is completely different. It involves responses of 15 or more pages detailing a blow by blow history of the whole case (often unwittingly failing to deal with the complaint) and reflecting the distress of the barrister at being the subject of any complaint, whether justified or not.

Because of the nature of the Act and the duties cast on the Council to investigate complaints, neither form of response is appropriate. The dismissive response usually results in protracted investigation as a Committee struggles to obtain a full factual picture and a full response from the barrister that deals with the precise complaint. Flippant or ill-considered comments in a first response become part of the investigation file which may ultimately become evidence before the Tribunal.

The long and detailed, distressed response also prolongs investigation, but in a different way. All responses to complaints by the barrister are sent to the complainant as a version on which they may then comment. Private or confidential correspondence cannot, therefore, be received in the course of the investigation, or treated as confidential unless a real issue of legal professional privilege arises or there is some other good reason of law. Long and unduly detailed responses from the barrister often provoke even longer comment from the complainant. Everything slows down as the issues are unravelled.

Responses to complaints often have to be written when the brief has long since been sent back. Recollections of precisely what occurred will fade, particularly if the case was small or insignificant. The Act now sets a three year time limit for a complaint. The Commissioner may, however, accept a complaint after the time limit has expired if he believes it is just and fair to do so, or if it is in the public interest to investigate.

An initial reply written without reference to the brief will frequently contain unwitting inaccuracies which may emerge in any hearing before a Tribunal. A fourteen day time limit for a reply is usually fixed but, if additional time is needed to get hold of the brief, it will generally be granted.

Some sensible guides for responding to a complaint are as follows:

1. Isolate and address the complaints rather than give a full history of the whole case. If the complainant has provided no background to the case, some background may be necessary to an understanding of the issues raised.
2. Responses are best if they are succinct, but must deal with the factual circumstances of the complaint and provide a full answer.
3. Few persons, including barristers, are capable of being fully objective about a personal or professional complaint. It is best to approach another barrister, preferably someone senior, or your solicitor, with the complaint and your draft reply. Most people resist doing this, but no matter how embarrassing, it invariably produces a better response.
4. Although the process required by the Act is prosecutorial in nature, conduct proceedings are not criminal proceedings. Failure to provide a prompt, full and frank response is itself a breach of standards of professional conduct. A barrister who fails to reply to a complaint is guilty of professional misconduct (s152).

Mediation

From 1 July 1994 the Council will be able to refer consumer type disputes to mediation. Participation will be voluntary and anything said is confidential and cannot be used later.

Belated Litigation

Quite frequently, something that becomes the subject of a professional conduct complaint is also the subject of either civil or criminal proceedings. When that occurs, the investigation process by the Council will normally cease until completion of the related litigation unless both parties otherwise agree. The Council has adopted that policy to ensure that the investigations and results of conduct proceedings are not misused by other litigants as a method of obtaining evidence in unfair circumstances. A barrister, for example, has a professional obligation to make admissions and provide a full and frank response to any complaint. The barrister in a criminal matter has a right to silence, and in a civil matter has no obligation to make admissions.

Conclusion

Since the new Act commenced in 1987, barristers are much more likely to be subject of complaints. The broadening of the scope for breaches of professional conduct by reason of the two levels of definition make barristers much more likely to be involved in full hearings defending allegations of breaches of professional conduct. If you are the subject of a complaint, draft a full but succinct reply and discuss the complaint and your response with a senior colleague or your solicitor before replying to the complaint. ❑

Contact with Judicial Officers

Attempts to achieve efficiency in the use of courts and court facilities, through means including the multiple listing of cases in many jurisdictions, has led to an increase in contact between judicial officers and members of the Bar outside of the court room. It is pertinent to remind ourselves of the requirement of the Bar Rules. Both Rules 58 and 59 of the current Bar Rules, and rules 56 to 58 of the "Draft Rules" require a barrister to act with propriety in extracurial communications with judicial officers.

The present Rule 58(1) says as follows:-

> "A barrister shall use his best endeavours to avoid being alone with any Judge, Magistrate, Arbitrator or member of a tribunal from the commencement of the day of hearing until the conclusion of addresses, except with the prior consent of his opponent."

