Rocco Fazzari

Professional conduct for barristers

By the Hon T F Bathurst AC QC

Rule 4 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) states that the Rules were made in the belief that barristers owe their paramount duty to the administration of justice and must maintain high standards of professional conduct. Although other principles are set out in Rule 4, these two principles, in my view, underpin the ethical obligations of barristers and, for that matter, any legal practitioner whether acting as an advocate or otherwise.

Compliance with ethical obligations is critical to ongoing respect for the administration of justice and the rule of law. In speaking about public confidence in the judiciary, the Honourable Murray Gleeson AC QC stated, 'the general acceptance of judicial decisions by citizens and by governments which is essential for peace, welfare and good government of this community rests not upon coercion but upon public confidence'.[1] However, it is not only the judiciary that is involved in the administration of justice. The courts in our judicial system could not properly function without the support of competent and ethical advocates who can be trusted by the judiciary and — equally importantly — can be trusted and respected by members of the public who consult them.

These principles also inform the two statutory bases upon which lawyers can be sanctioned, namely, professional misconduct and unsatisfactory professional conduct. Professional misconduct is defined in s 297 of the *Legal Profession Uniform Law (NSW) 2014* (NSW) as including both: (a) unsatisfactory professional conduct of a lawyer where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence, and (b) the conduct of a lawyer whether arising in the practice of law or otherwise which, if established, would justify a finding that the lawyer is not a fit and proper person to engage in legal practice. By contrast, s 296 of the *Uniform Law* defines unsatisfactory professional conduct as including conduct of a lawyer arising in connection with the practice of law that falls short of the standard of compliance and obligation the public is entitled to expect of a reasonably competent lawyer. Section 298 sets out a number of matters capable of constituting unsatisfactory professional conduct or professional misconduct.

In the *Council of the New South Wales Bar Association v EFA* [2021] NSWCA 339 it was made clear that there does not exist in New South Wales a distinct category of professional conduct that is defined by conduct that is regarded as disgraceful and dishonourable by professional peers divorced from the test of a fit and proper person to engage in legal practice. However, the court pointed out that what might be described as the disgraceful and dishonourable test, derived from the decision of the English Court of Appeal in *Allinson v General Council of Medical Education & Registration* [1894] 1 QB 750, remains the useful test in the determination of the fitness of a legal practitioner to remain on the roll (at [150]).

Although the definition of professional misconduct can include conduct occurring otherwise than in connection with the practice of law, the High Court in *A Solicitor v The Law Society of New South Wales* (2004) 216 CLR 253 at [19] adopted what was said by Fullagher J in *Zeims v The Prothonotary of the Supreme Court (NSW)* (1957) 97 CLR 279 at [290], that the approach of a court in a case of personal misconduct must be very different from its approach in a case of professional misconduct and generally speaking the latter must have a much more direct bearing on the question of a practitioner's fitness to practise than the former.

It is important in that context to remember that professional misconduct does not necessarily require a conclusion of unfitness to practise or removal from the roll. Although the conduct in question might justify removal from the roll, it is an area first where minds might differ, and second, it is necessary to bear in mind that the question of whether a person is a fit and proper person often falls to be determined some years after the conduct in question occurred and it is necessary to take into account other matters such as the lawyer's otherwise good character, steps taken towards rehabilitation and whether the conduct in question was an isolated incidence in an otherwise blameless life. In the case of conduct not directly connected with professional practice, this approach is illustrated by the two High Court cases to which I have referred. Zeims was found guilty of manslaughter being responsible for the death of a person while driving under the influence of alcohol. However, the circumstances were unusual. Mr Zeims, while drinking at a hotel, had been attacked and beaten. He was seriously injured. The sergeant of police advised him to go quickly to hospital. Zeims asked the sergeant to drive him, but the sergeant refused so he drove himself. On the way to hospital, the fatal accident occurred.

The Supreme Court of New South Wales made an order removing Mr Zeims from the roll. This was overturned by the High Court. Kitto J stated at [298] there were some offences which may show a defect of character demonstrating an unfitness to be joined with the bench and bar in the daily cooperation with satisfactory working of the court's demand. However, he stated that there were many kinds of conduct deserving of disapproval and many kinds of convictions or breach of the law which do not spell unfitness for the bar.

