QUEENSLAND LAW SOCIETY ANNUAL CONFERENCE – MARCH 2018

"PROFESSIONALISM IN THE COURTROOM"[1]

[1] I have been asked to deliver a paper to the symposium on the topic of professionalism in the courtroom.

[2] I firstly note in my view it is not appropriate to discuss any individual judges, magistrates or legal practitioners in this session unless there is reference to any such person in a decided case.

[3] In this paper I would like to cover the following topics.

1. conduct of lawyers in court;
2. conduct of judicial officers;
3. responses concerning the conduct of judicial officers.

Conduct of legal practitioners

[4] The starting point of any discussion as to professionalism of lawyers involves an examination of the duties that a lawyer owes.

[5] In *Giannarelli v Wraith*[2] Mason CJ noted the peculiar nature of a barrister's responsibility when he or she appears for a client in litigation. This involves the duty owed to the court as well as the duty owed to the client, the duty to the court being paramount. His Honour noted that counsel cannot mislead the court, cannot cast unjustifiable aspersions on any party or witness and cannot withhold documents or authorities which detract from his or her client's case.

[6] The 2011 Barristers' Rules provide as to counsel's conduct.

[7] Importantly insofar as you are concerned the Australian Solicitors Conduct Rules provide as to the conduct of solicitors. I thought it opportune to set out those rules relevant to today's paper.

[8] Rule 3 provides:

> "**Paramount Duty to the Court and the Administration of Justice**
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> 3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.
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> 4. **Other Fundamental Ethical Duties**

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1 Presented by Judge P.E. Smith, Judge Administrator, District Court Queensland.

2 (1988) 165 CLR 543.

4.1 A solicitor must also:

4.1.1 act in the best interests of a client in any manner in which the solicitor represents the client;

4.1.2 be honest and courteous in all dealings in the course of legal practice. …"

5. **Dishonest and disreputable conduct**

5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or

5.1.2 bring the profession into disrepute.

18. **Formality before the court**

18.1 A solicitor must not, in the presence of any of the parties or solicitors, deal with a court on terms of informal personal familiarity which may reasonably give the appearance that the solicitor has special favour with the court.

19. **Frankness in court**

19.1 A solicitor must not deceive or knowingly or recklessly mislead the court.

19.2 A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.

19.3 A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.

19.4 A solicitor seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which:

19.4.1 are within the solicitor's knowledge;

19.4.2 are not protected by legal professional privilege; and

19.4.3 the solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client. Queensland Law Society | Ethics Centre | Australian Solicitors Conduct Rules 2012 Page 13

19.5 A solicitor who has knowledge of matters which are within Rule 19.4 must:

19.5.1 seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under Rule 19.4; and

19.5.2 if the client does not waive the privilege as sought by the solicitor:

(i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and

(ii) must inform the court that the solicitor cannot assure the court that all matters which should be disclosed have been disclosed to the court.

19.6 A solicitor must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of:

19.6.1 any binding authority;

19.6.2 where there is no binding authority, any authority decided by an Australian appellate court; and

19.6.3 any applicable legislation, known to the solicitor and which the solicitor has reasonable grounds to believe to be directly in point, against the client's case.

19.7 A solicitor need not inform the court of matters within Rule 19.6 at a time when the opponent tells the court that the opponent's whole case will be withdrawn or the opponent will consent to final judgment in favour of the client, unless the appropriate time for the solicitor to have informed the court of such matters in the ordinary course has already arrived or passed.

19.8 A solicitor who becomes aware of matters within Rule 19.6 after judgment or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the court of that matter by:

19.8.1 a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or

19.8.2 requesting the court to relist the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.

19.9 A solicitor need not inform the court of any matter otherwise within Rule 19.8 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.

19.10 A solicitor who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness

whether there are previous convictions, in the hope of a negative answer.

19.11 A solicitor must inform the court of any misapprehension by the court as to the effect of an order which the court is making, as soon as the solicitor becomes aware of the misapprehension.

19.12 A solicitor must alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the solicitor contrary to the true position and is believed by the solicitor to have been made by mistake.

20. **Delinquent or guilty clients**

20.1 A solicitor who, as a result of information provided by the client or a witness called on behalf of the client, learns during a hearing or after judgment or the decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:

20.1.1 has lied in a material particular to the court or has procured another person to lie to the court;

20.1.2 has falsified or procured another person to falsify in any way a document which has been tendered; or

20.1.3 has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court;

must –

20.1.4 advise the client that the court should be informed of the lie, falsification or suppression and request authority so to inform the court; and

20.1.5 refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the solicitor to do so but otherwise may not inform the court of the lie, falsification or suppression.

