Civility and Professionalism - standards of courtesy

"The more I have to do with lawyers, the more I feel as if I had been compelled to take a voyage down a sewer in a glass-bottomed boat."
Thomas Wolfe (1900-1938), American novelist (Look Homeward, Angel), in a letter in 1937 to Maxwell Perkins, the renowned editor of Wolfe, Fitzgerald, Hemingway, and other writers.

1. INTRODUCTION

At the Opening of Law Term dinner in 2006 Chief Justice Jim Spigelman of the Supreme Court of New South Wales, in his annual address to the legal profession, made several poignant remarks about the decline in the standard of civility in society today. According to the Chief Justice, society on the whole is witnessing a general deterioration in manners and respect which is evidenced by a failure to use the common words of courtesy such as "please", "thankyou" and "sorry". Noting that commercial pressures are threatening the the traditions of courtesy and respect, the Chief Justice called for a zero tolerance approach to this decline in social graces.

The OLSC experience reveals that allegations of discourtesy about practitioners are frequent despite the positive obligation on all practitioners in Australia to ensure that their communications are courteous and that each practitioner avoids offensive or provocative language or conduct.[1]

In the period between July 2000 and June 2006, the OLSC received 523 complaints alleging practitioner rudeness. The frequency of these complaints is reasonably constant and averages just under 90 complaints annually. The majority of complainants are clients complaining about their own representative. There are also a significant number of complaints by other practitioners and an increasing number from judges who, despite the control they may exercise over their court, are showing an increasing desire for the regulator to be involved in breaches of communication standards.

The majority of these complaints are dismissed by the relevant disciplinary bodies on the basis that the conduct is unlikely to amount to unsatisfactory professional conduct or professional misconduct. Such dismissals are premised upon the following facts:

---

[1] **ACT** - Law Society of the Australian Capital Territory Professional Conduct Rules Rule 25; **NT** - Law Society of the Northern Territory Rules of Professional Conduct and Practicer Rule 18; **NSW**- Law Society of New South Wales Professional Conduct and Practice Rules Rule 25; **QLD** - Solicitors' Handbook Rule 18.00; **SA** - Rules of Professional Conduct & Practice Rule 21; **WA** - Professional Conduct Rules Rule 18.1; **VIC** - Professional Conduct and Practice Rules Rule 21.

- In NSW, Rule 25 of the Solicitors Professional Conduct and Practice Rules (Communications) refers to communications with other practitioners. Unlike the Queensland rule[2], there is no formal direction in relation to communication with clients.
- Rule 25 requires a practitioner to "avoid offensive or provocative language" and the boundary beyond which language becomes "offensive" or "provocative" shifts.
- Determinations in NSW in relation to allegations of discourtesy have set the hurdle at a particularly high level.

This paper explores current standards established by the interpretation of the professional conduct rules in a variety of jurisdictions, recent shifts in those standards evidenced by an examination of recent case law from other jurisdictions and presents recommendations for a more robust approach by regulators to complaints of discourtesy.

2. CURRENT STANDARDS

(a) The Rules in Australian jurisdictions

In New South Wales the obligation of courtesy is found in Rule 25 of the New South Wales Revised Professional Conduct and Practice Rules (Practice Rules). Rule 25, based upon the Law Council of Australia Model Rule[3], states as follows:

> "A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct."

The Statement of Principles prefacing the section of the Rules dealing with Relations with Third Parties states:

> "Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest."

In addition to the Conduct Rules, practitioners in New South Wales have a statutory obligation under clause 175 of the *Legal Profession Regulation 2005* to refrain from discriminatory or harassing behaviour.

---

[2] Rule 18 Queensland Handbook

[3] www.lawcouncil.asn.au/policy/1957352449.html

The same or similar practice rules as in New South Wales can be found in a number of other Australian jurisdictions (Victoria (Rule 21), Australian Capital Territory (Rule 25), Western Australia (Rule 18.1) and South Australia (Rule 21)).

In the Northern Territory the Rules of Professional Conduct state that a practitioner has a duty of courtesy as set in Rule 25 but there are additional statutory obligations to act with honesty, fairness and courtesy in dealings with other practitioners (s44(1)(c)(iii) *Legal Practitioner Act*) and with members of the community and clients (s44(1)(c)(iv)).

In the Queensland Rules, Guidelines 4.08 and 18 of the Solicitor's Handbook provide:

> 4.08 A practitioner shall not attempt to further the client's case by unfair or dishonest means. A practitioner shall at all times act and conduct himself/herself in relation to the practice in a dignified and responsible manner consistent with the standing of the profession.
>
> 18 The integrity of the profession and its good name with the public depend in a large part upon the maintenance and enforcement of high standards of professional conduct by the profession and those employed in the profession.

(b) The cases in Australian jurisdictions

Summaries of cases referred to are appended to this paper.

In New South Wales there have only been three cases over the last forty years in which the disciplinary tribunal/committee has considered the behaviour of a practitioner on grounds of discourtesy.[4] The first of these matters concerned behaviour towards members of the public and other practitioners during the course of practice, the second concerned conduct towards another practitioner within the court precinct whilst the third case concerned the behaviour of a practitioner during the course of a trial.