A similar approach was adopted by the High Court in *A Solicitor v Council for the Law Society of New South Wales* (2004) 216 CLR 253. The solicitor pleaded guilty to four counts of aggravated sexual assault on a person under the age of 16 years. He was sentenced to three months imprisonment on appeal reduced to a bond for a period of three years. This reflected sentencing practice at the time. The High Court found the solicitor was experiencing difficult circumstances at the time of the offences, recognised their seriousness and undertook rehabilitation. Some years later, following a further complaint by one of the victims, similar charges were laid. While those charges were pending, the Law Society notified the solicitor that it was considering disciplinary action in respect of the admitted offences. The solicitor did not tell the Law Society of the further charges. The Law Society commenced proceedings seeking the solicitor be removed from the roll. Before the determination of those proceedings the solicitor was found guilty of the further charges and sentenced to two years imprisonment. The convictions were quashed on appeal. The solicitor then filed an affidavit in the disciplinary proceedings disclosing the further charges and the decision on appeal. The society alleged the failure to disclose was a breach of the solicitor's duty of candour. The Supreme Court ordered that he be removed from the roll. The High Court reversed that decision, while upholding the finding of professional misconduct.

The High Court pointed out that in determining whether the personal misconduct constituted professional misconduct it was appropriate to consider the circumstances in which the conduct occurred and, in particular, whether it was isolated conduct. The court pointed out that the conduct had not occurred in the course of the practice of law and had no connection with the profession. The court agreed with the Court of Appeal that frankness required that the solicitor inform the society of the further convictions even if he considered them unjust and his failure to inform the society was professional misconduct. However, the court stated the Court of Appeal gave insufficient weight to the isolated nature of the admitted offences and the solicitor's subjective case. It is perhaps open to doubt whether the outcome of this case would be the same if decided today.

Reflecting the fact that the jurisdiction to deal with professional misconduct is protective rather than punitive, the courts have taken a far more cautious approach in cases involving conduct in connection with legal practice. That can be seen by a number of cases in the Court of Appeal in recent years. *Hilton v Legal Profession Admissions Board* [2017] NSWCA 232 involved an application by the appellant for readmission as a solicitor having been removed from the roll in 1988. He was convicted of a conspiracy in March 1983 to corrupt the Minister for Corrective Services by bribing him to secure the early release of three convicted persons. He was convicted in November 1986 and released from prison on 4 August 1989. He was removed from the roll in 1988, with the then president of the Court of Appeal stating that Mr Hilton was permanently unfit for practice.

On his release from prison Mr Hilton led an exemplary life for 27 years, performing roles which required honesty and integrity. In 2015, he applied for readmission. Notwithstanding his exemplary record, the application was refused. Both the primary judge and the Court of Appeal emphasised the necessity for members of the public and members of the profession to have a relationship of trust with people admitted as legal practitioners. The Court of Appeal found the primary judge was correct to proceed on the basis that solicitors who dealt with the appellant would have serious reservations in doing so and public confidence in the administration of justice would be impaired by his readmission. The court emphasised that Mr Hilton continued to be unable to explain why he committed the offences to which he originally pleaded not guilty.

A similar approach was taken by the Court of Appeal in *Prothonotary v Gregory* [2017] NSWCA 101. Mr Gregory, prior to his disbarment, was a highly successful practising solicitor who devised on behalf of one of his clients a scheme designed to fraudulently evade a significant amount of income tax. He was convicted and sentenced to two years' imprisonment, to be released on recognisance after 12 months. The Victorian Court of Appeal described the sentence as grossly inadequate although, for various reasons, they did not increase it. In ordering his removal from the roll, the court stated that the conduct struck at the heart of the qualities necessary to practise law (see also, *Council of New South Wales Law Society v Jefri* [2021] NSWCA 53; *Council of New South Wales Law Society v Hart* [2011] NSWCA 64).

There is, of course, a wide range of conduct that can constitute professional misconduct or unsatisfactory professional conduct being conduct that has a real and substantial connection to professional practice. As the court pointed out in *EFA* the requisite connection can be found at barristers' social events and, for that matter, in interactions with fellow barristers. In *EFA*, the court rejected an appeal brought by the Bar Council against the conclusion by the NSW Civil & Administrative Tribunal that the conduct of a barrister at a barristers' clerks' dinner was unsatisfactory personal conduct rather than unsatisfactory professional conduct. In the exceptional circumstances of the case, the court declined to impose a fine while recognising the conduct was appalling, stating the court has no tolerance for conduct of legal practitioners that does not recognise and meet appropriate standards in respect of the treatment of women. That lack of tolerance will, in my view, extend to inappropriate conduct in chambers or at social functions and is something of which we should all be aware.

I emphasised at the outset the underlying bases of the ethical obligations imposed on barristers. It may be possible to learn the Barristers' Rules by heart but what is really important when considering whether particular conduct is or is not ethical is to ask first, would it be regarded as such by your peers and, second, would it or would it not have the tendency to bring the administration of justice into disrepute or lessen public confidence in the administration of justice. These considerations would generally provide the answer as to whether the conduct is ethically appropriate. **BN**

ENDNOTES

[1] Gleeson, M, 'Public Confidence in the Judiciary' Speech to the Judicial Conference of Australia, Launceston, 27 April 2002.