The rule is wide enough to encompass, and its evident purpose requires that it should encompass, social functions. Rule 59 confirms this. It provides:-

"1. If, in connection with any proceedings then pending or part heard, a barrister for one side wishes to see the judge hearing or likely to hear any such proceedings to discuss a matter arising in connection with the proceedings, he shall not do so unless:
   a. he is accompanied by the barristers for all other parties interested, or
   b. he has informed the barristers for all other parties interested of the nature of the matters he wishes to discuss with the judge and has given them an opportunity to be present.
2. In the circumstances arising under subrule (1)(b) above, the barrister shall not mention to the judge any matter relating to the proceedings not communicated to the other barrister or barristers.
3. In subrules (1) and (2) where an opposing party is represented by a solicitor who has not briefed counsel, "barrister" includes such solicitor."

The practice of entering Judges' Chambers both prior to and during proceedings has become widespread in many jurisdictions. This seems to happen in particular:-

(a) Where large numbers of cases are listed per day; and
(b) In jurisdictions such as the Compensation Court where many cases are listed per day before each Judge and often barristers, holding multiple briefs in various courts, indulge in a little list juggling.

The rule is quite clear. Approaches to a judicial officer should not be made without the prior consent of one's opponent.

A problem may arise for a barrister when what is a social discussion turns to a discussion of a pending case or a part-heard case. In some jurisdictions this is complicated by the fact that some judicial officers themselves invite legal representatives into their rooms or chambers for what can be called a social discussion. Often the judicial officer is well known to the barrister. Entering judicial chambers for this purpose without the knowledge of one's opponent would prima facie contravene Rule 58(1) and could lead to abandonment of the proceedings, adjournments and unnecessary costs. In the present climate those are factors which should be taken seriously. It is important that social contacts do not interfere with the court's functions.

In many cases conversations with Judges take place in chambers where the barrister is required to proceed from those chambers through to open court. To the general public the sight of a barrister leaving a Judge's chambers on his own before the commencement of a hearing or during a hearing may lead to suspicion which in turn leads to a lack of confidence in the judicial system. This is something that the law and, in particular, barristers should avoid.

The Draft Rules differ from Rules 58 and 59 in that they would make two exceptions in respect of communications with the court, namely those when ex parte applications are to be made and those where the hearing of the matter has been properly notified to one's opponent. Rules 56 to 58 would prohibit communication with the court in the absence of one's opponent in connection with current proceedings. Current proceedings are defined as meaning:-

> "Proceedings which have not been determined, including proceedings in which there is still the real possibility of an appeal being heard."

Query whether the Draft Rules extend to the situation that exists, in particular, in country lists. The proposed Rule 56 does not appear to take into account the wide provisions of Rule 58(2) in that it only deals with communications and not with other activities which might convey the impression to a reasonable observer that the barrister is communicating information about the proceedings to the Judge.

The simple answer lies in the preamble to the Draft Rules relating to the paramount duty of a barrister to the administration of justice. In short, if in doubt do not communicate. If communication must be made with a Judge then it should be made after discussion with one's opponent and then through the Associate. Do not communicate to the Judge matters which have not been discussed with your opponent and which should be properly discussed in open court. Equally do not communicate to the Judge matters which you would be unhappy to discuss in the presence of your opponent. The comments of then Chief Justice, Mr Justice Street, in *R v Warby* [1983] 9 A Crim R 349 at 352 are appropriate:-

> "These principles underlie the concern expressed by Ward J at counsel seeking, 'on the run', as it were, in private chambers, to communicate to the judge matters which ought properly to have been communicated to him in open court either with or without appropriate safeguards. If they are matters involving confidentiality, that is to say if the requirements of justice within those exceptions which are referred to in that latter quotation justify hearing in private chambers, then again appropriate safeguards can be introduced to ensure that the minimum essential inroad is made upon the observance of the general principle. A chance casual or social comment is to be regretted, equally as it is to be disregarded." ❑

This is an important document - please pull out and keep.