In the matter of *Constantine Karageorge*, there were 6 counts of using offensive and racist language and threatening behaviour to members of the public and to other practitioners. The Statutory Committee found that the language used by Karageorge was "grossly offensive" and expressed the view that Karageorge's conduct was "disgraceful and dishonourable and amounted to professional misconduct." Karageorge was found guilty of professional misconduct by the Solicitors Statutory Commmitee and fined $5,000.

---

4 *In the matter of Constantine Karageorge* No.12 of 1986; *New South Wales Bar Association v Jobson* [2002] NSWADT 171 and *New South Wales Bar Association v di Suvero* [2000] NSWADT194 & 195.

In the matter of *New South Wales Bar Association v Jobson*, the conduct impugned was offensive language along with physical intimidation by a barrister towards a solicitor. The Tribunal was satisfied that the conduct amounted to unsatisfactory professional conduct and the barrister was publicly reprimanded.

In *New South Wales Bar Association v di Suvero*, the conduct that was challenged included the barrister making statements that were discourteous to the court, disrespectful to the presiding judge and offensive to the Crown Prosecutor. A finding of unsatisfactory professional conduct was made and the barrister's practising certificate was suspended for 6 months. The Tribunal's decision was upheld on appeal.

In the ACT, the Professional Conduct Board of the Law Society in 2001 found a solicitor guilty of unsatisfactory professional conduct and issued a reprimand in relation to offensive correspondence from the solicitor to an expert medical witness.

Practitioners in Victoria have been disciplined for prolonged offensive correspondence, aggressive and threatening behaviour, physical threats of assault and actual assault as well as sexual misconduct.

In 1992 the Solicitors Board in the matter of *Victor Horoch*[5] found Horoch guilty of professional misconduct in relation to continued offensive and discourteous correspondence to fellow practitioners and the Law Institute of Victoria and a threat of physical assault toward a fellow practitioner at the Magistrate's Court. He was reprimanded.

In the matter of *Basil Stafford*, the barrister angrily confronted a police witness within the court precinct. The Tribunal held that the barrister's behaviour was "sudden and very startling to the policeman." According to the Tribunal the barrister's behaviour was "aggressive and threatening" and "very serious".[6] The Tribunal considered that the barrister's behaviour was conduct "which is likely to diminish public confidence in the legal profession and otherwise to bring the legal profession into disrepute. Accordingly, the Tribunal found the barrister guilty of misconduct and imposed a fine of $1,000.

In the matter of *Trevor J McLean*[7], the Legal Profession Tribunal found McLean, another barrister, guilty of professional misconduct for assaulting another practitioner in the courtroom. The Tribunal expressed the view that the fact that the assaults took place within the confines of a court was extremely significant and commented that the barrister's behaviour was discreditable and was likely to diminish public confidence in the profession and likely to bring the profession into disrepute. The barrister was fined $2,000.

---

[5] No. 880 of 1992.
[6] T0603 of 1997
[7] T0034 of 2001.

In 2004, in the matter of *David Anthony Perkins*[8], the Legal Profession Tribunal found Perkins, a barrister, guilty of professional misconduct for using offensive language whilst applying to have the presiding member of the Victorian Civil and Administrative Tribunal disqualify himself from hearing a matter in which Perkins was appearing. The Legal Profession Tribunal held that Perkins conduct was "intemperate and vituperative" and that his conduct was discreditable to a barrister, prejudicial to the administration of justice and likely to bring the profession into disrepute. Accordingly, Perkins was reprimanded and suspended from practice for three months. Prior to the Tribunal's finding Perkins had been found guilty of contempt of court and fined $2,500 by the Victorian Civil and Administrative Tribunal.[9]

Again in 2004 in the matter of *Paul Reynolds*[10], the Legal Profession Tribunal suspended Reynolds, a barrister, from practice for six months for making sexual advances toward a client during a pre-trial conference. The Tribunal held that Reynolds had wilfully or recklessly engaged in conduct which was discreditable to a barrister contrary to Rule 4(a) of the barristers's rules and that Reynolds had engaged in conduct that was likely to bring the profession into disrepute.

In Western Australia the Legal Practitioners Complaints Committee appear readily prepared to deal with uncivil and offensive conduct by legal practitioners. The Committee can deal with a matter in the exercise of its summary professional disciplinary jurisdiction and will do so in cases of a lower level of seriousness. The findings of the Committee are published in their Annual Report although the names of the practitioners are not reported. Conduct matters dealt with by the Committee have included the following:

- Failing to act with due courtesy to the Court – the practitioner was reprimanded;
- Sending a client two letters that were discourteous – the practitioner was fined $500;
- Sending a fellow practitioner three letters that were discourteous – the practitioner was fined $400;
- Speaking about a complainant in offensive terms and using coarse language – the practitioner was reprimanded;
- Sending a letter which was intemperate in language – the practitioner was reprimanded and ordered to pay the Committee's expenses of $1,000.

More serious allegations involving rude and offensive behaviour are referred to the disciplinary tribunal.

In the matter of *Michael David Cole*, the practitioner was found guilty by the Legal Practitioners Disciplinary Tribunal of unprofessional conduct for gross discourtesy in sending three letters containing "strong criticisms, serious

[8] T0070 of 2004.
[9] [2000] VCAT 57.
[10] T0030 of 2004.

allegations and dismissive descriptions in mocking or ironic language against the employer's insurer's solicitors about their conduct in opposition to the workers claim." The practitioner was fined $500 and ordered to pay the Complaints Committee's costs of $3,500.

