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Bar Practice Course final lecture
Banco Court
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"The 'fit and proper' criterion: indefinable, but fundamental"

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Ten days ago, The Australian newspaper ran an editorial in these graphic terms:

> "What the arrogance of the legal fraternity towards its tax obligations reveals all over again is that this is a protected little enclave that has managed to hide behind its guild traditions to avoid the rigours of competition or accountability. For an even better example, how about the fact that barristers, who get rich on the proceeds of negligence suits against other professionals, cannot be sued for negligence by their own clients? What that tells us is that the 'officers of the court' have become adept at exploiting it for their own convenience, and that there is an ethos among those charged with administering the law that they are outside its reach. Apparently, because judges and barristers are initiates into an elite college who by definition do the right thing, it must be the right thing to fall into arrears with the taxation office or avoid tax altogether. Well, for most of us it is not the right thing at all. Highest among the responsibilities expected of barristers and judges, in return for all the privileges they enjoy, is to uphold the laws they are there to interpret, enforce and argue about. Society invests huge resources in the legal system, and once again those who are on the receiving end of those resources are bringing the system into disrepute."

I do not quote those observations because I endorse them, or all of them. They were provoked, largely it seems, by the misconduct of a number of Sydney barristers which emerged three or four years ago. Those barristers reportedly avoided substantial tax liabilities by failing to lodge tax returns, or by resorting to bankruptcy. The matter was brought up-to-date, as it were, by the recently reported revelation that a number of judicial officers, of all people, had defaulted in lodging their returns.

I quote the newspaper's observations for the purpose of illustrating how the dereliction of a few can besmirch a profession generally.

In this profession, we often speak of the dependence of the authority of courts on the respect of the people; we accept that the independent discharge of a barrister's function assumes the confidence of the litigating client; and we acknowledge the inherent fragility of

that respect and confidence – easily fractured, profession wide, by the breaches of only a few.

Of course I do not this evening claim any capacity, by my remarks, to eradicate such recalcitrance. My object cannot reach much beyond emphasizing the depths of the difficulties it creates.

An important basic thesis is that as true professionals, we embrace unique ethical responsibilities not because they are prescribed, or because doing so opens a gateway to financial return, or because if discovered in breach we may be disciplined. We embrace them, I certainly trust, because of a basic sense of refined decency and fairness; and albeit on a lesser plane, because we acknowledge them as a reasonable quid pro quo for the substantial privileges admission to this rank accords.

Do not lose sight of those advantages of the barrister: to appear as of right in courts representing litigating parties, a right accorded no other citizen; to make, in court, statements otherwise defamatory of people, under the cloak of absolute, not merely qualified, privilege; in the interests of fearless honesty, to enjoy immunity from suits in negligence in respect of courtroom performance; and through one’s performance, to promote the rights of the citizen, one against the other; the rights of the individual in relation to the State; the just treatment under the law of the individual pitted in the criminal court against the might of the State; the advancement of the State, possibly, in battles constitutionally against the Commonwealth…This arena is heady at all levels, imposing challenging responsibilities, presenting stimulating experiences. Barristers are generally enthused to meet those challenges.

But let there be no doubt. A bad person cannot be a good barrister. Those “fit” for this role, are imbued with ordinary human decency and fairness, and an acute perception and acceptance of the unique responsibilities which accompany practice at the Bar.

When "fitness" is questioned, courts will inevitably have close regard to any relevant historical record.

Over the last few years, applicants for admission have been required to disclose, to the Court of Appeal, past criminal offending, so that the court is seen to make a properly informed assessment of fitness to practise. In previous times, the admissions boards exercised a broader discretion in this area. The court's greater, more active vigilance, was excited in part by the New South Wales taxation cases. Some complain our current approach is too intrusive, too public. Public confidence being so critical, however, it is I believe extremely important that the court be seen to be addressing these situations up-front, even if disclosing embarrassing details in open court occasions discomfort to the admittee. Unsurprisingly, allowance is made for youthful aberrations and rehabilitation where that is demonstrated.