Ethics Report

edited by Robert McDougall QC

When does a client's complaint release privilege?

From time to time, a client may make a complaint either against solicitors, against counsel, or against both, relating to a matter in which counsel has been briefed. Often, the only way that the counsel or solicitors can respond to the complaint is to reveal, either in detail or in outline, the substance of advice given to the client and other matters relating to the facts out of which the complaint arises.

Prima facie, counsel and solicitors are bound by obligations of privilege in relation to advice given, and confidentiality. Can they, in the circumstances outlined, protect themselves - or each other - by revealing (their version of) what actually happened?

The simple answer appears to be "yes". A recent decision of the English Court of Appeal, *Lillicrap & Anor v Nalder & Son* [1993] 1 WLR 94, is clear authority for this proposition.

In some cases, it may be that the nature of a complaint does not require a revelation of all that occurred during the course of the retainer. In other cases - particularly where a general complaint is made of "failure to advise", it may be impossible to rebut the complaint without revealing all that occurred. Notwithstanding this, counsel should be careful to ensure that, so far as possible and consistent with their entitlement to defend themselves fully, they do not make public matters which have no bearing on the subject-matter of the complaint. ❑

Recent decisions

Recent decisions of the Legal Profession Disciplinary Tribunal and the Legal Profession Standards Board reveal matters of which counsel ought to be aware. In one matter, it appeared - and it was frankly conceded - that counsel had disclosed information which had come to him in the course of a retainer in certain proceedings. Thereafter, when other proceedings related to the same general subject-matter were current, counsel who had received the letter, without the client's permission, gave a copy of it to the other counsel who was, in those other proceedings, briefed against the client. The letter was tendered and used in those other proceedings.

The Tribunal found that the action of counsel in making available a copy of the letter constituted professional misconduct. That conclusion should come as no surprise to members and it is clearly consistent with rule 65.

In the particular circumstances of the case before the Tribunal, no penalty was imposed, although a finding of professional misconduct was recorded and the barrister was ordered to pay the Bar Association's costs. Counsel should not think that future cases will be dealt with on the same basis.

A recent case before the Board reveals another matter of interest. A complaint was made that counsel had given incorrect advice as to a client's liability to tax on certain receipts. The complaint was that this amounted to "unsatisfactory professional conduct". Counsel conceded that the advice was incorrect but maintained that it did not amount to unsatisfactory professional conduct. The Board did not agree. It took the view that "in the area of law where the barrister professes to practise he should know, or check if he is uncertain, those areas of law that he is likely to encounter every day and which are fundamental to tendering advice to clients". It held that the standard of competence embodied in the definition of "unsatisfactory professional conduct" in s. 123 of the Act, whilst it did not impose a standard of perfection, did "require a standard of competence that encompasses fundamental aspects of the law in which the practitioner professes to practise".

The Board found that the barrister was guilty of unsatisfactory professional conduct. In the particular circumstances of the case, it ordered that he be reprimanded, and that he waive and repay part of his fees, and that he pay the Bar Association's costs.

One lesson which may be learned from this decision is that counsel should take care to keep themselves informed of the law, and the developments in the law, relating to areas in which they practise. Another lesson is that when counsel venture outside their ordinary areas of practice, they should take great care to ensure that they are fully appraised of the law relating to the area into which they venture. ❑

Failure to Complete Chamber Work/ Failure to Return Brief

Recently, the Board found a barrister guilty of unsatisfactory professional conduct for failure to render an advice to his instructing solicitors and his failure to return the brief when requested to do so.

The brief had been delivered in April 1993 and a number of follow-up calls and letters had been sent to the barrister by late July 1993. Having received no response, the solicitors requested the return of the brief and again a number of follow-up letters were sent. Not having received the brief by early September the solicitors complained to the Association.

The Board found that the conduct of the barrister in, firstly, failing to deal with the brief and then failing to return the brief when requested to do so, fell short of the "standard of competence and diligence that a member of the public is entitled to expect" of a barrister.