In the matter of *Mr CL Lovitt QC*[11], the practitioner was found guilty of unprofessional conduct for three exchanges with a trial judge during the course of a criminal trial in which the practitioner was representing the accused. The Tribunal in finding the practitioner guilty of unprofessional conduct held that each of the exchanges by the practitioner were "intemperate, clearly and unfairly reflecting on the objectivity of the bench and in a way which was extremely discourteous and offensive."[12] According to the Tribunal the relevant punishment was a reprimand given the practitioners longstanding service in the legal profession; and the practitioners deep and genuine concern to protect his clients. The practitioner was also ordered to pay the costs of the complaint of $4,975.

In a second judgment, the same practitioner was also found guilty of unprofessional conduct for his conduct during a trial in which he represented another accused in an unrelated criminal matter in 1995.[13] During this trial the practitioner again had exchanges with the presiding officer which suggested the judge was biased and he used readily heard offensive language within the court. Again the practitioner was reprimanded and ordered to pay the costs of the complaint of $4,975.

In the matter of *Mr A Shand QC*, the practitioner, a Sydney barrister was found guilty by the Tribunal of unprofessional conduct for his conduct during a directions hearing in which he sought to have the Magistrate removed. When questioned by the Tribunal about his conduct the practitioner said that he believed his submissions were both necessary and appropriate. The practitioner also advised the Tribunal that he was instructed to make the submission. In finding the practitioner guilty of unprofessional conduct and reprimanding him the the Tribunal held that it was no defence that the practitioner had received instructions to make the submission.

In the matter of *Colin Robert McKerlie*[14], the Tribunal found the practitioner guilty of three counts of unprofessional conduct for treating fellow practioners with discourtesy and writing offensive correspondence to those practitioners. The practitioner was fined $500 for each count and ordered to pay $3,000 in costs.

In recent matter of *Quigley*, the practitioner was found guilty of unprofessional conduct for his intimidating and threatening behaviour to the Complaints Committee whilst they were investigating a complaint against him about

---

[11] Mr CL Lovitt QC, Disciplinary Hearing, Report of Proceedings, Legal Practitioners Disciplinary Tribunal, R1 of 1997

[12] Id at 3

[13] Mr CL Lovitt QC, Disciplinary Hearing, Report of Proceedings, Legal Practitioners Disciplinary Tribunal, R7 of 1997.

[14] *Colin Robert McKerlie*, R15 of 1997.

comments he had made on a radio programme in 2000[15]. In finding the practitioner guilty of unprofessional conduct the Tribunal held that there was no reasonable basis, or any basis, to the practitioner's allegations that the Complaints Committee, its members or the Law Complaints Officer had at any time acted with an improper purpose in bringing and maintaining the earlier disciplinary proceedings against the practitioner. The Tribunal further held that the practitioner's behaviour was conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence.[16] The question of penalty was reserved.

The Queensland Law Society and Legal Services Commissioner advise that complaints alleging rudness and discourtesy are not infrequent. In the past 4 months, for example, the Client Relations Centre at the Law Society of Queensland has dealt with 10 informal complaints concerning rudeness (either verbally or in correspondence). The 10 complaints broadly concerned as follows: a complaint by a practitioner about another practitioner's derogatory personal remarks in correspondence; a complaint by a party that a practitioner verbally abused during mediation proceedings; two complaints by practitioners on behalf of clients who had received threatening/defamatory letters of demand; three complaints by third parties who had received threatening letters from practitioners; one complaint by a partner about a practitioner (his employee) who had verbally abused and threatened him with violence; one complaint about a practitioner who had used offensive language in a letter to a client declining to take on a case; and one complaint by a financier about a practitioner verbally abusing the financier during a conveyancing transaction. In 4 of these matters the complainant was advised to initiate a formal complaint. The other 6 complaints were resolved by involving a Mananging Partner of the relevant firm.

Despite the evidentiary difficulty in proving rudeness and discourtesy in oral form, there have been some notable disciplinary cases in Queensland.

In December 1997 the Professional Standards Committee resolved to censure a practitioner for sending correspondence to former clients that was "unduly abusive and acrimonous" and warranted the practitioner being censured pursuant to Rule 82(4) of the Rules of the *Queensland Law Society Incorporated.*

In *Legal Services Commissioner v Shelly Lynn Johnson*[17], the practitioner, Johnson, was found guilty by the Legal Practice Committee of Queensland for using offensive and insulting language toward another party in a property dispute. The conduct in question involved the practitioner commenting to the opposing party whilst attending his residence on behalf of her client to collect various personal possessions of her client, "You are a grotesquely ugly man. I can't believe that Caroline would have been with someone as ugly as you." The Legal Practice Committee held that the practitioners comments were

[15] Legal Practitioners Complaints Committee v John Robert Quigley[2005] WASAT 215.
[16] Id at 35
[17] *Legal Services Commissioner v Shelly Lynn Johnson,* 006/05.

offensive and fell short of acceptable professional behaviour expected from a legal practitioner.

