LEGAL ETHICS

During the past year the Bar Council continued to perform the functions delegated to it by the *Legal Profession Act 1987*. There are four Professional Conduct Committees (PCC) consisting of council members, delegated barristers and Council-appointed lay members who are allocated work by the Professional Affairs Director, Helen Barrett, at the direction of the Council.

Members should be aware that the Bar Council has a duty to assist complainants with the formulation of their complaint. After receipt of the complaint the member is asked to make comment and generally evidence is collected in written form. Individual members of PCCs are allocated the file and work in conjunction with the Professional Affairs Director in preparing reports to be considered by the PCC which then makes a recommendation to the Bar Council.

On receipt of the report the full council considers it. Broadly speaking there are three main methods of dealing with matters referred:

1. Dismissal by the Council if no question of professional misconduct or breach of professional standards is found to have been raised by the material before the PCC or the Council (s.134) or if the complaint is adjudged to be frivolous or vexatious (s.132).
2. If the PCC Council considers there has been a breach of professional standards which does not warrant referral to the Board but that there is conduct requiring a reprimand the barrister can be asked to consent to a reprimand (s.134). It is to be noted that this power only relates to breaches of professional standards and not questions of professional misconduct. If consent is not given the matter must be referred to the Board.
3. Referral of the conduct or breach complained of to the appropriate Tribunal or Board (s.134(i)(c) and s.134(i)(b)).

In recent months we have seen the handing down of several decisions by both the Tribunal and the Board; abstracts of these decisions appear below. In the case of Board matters publication of a member's name is prohibited by the act (s.145) as proceedings are held in camera.

A review of complaints received, fortunately, reveals that there are relatively few which rely on allegations of moral turpitude such as criminal, dishonest or fraudulent conduct. The bulk of the complaints received arise out of allegations that barristers are guilty of various degrees of negligence, incompetence or dilatoriness. An example of the kind of conduct referred to is the decision No. 9 of 1991 dealt with below. Members are asked to note that in such circumstances even though the penalties applied might appear to be of a moderate nature the cost penalty which is visited upon the barrister has been quite substantial in each case where there has been a finding adverse to the barrister.

Another fruitful source of complaint are those cases where the barrister is alleged to have had direct contact with the client where the rules dictate that a solicitor should have been present. In some cases there were no solicitors ever effectively instructing the barrister (a breach of Rule 26). In others there were instances where a solicitor was instructed but not present at vital times such as conferences and gaol visits (see Rules 33 and 34).

In some instances while the Council has considered that the case has not involved a question of breach of professional standards it has deemed it prudent to counsel or advise the barrister about the risks inherent in his or her conduct.

MATTERS NOT REFERABLE TO THE STANDARDS BOARD WHERE THE BARRISTER WAS REPRIMANDED OR COUNSELLED

In one matter a barrister appeared in litigation on his own behalf but corresponded directly with the opposing party when that party was represented by solicitors. In the circumstances it was held that this conduct was a breach of Rule 21 as being contrary to the standards of practice becoming a barrister and the barrister was reprimanded.

Rule 33 was applied in the case of a senior member of the Bar attending a conference with his client at a gaol without requiring the presence of his instructing solicitor. In this instance because of the context in which the visit took place the barrister was merely counselled but members are again reminded of this rule.

Counselling by a senior member of the Bar Council was required in another case which involved a breach of Rule 26. A junior member had provided unpaid assistance to a member of his family in a conveyancing matter but allowed his name to be used on the contract as the vendor's agent and thereafter corresponded, in respect to the transaction, on his chamber's letterhead and signed himself as a barrister.

A comment made by a member of the Junior Bar in the hearing of a complainant was wrongly taken by the complainant to have been intended for her. On this being pointed out she withdrew the complaint but the Bar Council thought it appropriate to advise the member of the need to be careful in making such comments in the future.

Counselling was also prescribed where the barrister spoke to a client directly taking it upon himself to advise the client of her obligation to meet the fees of her solicitor. The member was reminded that this was an action which was not properly within the scope of his retainer.

DISCIPLINARY TRIBUNAL DECISIONS

Since the promulgation of the 1987 Act there have been five decisions handed down by the Disciplinary Tribunal. The decision concerning *Glissan QC* was dealt with in the last edition of *Bar News* while two very recently published decisions will be dealt with fully in a later edition. At the time of going to press the Tribunal has dismissed a complaint against *Crispin QC* but has not published its reason.