The Board took into account the barrister's frankness in admitting that his conduct fell short of the necessary standard. The Board further noted that the barrister had been the subject of another complaint which was dealt with by way of counselling by the President but that he had now taken steps to refine his practice in such a way as not to move outside areas with which he is confident and he could deal with expeditiously.

The barrister was reprimanded, fined $500 and ordered to pay the Bar Association's costs of $4,500. ❑

Ethics Report

Communicating with clients

Previous editions of the *Ethics Report* have stressed the importance of good communications with clients. Unfortunately, it appears that the message may not have sunk in. There are still far too many complaints about barristers which can be traced back to a simple failure to communicate effectively with the client and to explain to the client what is going on. I repeat what I said in the first *Ethics Report*:

> "The clear indication is that clients want their barristers to spend a little time with them, to explain things to them fully, and above all to behave courteously. They are entitled to no less. ... No matter how busy you are, you should deal fairly and courteously with your client. In your own interests, and in the interests of the profession as a whole, you should do what is in your power to ensure that when you and the client go your separate ways, the client has a well-founded belief that she or he has been treated fairly and courteously."

The concerns of clients were reflected in the December 1994 report of the Civil Justice Research Centre, *Plaintiffs and the process of litigation* (a report based on a study of the 1992 Supreme Court Special Sittings). One of the key findings of the report was:

> "With regard to information, the comments provided indicated that plaintiffs had a need for information about various aspects of their case, but that this need was left wanting. Comments made about the lawyer-client relationship indicated concern about the way their legal representative/s conducted their case."

Another finding was:

> "The main concern expressed was that they [plaintiffs] were excluded from the negotiations which ultimately resolved their case."

Barristers should not assume that a complaint against them which may be seen ultimately to be based on a failure to communicate will be dismissed. There are undoubtedly circumstances in which the inadequacy of a barrister's dealings with a client may amount to unsatisfactory professional conduct. Although Bar Council has appointed a committee to investigate ways in which this problem can be addressed, ultimate responsibility lies with individual barristers. Please take time to consider the way in which you deal with your clients, and endeavour to treat them as you yourself would wish to be treated were you in your client's position.

Rule 56

There seems to be an impression that r.56 may be complied with if a barrister:

- sends a communication to a court; and
- at the same time, sends a copy of that communication to the barrister's opponent.

Rule 56 is quite specific. A barrister must not communicate with the court, in the absence of the barrister's opponent, unless the court has requested that communication or unless the opponent has, before that communication is made, consented to the communication.

The administration of justice works because, at the end of the day, litigants are prepared to accept a court's decision. It is fundamental to the administration of justice that justice should not only be done but should be seen to be done. That fundamental principle will be undermined if a party to litigation communicates with the court in the absence of, or without first giving notice to, the other party. Rule 56 is not a matter of form, or technicality. It goes directly to the efficient administration of justice. Barristers should not think that a breach is likely to be excused.

The proper way to address witnesses

In *Reg v Marini* (CCA 60727 of 1993, 27 June 1994 unreported) Simpson J, with whom Hunt CJ at CL and Abadee J agreed) made the following observations:

"At the time of giving her evidence, the complainant was almost twenty-one years of age. She was addressed by the Crown in the usual way as Ms Martinez. In cross-examination she was persistently subjected to the indignity of being addressed by defence counsel by her first name. No other witness was so treated.

It should be clearly understood by defence and prosecution counsel that all witnesses should be treated equally and adult witnesses, in a formal proceeding such as a trial, must be addressed as such. The use of first names by counsel can only have the effect of demeaning the standing of a witness, and reducing him or her to a different and inferior position in the eyes of the jury. Neither criminal nor civil courts should tolerate the subtle differentiation between witnesses which arises from the selective use of first names and which has the effect of undermining the value of some witnesses' testimony.

The complainant in this case was entitled to be treated

with the courtesy normally accorded to adult witnesses and which was accorded to other witnesses in this trial.

While it may seem unfair to criticise the trial judge who was not asked to intervene or the Crown Prosecutor who was not responsible for the form of address, it is regrettable that neither intervened; it should be recognised that judges and counsel should be astute to prevent such occurrences in future.