This more apparent carefulness in the assessment of admission applications was as I have said at least partly inspired by the extraordinary revelation of taxation default on the part of those Sydney barristers about three or four years ago. It was then the Judges amended the forms to render more specific the obligation of disclosure. Most people would have been dumbfounded that such brazen default could be occurring, and by the gross hypocrisy that the offenders should at the same time be presenting themselves as fit to practise as barristers.

As long history shows, courts focus, when admitting new practitioners and monitoring the conduct of those already in practice, on exacting standards of honesty and expert capacity.

The "fit and proper" criterion is of ancient lineage. It dates back to the 5th century Roman Theodosian Code, and its common law application emerged in England in the 13th century Inns of Court (Ross: Ethics in Law 3rd ed, p 132). For this jurisdiction, it was included in the New South Wales 1823 Charter of Justice, and confirmed post-separation by the

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Supreme Court Act 1867. Now there is section 30 of the *Legal Profession Act* 2004: “A person is suitable for admission under this Act as a legal practitioner only if the person is a fit and proper person.” That the Act should trouble to state the obvious in that way, merely confirms the fundamental character of the requirement.

What does it mean? As the terms of my topic suggest, comprehensive affirmative elucidation of its content is futile. Rather curiously, its ambit may more helpfully be gleaned from established instances of unfitness. The concept really involves the exclusion of the category of unacceptable conduct described in general terms in *Allinson v General Council of Medicine* (1894) 1 QB 750, 761 763: “that…in the pursuit of his (or her) profession, (he or she) has done something with regard to it which would reasonably be regarded as disgraceful or dishonourable by…professional brethren of good repute and competency”. That is not, however, a definition: it is no more than a pointer.

On the question of fitness, I embrace *Allinson* with this qualification. Since it is the court which undertakes responsibility to the public for determinations of fitness to practise, the court cannot ultimately be bound by the professional view, influential though it be. The approach in *Rogers v Whitaker* (1992) 175 CLR 479 comes to mind. In recent times, the issue of fitness to practise has aroused some public interest. With professional associations – albeit unfairly – criticized by the media and others as self-serving “guilds”, it is especially important that the court preserve its independence in determining the composition of the profession.

My having said that, it would however be unusual were the view of the court to differ from the predominant mainstream professional view. The Judges, after all, have progressed from the profession to the court.

I do nevertheless emphasize the seriousness with which the court approaches its independent responsibility in admitting new practitioners and disciplining errant

practitioners. The public rightly expects the court to discharge that responsibility with its characteristic objectivity and independence.

Sir Edward Coke in the seventeenth century attempted a definition of fitness, although not specifically referable to the Bar. He said that "a 'fit' person to execute an office, is he – 'qui melius et sciat et possit, officium illud intendere'. This word "idoneus" (is) oftentimes in law attributed to those who have any office or function; and he is said in law to be idoneus, apt and fit to execute his office, who has three things, honesty, knowledge and ability; honesty to execute it truly, without malice, affection, or partiality; knowledge to know what he ought duly to do; and ability, as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or probity neglected" (Dwar. 685).

The most productive enquiry is nevertheless negative in character: absent past infamy, misconduct or incapacity, fitness will generally be presumed. The recent legislation illustrates that dependent relationship between the concept of fitness and the absence of professional misconduct. In determining whether a person is fit and proper as a legal practitioner, section 30 of the *Legal Profession Act* dictates that the court must consider what are styled "suitability matters". Under section 13, those matters include, among many others, whether the person is currently of good fame and character (itself a nebulous and subjective concept), whether the person is or has been an insolvent, whether the person has been convicted of an offence, whether the person is currently subject to an unresolved complaint of disciplinary action, and so on.

Another way of approaching this criterion of fitness is to assess it against the essential character of the profession. In his work "Law and Conduct of the Legal Profession in Queensland", Professor Walter Harrison recorded Lord Bolingbroke's description of the legal profession, offered in 1739, as "in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious"; and Lord Maugham's later observation that lawyers are "the custodians of civilization, than which

there can be no higher or nobler duty". Then Professor Harrison offers this view of his own (taken from G N Williams' second edition, p 23):

> "Civilization rests on social order, and social order rests on the maintenance of the law. Hence throughout the ages the law has ranked as a high calling, because it serves the most fundamental needs of the community, order and justice, and because at its best it calls for the highest qualities of character and intellect. At the same time lawyers have always been the object of criticism and sneers; for they do not all attain the highest ethical standards expected of them, and those who fall short are condemned even for conduct which is condoned, or in a way admired, in other callings."