In a recent case the Legal Practice Tribunal found a practitioner, Michael Baker[18], guilty of two counts of unprofessional conduct for using crude, insulting and offensive language to and whilst in the presence of a client and to other members of his firm. The allegations of rudeness were made together with a number of other allegations about the practitioner's conduct including dishonestly charging professional fees and disbursements. The practitioner was ultimately, for this and his other conduct, struck off the Roll of Legal Practitioners.

In another recent case in Queensland, *Legal Services Commissioner v Peter Arnold Murrell*[19], a practitioner was found guilty of unsatisfactory professional conduct for using hostile language in correspondence with the opposing party in a professional negligence claim. The practitioner did not have any instructions from his client to write the letter. The practitioner, a bankrupt, who had pleaded guilty was fined $2,000 with 12 months to pay .

The Law Society of the Northern Territory reported that there have been very few complaints concerning rudeness and discourtesy by practitioners.

In one complaint a practitioner was found guilty of unprofessional conduct in that she breached Practice Rule 1 and 10A.1 by failing to keep her client informed at regular intervals or as requested of the progress or lack of progress toward the resolution of the client's matter. The conduct consisted of the practitioner writing to the client in derogatory and offensive terms using expressions such as: "...Do not call me as your call would most certainly not be welcome...you are the most paranoid, pathetic client I have ever encountered..."; "I suggest you get a life, as I now understand why the offender in your matter would have felt compelled to slot you." And "I otherwise confirm the settlement amount exceeded your expectations ...for which you have expressd all the gratitude of a mangy dog with the heart the size of a split pea, with grub in it." The practitioner was fined 7 penalty units ($770.00).

In another matter, a current file which has not yet been determined, the practitioner is alleged to have told the complainant, a fellow practitioner, to "f--- off" after a conciliation hearing. If found guilty the likely penalties, according to the Law Society of the Northern Territory will be admonishment and a fine of between 5 and 10 penalty units.

In a third matter which was recently dismissed, the complaint made by a third party on behalf of a young indigenous client, alleged that the practitioner had failed to properly advise the client of bail conditions following completion of a criminal matter and that the practitioner was "culturally insensitive" because

---

[18] *Legal Services Commissioner v Michael Vincent Baker* [2005] LPT 002

[19] *Legal Services Commissioner v Peter Arnold Murrell*, 007/05.

he had walked in front of the client when they walked from the practitioner's office to the court. The complaint was dismissed on the merits.

(c) The Rules in overseas jurisdictions

The obligation to be civil and courteous is a core requirement of practitioners and is found in the practice rules of many jurisdictions overseas. In addition to these practice rules the obligation is also stipulated in the International Code of Ethics of the International Bar Association of which Australia is a member.[20]

(i) New Zealand

In New Zealand, Rule 6.01 of the Rules of Professional Conduct for Barristers and Solicitors provides that a practitioner "must promote and maintain proper standards of professionalism in relations with other practitioners."[21] The Commentary to this Rule, which is quite elaborate, gives detailed instructions as to the type of behaviour expected of a practitioner:

> "(1) A practitioner shall treat professional colleagues with courtesy and fairness at all times but consistent with the overriding duty to the client.
>
> (2) No practitioner shall discriminate against or treat unfairly any other practitioner by reason of the prohibited grounds of discrimination as set out in section 21 of the Human Rights Act 1993.
>
> (3) There are many occasions when a practitioner needs to rely on information given by another practitioner. Professionalism demands that such reliance should not be misplaced. Whether the information is given in writing, or orally, or is in the form of an oral or written undertaking, the practitioner receiving the information or undertaking is entitled to be able to rely and act on it with impunity.
>
> (4) Wherever possible oral undertakings should be avoided in favour of written undertakings - see Rule 6.07(2) following.
>
> (5) Practitioners should not communicate or correspond in an atmosphere of acrimony or discourtesy notwithstanding the nature of the relationship between their respective clients.
>
> (6) While it is not always possible to take telephone calls from another practitioner, such calls should be returned at the earliest opportunity.

---

[20] Rule 4 of the International Code of Ethics states as follows: "Lawyers shall treat their professional colleagues with the utmost courtesy and fairness": see International Code of Ethics, International Bar Association, available at http://www.ibanet.org/publicprofinterest/Professional_Ethics.cfm

[21] See Chapter 6 of the New Zealand Rules of Professional Conduct for Barristers and Solicitors, available at http://www.lawyers.org.nz/about/profcon6.htm

The duty to act professionally is reinforced in Rule 8.03, which provides that a practitioner must "in the conduct of litigation, as in all legal dealings, treat other practitioners with courtesy."[22] The Commentary to this Rule requires the practitioner to avoid making "disparaging or derogatory remarks or comments" in court or in chambers about another practitioner. In addition to Rule 8.03, Rule 11.09 specifically refers to the barrister and his/her duty to treat other practitioners with "courtesy and fairness."[23] There is no equivalent Rule in relation to a practitioners' dealings with third parties other than a requirement in Rule 7.01 that a practitioner should treat an unrepresented party with courtesy and fairness."[24]

In relation to practitioners' dealings with the court or tribunal, Rule 8.01 provides as follows:

> "In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the court or the tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client."

Included in this duty, is according to the second paragraph of the Commentary to this Rule the duty to be courteous.