In the case of *R A S Skiller* a complaint alleging, inter alia, breaches of Rule 26 (acting without the intervention of an instructing solicitor) and Rule 29B (soliciting a sum of money directly from a client for counsel's fees) was found proven. Skiller was suspended for six months and costs payable by him were determined at $7,500.00.

Members are reminded that s.134 of the *Legal Profession Act* requires the Bar Council to complete an investigation and, if it is satisfied that the complaint *involves any question* of professional misconduct it *shall* refer the complaint to the Tribunal.

In this edition we publish the decisions in respect of *Vernon* and another matter where the complaint was dismissed.

NEW SOUTH WALES BAR ASSOCIATION v VERNON

On the 8th of April, 1992 the Legal Profession Disciplinary Tribunal handed down its decision in relation to a complaint against C B Vernon alleging professional misconduct. The

Tribunal comprised Staff QC, McAlary QC and lay member D Mahon.

Complaints had been made against Vernon by the Bar Council pursuant to Sections 134 and 135 of the *Legal Profession Act, 1987*. There were various allegations contained in the original complaint and subsequent amended complaints but the three found to be significant by the Tribunal were, in summary, as follows:

(i) That the barrister swore a deliberately false affidavit.
(ii) That the barrister made a deliberately false statement to a Local Court Magistrate concerning advice given to him by the then President of the Bar.
(iii) That the barrister's conduct in breaching the law by the use and possession of cocaine and heroin for periods of ten and six years respectively justified the conclusion that he was not of good fame and character and was not a fit and proper person to remain on the Role of Barristers.

The first allegation revolved around Vernon's swearing of an affidavit to explain his failure to appear at the Federal Court hearing which had been listed for the 4th of September, 1989.

The affidavit deposed that committal proceedings in which Vernon was involved had commenced on the 31st of August, 1989 and were expected to finalise on that day. The reality was that those proceedings had commenced on the 28th of August, 1989 and had been listed to continue for more than one week, which they did. In proceedings before the Tribunal, Vernon alleged that he had instructed a solicitor to prepare the affidavit and had sworn it without having first read it. The Tribunal was not prepared to disbelieve Vernon on this point but held that his conduct in swearing the affidavit without reading it, and a subsequent failure in a later affidavit to draw attention to the erroneous statement in his earlier affidavit, amounted to gross recklessness. The Tribunal went on to say "the lack of a due sense of responsibility is a grave defect of character in a barrister. The Court and his colleagues are entitled to expect the exercise of a sense of responsibility in his dealings with them. To act so recklessly is almost as grave a defect of character as to lie to a Court and may readily result in similar damage to the administration of Justice".

The Tribunal found that Vernon's conduct in relation to the affidavit constituted professional misconduct.

As to the second allegation, it was common ground that after a conflict had arisen in the committal proceedings referred to earlier, Vernon sought advice from the then President of the Bar, Handley QC. It was also common ground that the advice he received from Handley QC was twofold, namely that he could continue to act for one set of defendants but should not cross-examine another defendant. The first limb of the advice had vindicated Vernon's stand before the Magistrate but the latter placed him under an important restraint. His subsequent report to the Magistrate emphasised the former and ignored the latter. After hearing evidence from Vernon, the Tribunal was not satisfied that he deliberately misled the Magistrate but observed that this conduct reflected his recklessness and lack of responsibility.

The Tribunal held that this conduct did not amount to professional misconduct but was unsatisfactory professional conduct.

As to the third allegation, it was admitted by Vernon that he had been using cocaine and heroin for periods of ten and six years respectively. However, with the exception of his arrest and subsequent conviction, this use was in private and the Tribunal accepted that it did not affect his professional activities. In these circumstances, the Tribunal held that this conduct did not amount to professional misconduct but constituted unsatisfactory professional conduct.

Other allegations contained in the various complaints were dismissed.

The Tribunal ordered that the name of Christopher Bernard Vernon be removed from the role of practising barristers, that his practising certificate be cancelled and that he pay the Association's costs of appearing and investigation on a solicitor-client basis. A costs order was made in Vernon's favour in respect of the unsuccessful complaint.

NEW SOUTH WALES BAR ASSOCIATION v A BARRISTER

In October, 1991 the Legal Professional Disciplinary Tribunal published the reasons for its decision on a complaint brought under the *Legal Profession Act, 1987* against a barrister. The Tribunal comprised Byers QC, McAlary QC and lay member D Mahon. The decision had been given at the conclusion of the hearing.