It is hardly surprising that following a calling of such nobility and significance should entail high standards of personal probity and performance.

The professional milieu of the barrister in particular is unique for the interaction among four players: barrister, court, client and public, with the barrister owing duties respectively to the other three. As classically put by Sir Frank Kitto in *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 297-8;

> "…the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar."

Those sentiments were expressed almost 50 years ago, but they remain definitive and completely applicable today. As said recently by Spigelman CJ in *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, 284:

> "Even in a period where other values have become of significance to the regulation of the legal profession – I refer particularly to the application of

> competition principles and professional regulation – the traditional professional paradigm still has a vitality of abiding significance. Neither the relationship of trust between a legal practitioner on the one hand, and his or her clients, colleagues and the judiciary on the other hand, nor public confidence in the profession, can be established or maintained, without professional regulation and enforcement…Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those appearing before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice."

It is of course the barrister's duty to the court which in part accounts for his or her being styled an "officer of the court". That designation carries with it an unspoken acknowledgement of the court's ultimate control of the practitioner's destiny: the court admits, and as appropriate, suspends, disbars or otherwise disciplines. The court bears a substantial responsibility to the public in accrediting lawyers in that way.

It is this kinship with the court – in terms of the continuance of the qualification, and the manner of its discharge – which distinguishes the barrister from most other professionals, whose orientation is almost completely in support of the client. Those bent on gratuitous criticism sometimes complain of undue closeness between court and profession. A moment's dispassionate consideration highlights the public benefit of this carefully crafted regime, and it is one which should be upheld, not disparaged.

The flavour of the concept of fitness may be discerned from some examples of infraction. Mr Ziems, for example, was a senior barrister who killed a motor cyclist while Ziems was driving his car back to Sydney from a circuit in Newcastle. Ziems was under the influence of liquor at the time. The High Court ordered that he be suspended, although Sir Owen Dixon would have disbarred him. Dixon CJ said (pp 285-6):

> "If counsel is adequately to perform his functions and serve the interests of his clients, he should be able to command the confidence and respect of the court, of his fellow counsel and of his professional and lay clients. When a barrister is justly convicted of serious crime and imprisoned the law has

> pronounced a judgment upon him which must ordinarily mean the loss by him of the standing before the court and the public which, as it seems to me, should belong to those who are entrusted with the privileges, duties and responsibilities of an advocate…"

Ziems' unfitness, at least for the period of the suspension was, you may feel, plain. Plainly unfit for the Bar, for a term of any duration, is a person prone to tell lies. I say that notwithstanding some popular cynicism fed by lines like these from Mark Twain: "What chance has the innocent, uncultivated liar against the educated expert? What chance have I against a lawyer?"; and notwithstanding portrayals like Jim Carey's in the film "Liar Liar" (cf. Ross, p 141).

Other examples of departures from the acceptable standard were usefully offered by the High Court in *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186, 198-201. But the court first pointed out, and importantly, that most of the constraints on a barrister are not to be found in written ethical rules and documentary codes, but are simply incidents of "common decency and common fairness". A similar point was put slightly differently by another commentator: we should act ethically even though no rule requires it (cf. Professor Patrick Schiltz: "On Being Happy, Healthy and Ethical", (1999) 52 Vanderbilt Law Review 871, 909).

The court in *Clyne* expressed the matter in this way:

> "To the Bar in general it is more a matter of 'does not' than of 'must not'. A barrister does not lie to a judge who relies on him for information. He does not deliberately misrepresent the law to an inferior court or to a lay tribunal…he does not, in cross-examination as to credit, ask a witness if he has not been guilty of some evil conduct unless he has reliable information to warrant the suggestion which the question conveys."