In addition to the courtesy rules, the New Zealand rules also contain practice rules about refraining from behaviour that would cause embarrassment distress or inconvenience to reputation[25] and use demands or threats for the purpose of blackmail.[26]

The New Zealand Law Practitioners Disciplinary Tribunal has recently heard two matters in relation to complaints of offensive behaviour. Summaries are appended to this paper. In the matter of Harder, by consent, the practitioner's name was struck from the Roll for lewd and offensive behaviour.

(ii) The United States

In the United States the Model Rules of Professional Conduct[27] do not explicitly require lawyers to be civil, civility is however indirectly "encouraged" through various rules. The Rules of Professional Conduct state the minimum level of conduct below which no lawyer should fall. For example, Rule 3.5(d) prohibits conduct intended to disrupt a trial[28], whilst Rule 8.4(d) prohibits

[22] See Chapter 8 of the New Zealand Rules of Professional Conduct for Barristers and Solicitors, available at http://www.lawyers.org.nz/about/profcon6.htm
[23] See Chapter 11 of the New Zealand Rules of Professional Conduct for Barristers and Solicitors, available at http://www.lawyers.org.nz/about/profcon6.htm
[24] See Chapter 7 of the New Zealand Rules of Professional Conduct for Barristers and Solicitors, available at http://www.lawyers.org.nz/about/profcon6.htm
[25] See Rule 7.04, Chapter 7, Id
[26] See Rule 7.05,Chapter 7, Id
[27] For a copy of the Rules see http://www.abanet.org/cpr/mrpc/mrpc_toc.html
[28] See http://www.abanet.org/cpr/mrpc/rule_3_5.html

conduct prejudicial to the administration of justice.[29] The Model Rules do not define the type of conduct that would constitute misconduct "prejudicial to the administration of justice." Rule 3.4 establishes an ethical duty in the discovery process, prohibiting a lawyer from obstructing another lawyer's access to evidence and from failing to comply with a discovery request by the opposing party.[30] Lastly, Rule 4.4 prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay or burden a third person.[31] Rule 4.4 extends not just to behaviour within a courtroom but also to behaviour during the discovery process, and in particular, depositions.

In addition to the Model Rules numerous state supreme courts and state bar associations have developed codes of professional conduct to emphasize the role and importance of civility in the legal profession.[32] The impetus for developing such codes resulted from a study by the National Conference of Chief Justices in 1999 at the request of former Chief Justice Warren E. Burger who expressed concern about the lack of civility in courtrooms across the United States. The study of Chief Justices recommended in their Final Report that each state establish a Commission on Professionalism or other agency under the direct authority of the appellate court of highest jurisdiction.[33] The Final Report also recommended that each jurisdiction adopt a set of standards for professional conduct. The Standards for Professional Conduct within the Seventh Judicial Circuit, the first aspirational civility code was soon after adopted setting the example for the other States.

Codes of Professional Courtesy are today commonly used in conjunction with a State's relevant conduct rules to discipline lawyers for uncivil behaviour. Although compliance with these codes is voluntary, a violation of the Code may in some circumstances amount to a violation of the relevant rules of professional conduct. This is largely because civility codes are attributed the "force of law" by judges in the United States who value "courtesy to brother lawyers above 'entire devotion to the interests of the client [and] warm zeal in the maintenance and defense of his rights." [34]

The purpose of these aspirational codes is to promote a high level of professional courtesy and to improve professional relationships.[35] The Codes address relations between lawyers themselves and relations between lawyers and their clients.[36] In South Carolina they have not only developed a Guide to assist practitioners but also require lawyers to take a one hour civility class

---

[29] See http://www.abanet.org/cpr/mrpc/rule_8_4.html
[30] See http://www.abanet.org/cpr/mrpc/rule_3_4.html
[31] See http://www.abanet.org/cpr/mrpc/rule_4_4.html
[32] See Justice Michael J. Wilkins, *"Supreme Court Adopts Professionalism Standards"*, 16 Utah B.J. 31 (2003).
[33] Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441 (1992).
[34] See Monroe Freedman, "Civility Runs Amok, Legal Times, Aug. 14, 1995, at 54 cited in The Hon. Marvin E. Aspen, "*A Response to the Civility Naysayers*", 28 Stetson L. Rev. 253 (1998) at 257.
[35] For a list of the Guidelines/Codes see http://www.abanet.org/cpr/profcodes.html

[36] See for example, the Code adopted by Arizona entitled "A Lawyer's Creed of Professionalism of the State Bar of Arizona." (Appendix 2).

and retake their oath saying: *"To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."*[37]

Whether or not these Codes are having some positive effect on the profession is a matter of lengthy debate amongst United States academics[38] but there are some noticeable signs of improvement, or at least recognition that uncivil behaviour is no longer acceptable. Intolerance for unprofessional and uncivil conduct is appearing in the courts across the United States with more frequency. Many cases concern the use of insulting and obstructive tactics during depositions. It appears that litigants and courts alike seem to be less willing to tolerate such uncivil conduct and will readily ask the court to intervene. The positive effect of these cases has meant that there exists a readily identifiable standard by which uncivil behaviour can be measured.