The proceedings alleged that the barrister had breached rules 8(1) (criminal briefs not to be retained except in most compelling circumstances) and 9 (criminal brief to be retained over civil brief) of the Rules of the Bar Association. The facts were that, prior to the 24th of July, 1989, the barrister had been briefed to appear in the trial of a charge of supplying heroin which was due to be heard on the 27th of November, 1989. The only substantial issue in the trial was the admissibility of alleged confessional material. It was not disputed in the proceedings before the Tribunal that this was a "serious criminal offence" within the meaning of Rule 8(1). On the night of the 24th of July, 1989, the barrister was briefed to attend a police station on behalf of another client who had been charged with the rape of a number of women. After the charging of the second client, the barrister persuaded him to submit to a DNA test the result of which led the police to drop the charges against him. This occurred on the 11th of October, 1989. The Government then announced the establishment of a Royal Commission to enquire into the second matter. The barrister received a brief to appear, with a leader, at the Royal Commission.

The Tribunal found that, due to his leader's illness, a great deal of the burden of preparation for the Royal Commission fell upon the barrister. Further, his leader was not always able to complete a full day of hearing which meant that the barrister could not be released from the Royal Commission to attend to other matters. Both senior and junior counsel were worried that the police were going to use the Commission to fight a rear guard action over their conduct and to try to secure an ex officio indictment against their client.

On the 22nd of November, 1989, the barrister phoned his instructing solicitor in the first case and told him in detail the circumstances he was in including the fact that he had been for sometime at that stage, closely involved with the second matter and that the client trusted him. The solicitor then asked the barrister to return the brief, which he did. Other counsel was instructed. It was common ground before the Tribunal that the brief had been returned in sufficient time for other counsel to properly master the case in the terms of Rule 8(1). The client consented to the brief's return.

At the time the brief was returned, Rule 8(1) did not contain the proviso that a barrister may return a criminal brief with the consent of the client given with full knowledge of all the circumstances concerning its return. However, the Tribunal held that the Rule was not exhaustive of all circumstances in which a criminal brief might be returned and that, even in the absence of the proviso, it could not see how the return of the brief with the approval of a fully informed client could be

professional misconduct. The Tribunal found that this was the situation in this case. Further, the Tribunal found that the nature of the barrister's involvement in the second matter and his leader's ill health meant that the barrister's continuous presence at the inquiry was essential if the client's interests were to be adequately safeguarded. In the opinion of the Tribunal, those factors prevented the barrister's conduct being considered to be "professional misconduct" or "unsatisfactory professional conduct".

As to Rule 9, the Tribunal was of the view that the words "civil" and "criminal" were not meant to cover the entire field of legal proceedings. In particular, the Tribunal was not persuaded that civil proceedings in Rule 9 extended so far as to include a Royal Commission. In any event, the Tribunal further held that, as the barrister had returned the brief, as he had been requested so to do, well before the Royal Commission started, there was no clash to which Rule 9 could apply.

The Tribunal made no order as to costs.

STANDARDS BOARDS DECISIONS

Members are advised that there have been several complaints made of the type that is represented by Matter No. 8 of 1990 (a case of duress being applied during advice on settlement). It is ironic that, over the past four years, most of such complaints have arisen in cases where the complainant's decision to settle has been required to be the subject of evidence by the complainant before a Judge; ie. in proceedings before the Compensation Court and the Family Court.

Some little time ago the Council held a meeting for practitioners who regularly practised in the Compensation Court in order to point out some of the risks that might arise when advising on settlement. It was pointed out at that meeting that:

(1) During conferences concerning possible settlement the solicitor or an experienced clerk should be present at all times;

(2) The barrister should take care that comprehensive *written* instructions were taken by the solicitor or clerk;

(3) The barrister should develop a format or routine to ensure that the advice he gives is always as comprehensive as possible and is easily understood by the lay client.

These steps should be followed even if evidence is to be given by the client concerning the giving of the advice, the understanding of the advice and a desire to have the proposed settlement approved.

Matter No. 8 of 1990 arose out of Common Law proceedings where no such evidence was required. In such cases it is all the more important for steps (1), (2) and (3) to be followed. Of course in any case, where approval is dependent upon evidence or not, the primary consideration must be that the client's access to the court is not frustrated by use of threats or an overbearing attitude to induce him to settle contrary to his preferred course.

