DISCIPLINE WITHIN THE LEGAL PROFESSION

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Delivered at a Meeting of the Medico-Legal Society held on 26th March, 1977 at 8.30 pm at the Royal Australasian College of Surgeons, Spring Street, Melbourne. The Chairman of the Meeting was the President, the Hon. Mr. Justice Connor.

When I was asked to deliver a paper on "Discipline within the Legal Profession", it was not made clear to me whether my subject included appropriate rules of conduct in the profession and their enforcement, the ascetic devotion to duty and rigorous working hours of professional men, or the incidence of flagellation among practitioners. There are other possibilities, of course. Bacon is recorded as having said that "Certainly wife and children are a kind of discipline of humanity". In any event my only riding instructions were: "It need only be an informative paper. You don't have to be funny". The somewhat unpromising title does at least have a degree of latitude and I propose to use it.

Within the legal profession, the disciplinary tribunals to which one is subject differ, depending upon whether one practises as barrister or solicitor—although since all are admitted to practise in both capacities by the Supreme Court, control ultimately resides there. For solicitors, the disciplinary tribunals are prescribed by the Legal Profession Practice Act and consist of the Statutory Committee which has six members who are appointed by the Chief Justice, the Council of the Law Institute or the Supreme Court. Any person who is aggrieved by the alleged misconduct of any "practitioner" may make a charge thereof in writing to the Statutory Committee. The Law Institute Council may itself refer any question of misconduct to the Statutory Committee. If after inquiry the Committee is of the opinion that the practitioner has been guilty of misconduct, it may transmit a report to the Supreme Court, which may make such order as it thinks fit, including an order striking off. The alternative process, much more frequently employed at the present time, is that the Secretary of the Law Institute is authorized to cancel, suspend or refuse to issue a practising certificate. The Secretary may refer any such case to the Council of the Law Institute (consisting of the Attorney-General, eighteen elected members, and the Presidents of sundry regional Law Associations). The practitioner affected may require the Council to hold a full inquiry into the matter. The Council has a like power to

refuse, cancel or suspend the certificate, but may, as an alternative, fine the person concerned up to one thousand dollars. Any person thus penalized may appeal to the Supreme Court. For certain offences the Council may fine a solicitor not more than two hundred dollars.

Members of the Bar on the other hand are subject to the jurisdiction of the Ethics Committee (consisting of seven members appointed by the Bar Council) which is entitled to deal summarily with various disciplinary offences and impose a fine of not more than five hundred dollars. The Bar Council deals with more serious disciplinary offences and is entitled to impose a fine of up to one thousand dollars, to reprimand or suspend the barrister concerned or to direct that the person's name be struck off the roll of barristers. Until recently the only right of appeal was to a general meeting of the Bar (somewhere over six hundred and fifty members). There is, so far as I am aware, only one recorded instance of such an appeal. As an appellate tribunal, the general body of the Bar was corpulent, hypertensive, and subject to recurring bouts of epilepsy and flatulence. It was also incontinent, since there were persistent leaks to the Press. Fortunately it is now moribund because provision has been made for an alternative appellate tribunal of seven barristers. There is no statutory basis for the Bar's procedure. The Victorian Bar consists of a voluntary association of barristers-and-solicitors who undertake to practise only as barristers. There is actually no definition of "practitioner" in the Legal Profession Practice Act and there is no obvious reason why the Statutory Committee should not have jurisdiction to deal with a barrister if a complaint of misconduct is made by a member of the public or is referred to it by the Law Institute Council. So far as I am aware, the Committee has never yet dealt with a charge against a barrister, but I have no doubt that many solicitors would relish the chance to fix a basilisk stare on errant members of the Bar in such circumstances.

I now turn to complaints against solicitors and how they are processed. It may be helpful to bear in mind at the outset the qualities a good solicitor should have. These are set out in a work published in 1669 called *The Compleat Solicitor* as follows:

> "First, he ought to have a good natural wit. Secondly, that wit must be refined by education. Thirdly, that education must be perfected by learning and experience. Fourthly, and, lest learning should too elate him, it must be balanced by discretion. Fifthly, to manifest all these former parts, it is requisite that he have a voluble and free tongue to utter and declare his conceipts."