Those examples are obvious enough. But dereliction can occur in much more subtle forms, should the practitioner lack moral fibre; as put colourfully in ex parte *Tziniolis* (1966) 84 WN (Part 2) NSW 275-300, by exhibiting an "inability to withstand the importunings of

the evilly disposed", or a "propensity to exploit the gullible". One would question the "fitness" of a barrister who invited the client to swear a supplementary affidavit supplying a "missing link" – though confident it was never there; or who yielded to the client's urgings, or perhaps insistence, to call witnesses who the barrister knew could not give relevant evidence; or who put to a witness that he or she was dishonest or partisan, where there was no reasonable basis for that view; or who accepted a brief in an area knowing it was beyond his or her expertise and capacities.

The barrister's duty, as explained by the House of Lords in *Rondel v Worsley* (1969) 1 AC 191, 272, points to the considerable potential for tension in the client, tension which must however be endured. As put by Lord Pearce, it may be hard for the barrister "to explain to a client why he is indulging in what seems treachery to his client because of an abstract duty to justice and professional honour." One may see that arising where the barrister rejects "a legal or factual point taken in his favour by the Judge, or (removes) misunderstanding which is favourable to his own case"; likewise where the barrister insists on the disclosure of a document which the client appreciates may be nearly fatal to his or her case.

The more recent cases provide contemporary illustrations of the exacting standard expected of a barrister, and I mention the political activist and journalist Wendy Bacon (1981) 2 NSWLR 372, and Kate Wentworth who unsuccessfully took her case for admission to the High Court.

My purpose this evening has been to offer only a few examples of misconduct or unsuitability, in order to illuminate the concept of fitness. The case law certainly discloses a rather colourful collection of circumstances, including this Supreme Court's ruling in 1941 that the sympathies of Mr Max Nordau Julius for the Communist Party did not condemn him as unfit for the Bar ((1941) St R Qd 247).

Some of you, ladies and gentlemen, have already been admitted as legal practitioners. The court has already adjudged you fit and proper to join that rank. You will be alive, of course, to the need to maintain that fitness. It is recent graphic examples of practitioners who have failed in that regard, which have provoked editorial comment of the character mentioned at the outset.

One of the best known recent cases is that of *Cummins*, the New South Wales barrister who failed to lodge a taxation return for 38 consecutive years, misconduct described in the New South Wales Court of Appeal as "an inexcusable pattern of illegal conduct in complete defiance of his civic responsibilities" (p 286). For those who may be tempted to think that tax evasion is in this country a game which will, in the spirit of things, be condoned or overlooked, or who are emboldened by that reckless claim that the payment of income tax is optional, the warning of Mason P in *New South Wales Bar Association v Hamman* (1999) NSW CA 404, para 85 is salutary:

> "I emphatically dispute the proposition that defrauding 'the Revenue' for personal gain is of lesser seriousness than defrauding a client, a member of the public or a corporation. The demonstrated unfitness to be trusted in serious matters is identical. Each category of 'victim' is a juristic person whose rights to receive property are protected by law, including the criminal law in the case of dishonest interception. 'The Revenue' may not have a human face, but neither does a corporation. But behind each (in the final analysis) are human faces who are ultimately worse off in consequence of fraud. Dishonest non-disclosure of income also increases the burden on taxpayers generally because rates of tax inevitably reflect effective collection levels. That explains why there is no legal or moral distinction between defrauding an individual and defrauding 'the Revenue'."

May I conclude with these brief observations?

I hope you may rarely need to read the ethical rules of the Bar Association, or the analysis of fitness, in the context of misconduct, offered by the cases to which I have referred this evening. Your innate sense of what is right, together with an appreciation of your duty as counsel, should render that unnecessary.

Inevitably and unfortunately, human nature being what it is, practitioners will continue to breach their ethical and other obligations, exhibiting unfitness for practice; and the profession overall will inevitably thereby be degraded. Remember the poet John Donne’s lines about the dependence of the whole on each part.

But there is equally no doubt that the conscientious dedication of the vast majority will preserve the profession, and at least generally maintain the public confidence on which it depends, as well as the confidence of the judiciary, and the respect of the litigants.

Just as the Bar is uniquely challenging, I hope, ladies and gentlemen, that you will also, as the years ensue, find it uniquely fulfilling.