At present the Bar Council's Rules Committee is considering the suggestions that Rule 2(b) be changed in the manner suggested by the Board.

REPORT OF DETERMINATION OF THE LEGAL PROFESSION STANDARDS BOARD MATTER NO. 8 OF 1990

The complaint about the barrister to the Board in this case was that he had acted in breach of Rule 21 by engaging in conduct or acting contrary to the standards of practice becoming a barrister and/or was otherwise guilty of unprofessional conduct. It concerned behaviour of the barrister during a conference with the client who was the plaintiff in a personal injuries action. In the conference there was discussed an offer of settlement which had been made by the defendant. When the client had indicated that he wanted to reject the offer and would not settle for anything less than a higher sum it was alleged that the barrister, amongst other things, became angry and used abusive language; told the client that unless he signed written instructions to refuse the offer then the barrister would withdraw and gave him 20 minutes to make up his mind. It was said that the client accepted the offer because he believed if he did not do so he would be deprived of legal representation.

The Board noted that there was no complaint that, objectively speaking, the defendant's offer was not proper and acknowledged that it was appropriate for the barrister to point out substantial risks on liability as well as damages. The Board noted that with this particular client that was probably not an easy task.

The Board found that the barrister did threaten to withdraw from the case. It found that he appeared to become angry and used offensive language in describing the chances of success. It found that the client had been told that written instructions to refuse the offer were required and that he should make up his mind within 20 minutes or so. They were not all matters that the barrister could be criticised for. The Board described it as "perfectly proper for the plaintiff to be asked to provide written instructions and for counsel, if he believed this to be the case, to warn the plaintiff that an adverse decision in a hearing might result in the plaintiff losing his home and to attempt to persuade the plaintiff to settle". Nevertheless, the Board concluded that, when all the matters were taken into account, the barrister had placed the client under undue pressure to accept the offer. Although the barrister had the duty to advise the client regarding the desirability of the offer "he also had the obligation to allow" the client "the exercise of his own free will". In this case the Board concluded that the client's acceptance of the offer was not the result of an "exercise of his own *free* will".

The Board has specifically referred to the decision of the Legal Profession Disciplinary Tribunal in *Glissan* and the view expressed in that decision that a barrister may always, should the advice not be accepted, return the brief. The Board indicated that it was unable to share that view. It emphasised the cab-rank rule and a client's right to have his or her own rights determined by the court and not by counsel. Specifically, the Board was of the view that Rule 2(b) of the Bar Rules extended to a client deciding to reject counsel's advice to accept an offer of settlement instead of the court determining the issues. The Board was of the view that there was a clear inconsistency between an obligation to appear and the existence of any discretion to withdraw if advice as to settlement is not accepted. Thus Rule 2(b) "would not justify the barrister's conduct in threatening to withdraw his services, even if this threat had occurred long before the hearing" and certainly not in the precincts of the court whilst waiting for the case to be called on (which were the circumstances in this case, even though the chances of it being reached were not good). The Board found the barrister guilty of unsatisfactory professional conduct.

Another member of the Board, who agreed with all of the above, added his own specific observations which ought to be set out in full :

"Counsel has a duty to facilitate and not to frustrate the client's access to the courts. If counsel believes settlement is in the best interests of the client, counsel may seek to persuade the client to settle a case by reasoned argument. The client may

accept counsel's advice. Settlement then becomes the client's preferred course. But the client's access to the courts is frustrated and denied if he is induced by threats or an overbearing attitude to settle contrary to his preferred course. The situation is the more acute in the case of a "spec" brief, that is, where counsel does not expect to be paid a fee unless the case is won or settled. In such a case, counsel is subject to a conflict of interest. If the case is settled he is assured of payment. If it is not, his fee is in doubt. If the case is likely to be lost, he is unlikely to be paid unless the case is settled. In these circumstances, counsel has a special responsibility to avoid excessive persuasion, however altruistic his true motive, lest the standing of counsel be called into question. It is contrary to the public interest that the standing of the Bar should be embarrassed in such a way."

That member's very strong view was that refusal by the client to accept a reasonable offer of settlement is not a ground upon which counsel is entitled to return a brief, including a "spec" brief. He recommended that the matter should be resolved beyond doubt and that the Bar Council should consider amending the rules to that effect.