The author adds various moral requirements such as patience and prudence, a calm content, and "a certain stayed and settled manner of living".[1]

The most notorious complaints against solicitors relate to allegations of misappropriation of moneys belonging to the client. One of the significant differences between barristers and solicitors is that the barrister never handles his client's money, whereas solicitors usually have large trust accounts in which clients' funds are retained for various purposes. I for one have always been profoundly thankful that barristers do not have this responsibility. In any case, since such pastures are forbidden to the barrister, I will not trespass further upon them in this paper. The Law Institute receives some seventy to one hundred and twenty complaints a month, averaging slightly over one thousand per year. This does not include the additional inquiries caused by the vagaries of the Telecom system. The Secretary of the Law Institute recently picked up his telephone to be asked by an aggressive questioner whether he had finished spaying her Basset Hound. He replied that he hadn't started and the caller became quite threatening. Complaints are required to be put in writing, which is not always helpful. The longest known complaint was four hundred and four pages. In the main, complaints relate to matters such as delay, lack of communication, dissatisfaction with the handling of a matter, excessive bills of costs, and lack of courtesy. Some solicitors find the direct approach an aid to communication with their public. One began a letter to his client "You rude illiterate Teutonic peasant". The same man commenced a letter of demand to the proposed defendant after a motor car accident "You rat, you worm, you disgrace". The abuse is by no means one-sided. The Secretary of the Institute recently replied to a letter of complaint with a detailed explanation. The response came in the following terms:

> "Dear Mr. Lewis, you bastard,
>
> Thank you for your weaselling doubletalking buck-passing two-faced chiselling letter. You, sir, are a pusillanimous prick. How dare you write such rubbish to me?"

After six more pages of the same, the writer concluded on a Delphic note, "So you bastard, drop dead".

I note that the Law Society in New South Wales receives some 6600 complaints a year. The contrast must be a compliment to the conservatism of Victorian solicitors.

Partly because the Bar does not handle clients' moneys and partly because barristers are to a considerable extent insulated from the public, there are fewer complaints relating to the conduct of barristers. Last year there were in all some fourteen complaints by members of the public to the Bar Council about barristers' conduct. There were five complaints by solicitors and four by barristers against

their fellows. In the main the matters alleged related to conduct of cases in court, breach of confidence, negligence or delay.

Those of the medical profession who have smarted at the insistence by certain judges upon timely attendance at court will no doubt be glad to know that lawyers also are subject to discipline if they should arrive late. One well-known occasion occurred when Martin Ravech (now Judge Ravech) and Sam Gray (now Judge Gray) were opposed in a trial before Sir Oliver Gillard. Judge Ravech had arranged to give Judge Gray a lift to the country town where the trial was to take place. When Judge Gray was being picked up, he was slow putting his bag into the car, and in his exasperation, Judge Ravech slammed the door, removing the top of Judge Gray's right thumb. Various other distressing occurrences followed including a minor accident and a near escape from a rabid Alsatian after which their Honours limped into Court forty-five minutes late. At 10.30 am Sir Oliver Gillard had a discussion with the instructing solicitors, the general nature of which related to penalties for contempt of court and certain of the more extreme forms of Eastern torture, after which Sir Oliver had required the solicitors to conduct the case themselves.