Appended to this paper are examples of the worst types of behaviour demonstrated by lawyers in the United States during the litigation process. They are divided into 3 categories of conduct that appears to typically warrant discipline, disruptive deposition tactics, egregious conduct including physical assault and discriminatory bias based on gender, religion or ethnicity.[39] In the majority of these cases the courts have relied on Rule 8.4 of the ABA Model Rules of Professional Conduct (discussed above), to sanction the lawyers.

(iii) The United Kingdom

The professional conduct rules of the United Kingdom and Wales neither specifically refer to a duty of courtesy nor a duty to avoid using offensive language. Instead the rules contain a number of general principles that, when interpreted widely, mandate courtesy and professionalism. Rule 1 of the *Solicitors Practice Rules 1990* provides that a practitioner must not do anything in the course of practising as a solicitor that would compromise or impair the following:

(a) the solicitor's independence or integrity
(b) a person's freedom to instruct a solicitor of his or her choice
(c) the solicitor's duty to act in the best interests of the client
(d) the good repute of the solicitor or of the solicitor's profession
(e) the solicitor's proper standard of work

---

[37] Talkleft, *S.C Lawyers in need of charm school* 26 February 2005, available at http://www.talkleft.com/new_archives/009846.html

[38] See for example, Christopher J. Piazzola, "Ethical Versus Procedural Approaches To Civility: Why Ethics 2000 Should Have Adopted A Civility Rule", 74 U.Colo. L. Rev. 1197 (2003) at 1221 who argues at 1235, that civility codes are unhelpful because they may create conflicting ethical obligations beyond the minimum requirements of professional ethical rules; The Hon. Marvin E. Aspen, "A Response to the Civility Naysayers", 28 Stetson L. Rev. 253 (1998).

[39] See Christopher J. Piazzola, "Ethical Versus Procedural Approaches To Civility: Why Ethics 2000 Should Have Adopted A Civility Rule", 74 U.Colo. L. Rev. 1197 (2003) at 1221.

(f) the solicitor's duty to the Court. [40]

According to Principle 17.01, note 6, of *The Guide to the Professional Conduct of Solicitors 1999* (The Guide), it is a breach of Rule 1 to for a solicitor to write offensive letters to third parties.[41] The same principle applies to offensive behaviour. Principle 17.01 of the Guide provides that a practitioner "must not act, whether in their professional capacity or otherwise, towards anyone in a way which is fraudulent, deceitful or otherwise contrary to their position as solicitors. Nor must solicitors use their position as solicitors to take unfair advantage either for themselves or another person."[42] The Guide also states that it is a breach of Rule 19.01, note 3, to write offensive letters to other practitioners:

> "A solicitor must maintain his or her personal integrity and observe the requirements of good manners and courtesy towards other members of the profession or their staff, no matter how bitter the feelings between clients. A solicitor must not write offensive letters to other members of the profession."[43]

In relation to answering letters from practitioners and former clients, Principle 19.03 of the Guide requires practitioners to acknowledge the receipt of a letter from another practitioner as a matter of courtesy, whilst Principle 12.10 provides that a practitioner should deal promptly with communications relating to the matter of a client or former client.

The duty to act courteously is specifically referred to in *The Law Society's Code for Advocacy* (Advocacy Code).[44] Rule 6.1 of the Advocacy Code provides that an advocate "must in all their professional activities be courteous and act promptly, conscientiously, diligently and with reasonable confidence and take all reasonable and practical steps to avoid unnecessary expense or waste of the court's time and to ensure that professional engagements are fulfilled." In addition to Rule 6.1 the Advocacy Code also states that a practitioner must not make statements or ask questions of a witness or another person that are "scandalous or intended or calculated only to vilify, insult or annoy."[45] Nor must a practitioner "compromise their professional standards in order to please their clients, the court or a third party."[46]

In relation to the duty not to discriminate, Rule 1 of the Solicitors Anti-Discrimination Rules 2004[47] provides that practitioners must comply with any anti-discrimination legislation in force and must not "discriminate against any person, directly or indirectly, nor victimise or harass them on the grounds of their sex (including their marital status); on racial grounds; or on grounds of

---

[40] *Solicitors Practice Rules 1990*, available at http://www.lawsociety.org.uk/documents/downloads/Profethics_PracticeRules.pdf

[41] See Principle 17.01(6) available at http://www.lawsociety.org.uk/professional/conduct/guideonline

[42] Id

[43] Id

[44] available at http://www.lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf

[45] Rule 7.1(e) of The Law Society's Code for Advocacy

[46] Rule 2.6(c) of The Law Society's Code for Advocacy

[47] see http://www.lawsociety.org.uk/professional/conduct/guideonline/view~page.law?POLICYID=189

their racial group; ethnic or national origins; colour; nationality; religion or belief; or sexual orientation." The duty not to discriminate also extends to discrimination on the grounds of disability. The duty not to discriminate is also referred to in the Advocacy Code.[48]

The majority of cases in the United Kingdom in which discourtesy and/or rudeness form the basis of a complaint concern discriminatory behaviour rather than aggressive trial tactics or common discourtesy. In May 2006, for example the Compliance Committee, the body responsible for investigating complaints and disciplining where appropriate, reported that they received 63 new matters in 2005 alleging discrimination and five formal complaints representing 0.35% of the total matters received.[49] Of the 63 matters opened in 2005, 32 were closed no discrimination found, 3 were withdrawn, 5 were temporarily closed, 21 remain ongoing and 2 matters were adjudicated. In one case a fine and warning were issued and in the other adjudication no breach was found.[50] No referrals were made to the Solicitors Disciplinary Tribunal in 2005 on the basis of discourteous conduct.