One other important but incidental matter arose. In the barrister's correspondence with the Bar Association the barrister had made it clear that he had informed the client that unless he received written instructions to refuse the offer he would withdraw from the case. He resiled from that statement in his sworn testimony before the Board. The Board did not find the barrister's evidence before it on this point convincing. In reaching its conclusion that he had threatened to withdraw from the case it necessarily rejected his evidence. Accordingly, this apparently caused the Board "to consider whether it was not obliged to terminate the hearing and refer the complaint to the Tribunal pursuant to S143(3) of the Legal Profession Act". However the Board was of the view that the construction of the statute was such that it was not able to refer to the Tribunal a matter such as that arising in the course of the hearing. One member of the Board recommended that the statute should be amended to enable the Board to make such a reference.

The Board found that the barrister was guilty of unsatisfactory professional conduct, reprimanded the barrister and ordered him to pay the Bar Council's costs of the proceedings.

REPORT OF DETERMINATION OF THE LEGAL PROFESSION STANDARDS BOARD IN MATTER NO. 9 OF 1991

The barrister's client in this case had had a car accident and had made a claim under the *Motor Accidents Act 1988*. A section of that Act provides that if proceedings are commenced more than 12 months after the claim then the claimant must provide a full and satisfactory explanation to the court for the delay. In this case, the time for commencement of the proceedings expired on 21 or 22 January 1991. The barrister had originally been briefed to advise in December 1989. In December 1990 (about a month before the expiry), he had been specifically briefed to draft the statement of claim. There was some evidence to suggest that he had been earlier asked in conference or by telephone to draft the statement of claim.

It was alleged that the barrister was guilty of unsatisfactory professional conduct. The two grounds were failure to draft the statement of claim and failure to respond to the solicitors' communications between December 1990 and June 1991 (when his brief was withdrawn and the complaint made). Both grounds were made out: the Board found unsatisfactory professional conduct, reprimanded the barrister, fined him $750.00, ordered him to pay to the complainant any disbursements incurred on any application for relief under the *Motor Accidents Act* and ordered him to pay the Bar Council's costs of the proceedings.

Some observations made by members of the Board in their reasons for determination should be highlighted.

1. The solicitor thought the time expired before it did. This was suggested in the brief. The barrister claimed that his oversight was therefore not causally related to the failure to file within time because of the solicitor's misunderstanding. This submission was rejected. The Board said that it was the barrister's obligation to come to his own view about whether the claim was barred and to form an opinion independently of the solicitor's observations.
2. Despite the fact that the time ran out in January and the specific instructions were received in December (with the intervention of vacation) there remained an obligation to draft the process as soon as possible. If "anything is to be taken seriously, it is time limitations and applications for relief from non-observance of time limitations".
3. Even if the barrister was under the impression that time had expired, he was under an obligation to draft the process as soon as possible in order to maximise the client's prospects for statutory relief from the time bar.
4. The barrister agreed that his failure to respond between December 1990 and June 1991 amounted to unsatisfactory professional conduct and submitted that a reprimand was the appropriate penalty. The Board did not agree. It set out a series of letters, telephone calls, communications with the barrister's clerk and indications given by the barrister regarding doing the work. There was also a history of unanswered letters and telephone calls before December 1990 going back to at least July 1990. The Board said that delay had to be seen in the context of the urgency of the instructions. In this case, there was a time bar and the work should have been done quickly. The weight given to subjective features on the question of penalty was discounted by one member because of "the frequency and flagrancy of his defaults during the period December 1990 to June 1991". The Board rejected the reprimand submission and imposed the fine.
5. One member of the Board was of the view that once the time limit had expired in the case where the counsel had held the brief for a year then the brief ought to be returned immediately because drafting the process for relief from being out of time represents the barrister with a conflict of interest because of the barrister's contribution to the breach.

RULINGS

Members are reminded that in the event that they require advice on, or a ruling in respect of, any matter (whether apparently covered by the rules or not), they should contact any Senior Member of the Bar Council. In some cases, they will be asked to confirm, in writing, the verbal ruling given and to forward a copy thereof to the Registrar as well as to the silk giving the ruling.

In many instances the request for advice can be dealt with by the Professional Conduct Committee however, usually, because of time constraints, requests are dealt with by the Senior Members. Members are encouraged to use this service whenever they have doubts about which course or option to pursue.

❑ J Poulos QC, R Coolahan, R D Cogswell