Misconduct by barristers is particularly likely to be related to their conduct in Court and their preparation for it. When a barrister transgresses in Court he may be disciplined both by his domestic tribunals and by the Court itself for contempt. In past times, any barrister who so far forgot himself as to hurl a missile at a judge might expect to be severely dealt with. Most lawyers are familiar with the occasion in 1631 when at Salisbury a disgruntled litigant threw a brickbat at a judge, because of the quaint old Law French in which the decision was couched.[2] The half-brick narrowly missed. What is not quite so well known is that the litigant's throwing arm was promptly amputated and nailed to a gibbet in the Court. The Judge must have received a considerable fright because, to underline his sense of outrage, the prisoner was himself immediately thereafter hanged from the same gibbet. Only Vlad the Impaler would not have been impressed. By the nineteenth century judges had either become more civilized or they had reluctantly accepted that they were appropriate targets for airborne projectiles. When a second jaculatory litigant removed a dead cat from a paper parcel and hurled it inaccurately at a County Court judge, he merely remarked "I shall commit you for contempt if you do that again". The case is chronicled in Megarry's *Miscellany-at-Law*.[3] One of the delights of this book is the Index. The incident is there recorded in diverse ways such as "Contempt of court—dead cat—one throw allowed" and "County Court judge—contempt to throw dead cat at twice".

Prolix lawyers have always been at risk. In the case of *Mylward v. Weldon*[4] in 1596 the plaintiff employed his son Richard to draw the Replication. This might have been completed in sixteen pages if the hapless pleader had confined himself to matters barely relevant. Instead his effusion occupied some one hundred and twenty pages. The infuriated judge committed Richard to the Fleet upon the express condition that a hole was to be cut in the Replication, and Richard's head passed through the hole, and he was then to be paraded bareheaded and barefaced around Westminster Hall, whilst the Courts were sitting, and shown at the Bar of each of the three Courts within the Hall with his head thus framed.

In American courts, matters are conducted in somewhat more freewheeling fashion but it has nevertheless been said by their Supreme Court that "Lawyers owe a large, but not an obsequious, duty of respect to the court in its presence". [5] In *Offutt v. United States*[6] the Supreme Court set aside a judge's summary committal of a trial lawyer for ten days for contempt of court.

One of the interchanges cited was as follows:

"The Court: Motion denied. Proceed.
Mr. Offutt: I object to your Honour yelling at me and raising your voice like that.
The Court: Just a moment. If you say another word I will have the Marshal stick a gag in your mouth."

The judge had really warmed to his task, by the time he came to discharge the jury, with these comments—"I also realise that you had a difficult and disagreeable task in this case. You have been compelled to sit through a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst".

A lawyer's finest hour often occurs when he is acting fearlessly in defence of his client. That occasion frequently coincides with his most perilous hour. Most of those present will know E. D. (Woods) Lloyd Q.C. The case of *Lloyd v. Biggin,*[7] reported in 1962, demonstrates some of the difficulties which occur when an advocate is confronted by an irascible magistrate. Lloyd had been asking the magistrate to rule whether he would determine the admissibility of some evidence of a witness then under cross-examination. The magistrate intimated that that was for somebody else to decide. The report continues as follows:

> "Mr. Lloyd said: 'But your Worship must determine', and that statement was interrupted by the magistrate saying 'Carry on

> with your case'. Mr. Lloyd said: 'Your Worship with great respect, I wish your Worship to determine whether your Worship proposes to rule . . .'. The magistrate said: 'Carry on with your cross-examination'. Mr. Lloyd said: 'I cannot carry on with any cross-examination unless your Worship informs me whether this . . .'. The magistrate said: 'I have had enough of your impertinence. I have put up with it for two days. You're . . .'. Mr. Lloyd said: 'Would your Worship just hear me?' The magistrate said: 'You're fined five pounds for contempt of court. If you do anything more I will commit you'. Mr. Lloyd said: 'Your Worship if you would just hear . . .'. The magistrate said: 'You're committed. Constable remove that man and place him in the watchhouse for three hours'."

The constable concerned had recently been cross-examined by Lloyd to some effect and removed him with pleased alacrity to the police station next door, where a second constable—better disposed to Lloyd—gave him a cup of tea. The first policeman then asserted that Lloyd was supposed to be in the cells. The place was Kaniva, the time was mid-summer and the temperature was over one hundred degrees. The cells were a small contraption in the backyard, in full sun. The accommodation proposed was roughly comparable in standard to that offered by the Tiger Cages of Con Son Island. Lloyd flatly refused to enter the cells. The affronted constable returned to the Court and complained to the magistrate that Lloyd wouldn't go into the cells. The magistrate then told him that if he didn't put Lloyd in the cells, he too would be committed for contempt. It required the intervention of an inspector from Horsham to calm matters down, and later Mr. Justice Smith set aside both the fine and the committal as having been wrongly imposed.