I should add that while I have in these remarks referred to adult witnesses, the principle concerned is not confined to adults. Counsel regularly deal, and usually sensitively and sensibly, with witnesses of all ages; very young children are commonly, it is thought, more comfortable when addressed by their first names. Finer judgments will be required in the case of adolescent witnesses, and it will be a matter for the good sense, judgment and sensitivity of the professional participants in a trial as to the form of address on those occasions. For myself, I consider that if doubt exists, it should be resolved in favour of greater rather than less formality."

A transcript of the judgment is available from the library.

Although the remarks of Simpson J were directed to the cross-examination of a witness, it is quite clear, both from what her Honour said and by reference to basic considerations of courtesy and propriety, that the underlying concerns are not limited to cross-examination. Counsel should take care to deal with witnesses in an appropriate way.

Responsibility for costs

In *Stafford v Taber* (CA 40436 of 1990, 31 October 1994 unreported) Kirby P (with whom Handley and Sheller JJA agreed) in the course of ordering, by consent, that an appeal be dismissed, made the following observations as to a solicitor's responsibility for costs:

"Inference of neglect: solicitor to pay part costs

The only inference that is presently available is that this appeal has been seriously neglected by the appellant's solicitors. It also appears that the interests of the appellant have been seriously neglected and possibly prejudiced. I should say that I do not believe that this has finally had any adverse effect on the rights of the appellant. My careful examination of the case has led me, albeit without full argument, to the conclusion that the appellant would probably not have succeeded in the appeal. Nonetheless, every client, and indeed every individual, is entitled to be dealt with courteously by the Court and by every officer of the Court. A client is entitled to have an appeal handled with attentive diligence. That does not appear to have occurred in this case.

By Pt 52, r.66 and Pt 52A, r.43 of the *Supreme Court Rules*, provision is made whereby, in the circumstances such as occurred in this case, the Court may in disposing of orders for costs order that a legal practitioner, in default, should pay the whole or part of the costs that have been incurred by want of due attention to the proceedings. It seems to me that those rules apply in the contested facts of this case.

In the presence of the solicitor an opportunity was afforded to indicate to the Court why the foregoing rules should not be invoked in this case. In the result, no submission was put to the Court to suggest that this was not a proper case to invoke those rules and to order the solicitor to pay part of the costs. I say 'part' because the appellant, apparently with complete honesty and candour, told the Court that he had given instructions to lodge the appeal although he knew the appeal had difficulties and success was by no means assured.

He, therefore, must take some responsibility for the initiation of the appeal. However, in the circumstances, as the Court understands them at this stage, it would be wrong that the appellant should bear the whole of the respondent's costs. So much of his costs as were incurred after 23 September 1994 (when the matter was called over before Handley JA) should, I believe, be borne by his solicitors. The possibility of an order which reflected this consideration was put in the presence of Mr Mezzanotte. Counsel for the appellant told the Court that the solicitor did not wish to be heard to resist the making of such an order.

The result is that it is proper in the circumstances to make the order disposing of the appeal by dismissing it. I repeat that, in my view, there is probably no ultimate prejudice to the appellant for I consider that, almost certainly, that would have been the order that would have been made on a full hearing of the appeal. But we shall never know. The matter was never finally disposed of by contest on the merits, as it could have been within the costs which were accumulated by the appointed hearing day. Instead, the case has been disposed of in the rather unfortunate way which I have now described.

Nonetheless, the appellant himself should pay one-third of the costs of the respondent of the appeal. The balance of two-thirds of the costs of the respondent of the appeal should be ordered to be paid by John J Pulco & Co., the solicitors on the record for the appellant. The appellant will have to pay his own costs of the appeal to those solicitors. However, such costs should not include any costs on or after 23 September 1994 when the proceedings were called over before Handley JA and the Court was assured, incorrectly as it has transpired, that the matter was ready for hearing.

Finally, I consider that the papers in these proceedings should be referred to the Law Society of New South Wales for such further consideration and investigation as appears appropriate to the Society."

A transcript of the judgment is available from the library.