A recent case indicates that English lawyers are not immune to "Rambo" tactics. In *Three Rivers District Council v. The Governor and Company of the Bank of England [2006] EWHC 816 (Comm)*. a High Court Judge in handing down his judgment not only criticised the merits of the case but also made several critical remarks about the conduct of the leading Counsel, Gordon Pollock QC for his "sustained rudeness" to fellow lawyer and opposing counsel, Nicholas Stalden QC. The case which involved a suit against the Bank of England by Deloitte, the liquidators to the Bank of Credit and Commerce International (BCCI) was heard before Mr Justice Tomlinson a Senior Judge of the High Court. Deloitte's had alleged that the Bank failed to supervise BCCI before it collapsed in 1991 with £9 billion of debt. This was a controversial case that apparently warranted an opening address by Pollock that took 86 days and an opening address by Stalden that took 119 days.[51] The lawsuit against the Bank of England was withdrawn after 256 days of hearings ending a two-year trial and a legal battle that dated from 1993.

The High Court judge wrote of Pollock's behaviour: "It was behaviour not in the usual tradition of the Bar and it was inappropriate and distracting. I should have done more to attempt to control it, although I doubt if I should have been any more successful than evidently were Mr Pollock's colleagues whom on at any rate one occasion I invited to attempt to exercise some restraining influence." The Bar Council is investigating Pollock's conduct.

---

[48] Rules 2.4.1 and 2.4.2 of The Law Society's Code for Advocacy

[49] Compliance Committee, The Law Society of the United Kingdom and Wales, Discrimination Complaints 2005, 4 May 2006 at 1.

[50] Ibid at 3-4.

[51] See Marcel Berlins, 120m Cost of English justice at its worst, The Guardian, 17 April 2006 available at http://guardian.co.uk/law/story

3. CONCLUSION

As this paper has demonstrated there is a considerable body of caselaw both in Australia and overseas in which practitioners have been disciplined for conduct involving rudeness and discourtesy. What this body of case law reveals is that it is clearly unacceptable for a practitioner to behave in a way that violates a professional conduct rule mandating courteous communications. In compliance with that conduct rule a practitioner should thus, according to the Australian and overseas case law, refrain from the following conduct (cases referred to are summarised in the addendum to this paper):

(1) Use offensive ot provocative language including swearing at a client or fellow practitioner

See *Karageorge, Jobson, Johnson, Baker, Corsini v U-Haul Int'l Inc, Paramount Communications Inc v QVC Network Inc, Carroll v The Jacques Admiralty Law Firm;*

(2) Discriminate against a client or a fellow practitioner

See *Karageorge, Golden, Kirby, First City Bancorporation of Texas*;

(3) Physically intimidate, threaten or assault a fellow practitioner or a client

See *Jobson, Horoch, Stafford, McClure, Grievance Administrator –v-Sanford L Lakin;*

(4) Physically intimidate, threaten or assault a witness

See *Horoch, Stafford;*

(5) Make statements during proceedings that are disrespectful or allege dishonesty and impropriety to the court or fellow practitioners

See *di Suvero, Perkins, Lovitt QC, Shand QC;*

(6) Use offensive and intimidatory language in correspondence to fellow practitioners, clients or opposing parties

See *Horach, Murrell;*

(7) Use offensive and intimidatory language in correspondence towards investigating authorities

See *Quigley;*

(8) Sexual misconduct

See *Reynolds, Harder.*

The importance of maintaining civility amongst practitioners is undeniable. Cordial and courteous communications promote a good working environment to adjudicate disputes without tension and distress. According to Nagorney, civility within the legal system:

> "not only holds the profession together, but also contributes to the continuation of a just society ... Conduct that may be characterised as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice.[52]

A lack of civility diminishes public regard and may in turn reduce confidence in the judicial system.

The need for courteous communications has been recognised on numerous occasions by the courts, regulators and academics both in Australia and overseas. According to Chief Justice Spigelman, 'civility' is recognised as a 'fundamental ethical obligation of a professional person'.[53] Similarly, in *Garrard v Email Furniture Pty Ltd*[54] Kirby ACJ remarked:

> "Those members of the legal profession who seek to win a momentary advantage for their clients without observing the proper courtesies invite correction by the court and disapproval of their colleagues ... To the extent that solicitors act in this way, they run the risk of destroying the confidence and mutual respect which generally distinguishes dealings between members of the legal profession from other dealings in the community."

In the United States where the necessity for civility has been a major topic of concern for the past forty years, a former President of the American Bar Association recently commented:

> "A deterioration of civility interrupts the administration of justice. It makes the practice of law less rewarding. It robs a lawyer of the sense of dignity and self-worth that should come from a learned profession. Not least of all, it ... brings with it all the problems ... that accompany low public regard for lawyers and lack of confidence in the justice system."[55]

---

[52] K A Nagorney, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999) 12 *Geo J of Legal Ethics* 815 at 816–17.