The atmosphere of an Irish court has a somewhat different flavour. At the turn of the century an advocate called Sir Francis Brady, who had a passion for music, was conducting a prosecution before Lord Justice Fitzgibbon. The case is instructive, among other things, for what may occur when a barrister commits the cardinal sin of not reading his brief properly. As recalled in Maurice Healy's splendid book, *The Old Munster Circuit,* the story goes as follows:

> "Sir Francis, debonair and heedless of all around him, opened his brief, probably for the first time, as the witness was sworn, and the following somewhat unusual scene occurred. 'Your name is Marmaduke Fitzroy?' 'It is not.' 'And you live at Rocksavage, on the Douglas Road?' 'I do not.' 'And you are a retired Army officer?' 'I am not.' Fitzgibbon had by this time recovered from his laughter at the first answer, which was hardly a surprise from the somewhat rough lips that had spoken it. 'Sir Francis, Sir Francis!' he cried,

> the witness doesn't agree with a word you are putting to him!' Sir Francis lowered his brief, and for the first time caught sight of the coal-heaver who had been answering his questions, if questions they might be called. He looked at the ceiling, whistled a few bars of 'Let Erin Remember', looked at the witness again and said blandly: 'Then who the deuce are you? And what are you here to swear?' "[8]

The Irish had their own methods of disciplining unruly judges. The Lord Chancellor in Ireland was at one time Sir Ignatius O'Brien. His Court of Appeal was a disaster and counsel were usually unable to make the simplest statement without interruption. O'Brien insisted upon informing counsel of the way his mind was operating. According to Maurice Healy,[9] Serjeant Sullivan once interrupted such a soliloquy by sweetly suggesting that the operation of what his Lordship was pleased to call his mind, would become relevant if his Lordship would first listen to the facts of the case. Quite a lot of progress was then made during the remainder of the day. It was another Irish counsel, Curran, who offended Mr. Justice Robinson, to the point where that judge cried out, "If you say another word, sir, I'll commit you." Curran responded "Then, my Lord, it will be the best thing you'll have committed this year."[10]

The Irish traditions have not entirely disappeared from the Melbourne Bar. Tom Doyle who died in 1961 was on one occasion cross-examining a New Australian. He had driven him into a corner and, moving in for the kill, asked: "If that is so, then why did you say this to the plaintiff?" The witness cowered back into the box and said: "I no answer da quest." Doyle leaned forward and said: "If you no answer da quest, da judge, he make for you plenty of troub!" He then turned to the judge and said: "I must apologize to Your Honour for parading my linguistic abilities in this way." The judge replied: "That is quite all right, Mr. Doyle, you said exactly what I was about to say myself."[11]

Sex has never been a problem for lawyers. This is not necessarily because all lawyers are derelict hulks. Nor, by contrast, are all medical men entitled to parade the red-blooded image of sexual success. The lawyer, of course, has much less opportunity for the laying on of hands. In consequence the Law Institute takes the view that a solicitor may be over-sexed but not dishonest, while the reverse applies to doctors. One woman actually wrote to the Law Institute complaining that her solicitor persistently looked at her with lustful eyes. The Secretary of the Law Institute has also on occasion undertaken the function of sexual counselling. A lawyer recently rang the Secretary to inquire whether it was permissible to have sexual inter-

course with his client. The man was plainly in a state of barely contained ardour and his client must have been waiting on his couch for the answer. The Secretary informed him that it all depended on the professional relationship and was pointing out that he was not entitled to take advantage of his position, particularly in matrimonial cases, when there came an agitated interjection: "But I'm a conveyancer!"