It is clear from what his Honour said that:

- a costs order of the kind which his Honour thought should be made could, in appropriate circumstances, be made against a barrister; and

. that the "serious neglect" which his Honour found to have occurred could amount to unsatisfactory professional conduct or to professional misconduct.

Counsel should take his Honour's comments to heart. Barristers, as much as solicitors, should deal with their clients with courtesy and with attentive diligence. Barristers, as well as solicitors, may be ordered to compensate their clients in costs if they do not meet this obligation.

Barrister's entitlement to appear for corporation

In *Jiwira Pty Ltd v Primary Industry Bank of Australia Ltd* (ED 4574 of 1994, 17 February 1995 unreported) Master McLaughlin concluded that s.38I of the *Legal Profession Act* 1987 did not override the commandment of Part 4, r. 4 of the *Supreme Court Rules*, insofar as that rule provides (sub-r.2):

> " (2) Except as provided by or under any Act, a corporation (other than a solicitor corporation) may not commence or carry on any proceedings otherwise than by a solicitor)."

Master McLaughlin held that:

. s.38I did not mean that "the involvement of [counsel] in his role as an advocate in the proceedings entitles the first plaintiff" [a corporation] "to carry on the proceedings without a solicitor"; and
. s.38I did not authorise a plaintiff corporation to commence proceedings otherwise than by a solicitor.

Accordingly, Master McLaughlin concluded that the proceedings should be dismissed with costs.

A transcript of the judgment is available from the library.

Rule 101

Rule 101 provides that, with certain exceptions:

> "A barrister who has reasonable grounds to believe that there is a real possibility that the barrister may cease to be solely a disinterested advocate by becoming also a witness in the case or a defender of the barrister's own personal or professional conduct against criticism must return the brief as soon as it is possible to do so without unduly endangering the client's interests. ..."

Rule 101 is fundamental to the proper administration of justice. It means that a barrister can advocate a client's cause without having any personal stake in the outcome.

There may be situations where it is difficult to know whether or not to retain the brief. Certainly, counsel should not be persuaded lightly to return a brief unless they are satisfied that there is a real, as opposed to a fictitious, possibility that they may cease to be nothing more than disinterested advocates. If you are in any doubt, you should do as the rule suggests and seek a ruling.

Documents on subpoena

In a recent complaint, it was alleged that counsel had been guilty of unsatisfactory professional conduct in circumstances where:

. a subpoena for production of a medical file was issued and served;
. the medical practitioner upon whom the subpoena was served gave the relevant file to the solicitor for the party who had issued the subpoena, to be produced to the court;
. counsel retained by that solicitor had access to the file, before it was produced to the court, and utilised the file (or documents within it) in the course of cross-examinations.

A subpoena for production is a command of the court. It requires documents to be produced to the court. It frequently happens that a person to whom such subpoena is addressed gives the documents to the solicitor at whose request the subpoena is issued. Nonetheless, it is at least implied that the documents are provided to that solicitor in answer to the subpoena: that is to say, upon the basis that they are to be produced to the court. It is not a matter for counsel retained by that solicitor to assume that an order for access will be granted, or to anticipate such an order by utilising the documents in advance of it being made.

In the case in question, Bar Council concluded that the conduct complained of could amount to unsatisfactory professional conduct and resolved to take appropriate action.

Counsel should be aware that documents produced under the command of the court are to be given to the court and that access to those documents is to depend upon the order of the court. They should not assume that such an order will be made or act in anticipation of its making. ❑

Robert McDougall QC, Ethics Convenor

Butterworths has just published a book, Ethics in Law, subtitled Lawyers' Responsibility and Accountability in Australia. The editor is Dr Stan Ross of the Faculty of Law, University of New South Wales. Stan Ross has more than 20 years' experience of working and teaching in the area of legal ethics and professional responsibility.

The book aims to examine the nature of lawyers' ethical responsibility and accountability throughout Australia. Although it deals principally with the present, it places legal ethics in their historical context. The analysis is based on the Australian position, but is supplemented by extensive overseas analogues. A full review of the work will appear in a later edition of Bar News. ❑