[53] Opening of Law Term Dinner, 2006, address by The Honourable J J Spigelman AC, Chief Justice of New South Wales to the Annual Opening of Law Term Dinner of the Law Society of New South Wales, Sydney, 30 January 2006.

[54] *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 667.

[55] See Guidelines for Conduct, American Bar Association, available at http://www.aba.net

However it is not just the leaders of the profession who have expressed concern. Members of the profession have also commented on the behaviour of their fellow practitioners. A considerable number of practitioners have taken their time to write into the New South Wales Law Society Journal to complain about discourtesy. Some of those letters are appended. The message is clear. The majority of the profession consider that it is an honourable profession and wish to maintain the highest standards of courtesy in communications to ensure it remains honourable.

Communication includes the making and returning of phone calls. The Ethics Department of the Law Society of New South Wales has commented on the practice of practitioners who do not return phone calls as an adversarial tactic and is presently considering an amendment to Rule 25 of the New South Wales Practice Rules directed to practitioners' use of speaker phones and multiple lines when in conversation with other practitioners. The proposed amendment seeks to address complaints about practitioners who will use speakerphone without notifying the other party that the speakerphone is being used. Apparently the use of speakerphones is often used as a tactic to intentionally mislead the other party into thinking that a conversation is private when it is not.

Despite the obvious benefits of civility to the legal profession, many avow that civility is anachronistic or incompatible with today's commercial realities. According to this view law is a deemed 'business' and calls for ruthless competitiveness. The 'law as a business' advocates believe that the only effective method available to a practitioner to succeed is to become a "Rambo" lawyer who operates without conviction or conscience.[56] An explicit example of this attitude is the title of one divorce lawyer's editorial in the New York Times, "I'm Paid to be Rude."[57]

The "Rambo" style of litigation, less common in Australia but well documented in the United States, refers to such practices as refusing to return phone calls, refusing to consent to routine extensions of deadlines, refusing to shake hands in the courtroom, using hostile language to correspond with opposing parties and other vulgar behaviour such as name-calling, shouting, temper tantrums and occasionally physical assault.[58] According to the Rambo lawyer, litigation is war. Rambo lawyers justify their conduct as being mandated by an ethical requirement for "zealous advocacy."

---

[56] For a general discussion on the profile of the "Rambo" lawyer and case examples see Allen K. Harris, "The Professionalism Crisis –The "z" Words and Other Rambo Tactics: The Conferences of Chief Justices Solution, 53 S.C.L. Rev. 549 (2002); James A. George, The "Rambo" Problem: Is Mandatory CLE The Way Back To Atticus", 62 La. L. Rev 467 (2002); Douglas. R. Richmond, "The Ethics of Zealous Advocacy: Civility, Candour and Parlour Tricks", 34 Tex. Tech. L. Rev. 3 (2002);

[57] Raoul L. Felder, I'm Paid to Be Rude, N.Y. Times, July 1997, at A23, cited in Christopher J. Piazzola, "Ethical Versus Procedural Approaches To Civility: Why Ethics 2000 Should Have Adopted A Civility Rule", 74 U.Colo. L. Rev. 1197 (2003) at 1233.

[58] See Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10. Geo. J. Legal Ethics (1997) 367, 379.

Civility is however not inconsistent with representing a client diligently within the rules, and nor is it a sign of weakness:

> A lawyer can be firm and tough-minded while being unfailingly courteous. Indeed, there is a real power that comes from maintaining one's dignity in the face of a tantrum, from returning courtesy for rudeness, from treating people respectfully who do not deserve respect, and from refusing to respond in kind to personal insult.[59]

Without civility there can be no professionalism. As Chief Justice Robert Benham of the Supreme Court of Georgia in *Butts v State 546 S.E.2d 472 (Ga.2001)* commented:

> "...civility, which incorporates respect, courtesy, politeness, graciousness, and basic good manners, is an essential part of effective advocacy. Professionalism's main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer."[60]

And further:

> "Civility is more than just good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the rights of others: corporations would become irresponsible in conducting their business: governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible."[61]

The High Court stated in *Clyne v New South Wales Bar Association*;

> "It is not merely the right but the duty of Counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion. From the point of view of the common law, it is right that the person attacked should have no remedy in the Courts. But from a point of view of a profession, which seeks to maintain standards of decency and fairness, it is essential that the privilege and power of doing harm, which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustifiably occasioned."[62]

---

[59] Justice Matthew B. Durant, *"Views from the Bench: Civility and Advocacy"*, (2001) Utah Bar J. 35
[60] Cited by Allen K. Harris, *The Professionalism Crisis- The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices Solution"*, 53 S.C.L. Rev. 549, 577-578.
[61] Id.
[62] *Clyne v New South Wales Bar Association* (1960) 104 CLR 186

4. RECOMMENDATIONS

(a) It is clearly the duty of the regulator to insist on high standards of courtesy and to apply sanctions when those standards are not met.

(b) Those standards of courtesy apply to all communications with clients, other practitioners, court officers and members of the public.

(c) It is incumbent upon the regulator to push for amendment to professional conduct rules to ensure that communications between practitioners and clients and third parties as well as other practitioners are, at all times, courteous.