There is, so far as I am aware, only one Australian case bearing upon the sexuality of legal practitioners. In *Bar Association of Queensland v. Lamb,*[12] the applicant solicitor had had extramarital intercourse with his client in a matrimonial cause, after decree absolute but before questions of custody and maintenance had been determined. The solicitor sought admission as a barrister, against the opposition of the Bar Association. The report does not make clear whether the applicant desired to change the nature of his practice, because, as a solicitor, he had found the demands of his clients to be excessive or because, as a barrister, he hoped to increase his scoring rate. In any event, the High Court merely observed that his conduct, though "improper" and "unprofessional", fell short of amounting to unprofessional conduct which would render him unfit to remain a solicitor or become a barrister.

We live in difficult times. Our professional numbers have increased enormously. In 1966 the number of barristers on the Practising List barely exceeded three hundred. In the year ending 31st August 1976, one hundred and three persons signed the Bar Roll. The Practising List had then grown to six hundred and fifty-four. The consequences for the Bar have been serious. Standards have clearly declined. Ethical rules which used to be unquestioned and regarded as fundamental, have been flouted by people who blandly asserted that they did not know that what they were doing was wrong. In 1966 it was possible for most of the Bar to be housed in one building. The Bar is now scattered over more than four. This has itself resulted in a lessening of the collegiate atmosphere which once existed and may account in part for the growth in ignorance, incompetence and downright dishonesty among barristers. In the same period the number of solicitors in practice in Victoria has nearly doubled to approximately four thousand. The amount of money held in trust accounts has vastly increased and, inevitably, temptation and opportunity have combined to produce numerous cases of misappropriation. It is probably not coincidence that highly critical—indeed hostile—attention from the Press and the lay public has focused on the legal profession in recent years, demanding change. One of the areas where change is most sought after, is the composition and conduct of the tribunals which enforce discipline among lawyers.

The Law Institute and the Bar Council are both very well aware that if they do not enforce acceptance of rigorous standards and the highest ethical practices by their members, the maintenance of discipline will forcibly be taken from them and imposed from outside. Both bodies are reacting to demands for change, the more impressive response coming from the Law Institute which has recommended to its members and the Government the creation of a new Solicitors' Disciplinary Tribunal. In stark contrast to the past, this new Tribunal would include a lay member and its hearings would be open to the public unless otherwise ordered. Decisions would be published in the *Law Institute Journal* and given to the media. The Law Institute has also recommended that the Ombudsman be given jurisdiction to investigate complaints by the public of any alleged failure to act on the part of the Institute.

The problem remains that the public, the Press and to an extent, our legislators basically dislike and distrust the law and lawyers. As Alan E. Kurland has pointed out,[13] the inferiority complex of lawyers is constantly being fed by survey results that rank them in public esteem at a level with morticians and just below butchers and above hairdressers. In this respect our medical brethren are in a significantly different position. Notwithstanding the inroads of Medibank, the doctor remains, I think, a valued friend to his client and an object of respect in the community at large. The public opinion of lawyers is aptly summed up in the following verse:

"The law the lawyers know about is property and land;
But why the leaves are on the trees,
And why the waves disturb the seas,
Why honey is the food of bees,
Why horses have such tender knees,
Why winters come when rivers freeze,
Why Faith is more than what one sees,
And Hope survives the worst disease,
And Charity is more than these,
They do not understand."[14]

In this day and age it may be as well for both solicitors and barristers to bear in mind the suggestion Shakespeare placed (as long ago as 1591) in the mouth of Dick the Butcher talking to Jack Cade the Rebel:

"The first thing we do, let's kill all the lawyers."[15]

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5 *Fisher v. Pace* 336 U.S. 155 at 168 (1949)
6 348 U.S. 11 at 12 (1954)
7 (1962) V.R. 593.
8 *The Old Munster Circuit.* Maurice Healy 56-7.
9 Op. cit. 129
10 *Curiosities of Law and Lawyers.* Croake James. 159-60.
11 *A Multitude of Counsellors.* Sir Arthur Dean. 233
12 [1972] A.L.R. 285.
13 *Journal of the American Bar Association.* January 1976.
14 *The Devil's Devices.* H.D.C. Pepler, 38.
15 *Henry VI, Part II,* Act IV, scene 2.