20.2 A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:

20.2.1 may cease to act, if there is enough time for another solicitor to take over the case properly before the hearing, and the client does not insist on the solicitor continuing to appear for the client;

20.2.2 in cases where the solicitor continues to act for the client:

(i) must not falsely suggest that some other person committed the offence charged;
(ii) must not set up an affirmative case inconsistent with the confession;
(iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
(iv) may argue that for some reason of law the client is not guilty of the offence charged; and
(v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged;

20.2.3 must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.

20.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must:

20.3.1 advise the client against that course and warn the client of its dangers;
20.3.2 not advise the client how to carry out or conceal that course; and
20.3.3 not inform the court or the opponent of the client's intention unless:
(i) the client has authorised the solicitor to do so beforehand; or
(ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

21. **Responsible use of court process and privilege**

21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:

21.1.1 is reasonably justified by the material then available to the solicitor;
21.1.2 is appropriate for the robust advancement of the client's case on its merits;
21.1.3 is not made principally in order to harass or embarrass a person; and
21.1.4 is not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court.

21.2 A solicitor must take care to ensure that decisions by the solicitor to make allegations or suggestions under privilege against any person:

21.2.1 are reasonably justified by the material then available to the solicitor;

21.2.2 are appropriate for the robust advancement of the client's case on its merits; and

21.2.3 are not made principally in order to harass or embarrass a person.

21.3 A solicitor must not allege any matter of fact in:

21.3.1 any court document settled by the solicitor;

21.3.2 any submission during any hearing;

21.3.3 the course of an opening address; or

21.3.4 the course of a closing address or submission on the evidence, unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.

21.4 A solicitor must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the solicitor believes on reasonable grounds that:

21.4.1 available material by which the allegation could be supported provides a proper basis for it; and

21.4.2 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

21.5 A solicitor must not make a suggestion in cross-examination on credit unless the solicitor believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.

21.6 A solicitor may regard the opinion of an instructing solicitor that material which is available to the instructing solicitor is credible, being material which appears to the solicitor from its nature to support an allegation to which Rules 21.1, 21.2, 21.3 and 21.4 apply as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence).

21.7 A solicitor who has instructions which justify submissions for the client in mitigation of the client's criminality which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the solicitor believes on reasonable grounds that such disclosure is necessary for the proper conduct of the client's case.

21.8 Without limiting the generality of Rule 21.2, in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:

21.8.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

21.8.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks.

22. Communication with opponents

22.1 A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise).

22.2 A solicitor must take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false.

22.3 A solicitor will not have made a false statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

22.4 A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.

22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.

22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

22.8 A solicitor must take steps to inform the opponent as soon as possible after the solicitor has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.

23. Opposition access to witnesses

23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.

23.2 A solicitor will not have breached Rule 23.1 simply by telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

24. Integrity of evidence – influencing evidence

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

25. Integrity of evidence – two witnesses together

25.1 A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time:

25.1.1 about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing; and

25.1.2 where such conferral could affect evidence to be given by any of those witnesses, unless the solicitor believes on reasonable grounds that special circumstances require such a conference.

25.2 A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

26. Communication with witnesses under cross-examination

26.1 A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination, unless:

26.1.1 the cross-examiner has consented beforehand to the solicitor doing so; or

26.1.2 the solicitor:

(i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;

(ii) has, if possible, informed the cross-examiner beforehand of the solicitor's intention to do so; and

(iii) otherwise does inform the cross-examiner as soon as possible of the solicitor having done so.

27. Solicitor as material witness in client's case

27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.

28. Public comment during current proceedings

28.1 A solicitor must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.

[9] It is worth reading the rules every so often to remind oneself of these duties.

[10] Some practitioners once they set foot in a courtroom develop what Jeffrey Phillips SC describes as "white line fever"[3]. Counsel who have high conflict personalities may infect the whole process. This is not to say that counsel (including solicitors) should not firmly advance their client's interests. However there is a line to be drawn between acting firmly and acting unprofessionally and irresponsibly.

[11] In *Escobar v Spindaleri & Anor*[4] Kirby J stated:

> "This appeal illustrates the importance of courteous and vigilant behaviour in court on the part of counsel and temperate and

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3 "Judicial Bullying" Jeffrey Phillips SC, 4 August 2017, Annual Conference of New South Wales Magistrates under the auspices of the Judicial Commission of New South Wales.

4 (1986) 7 NSWLR 51.

> painstaking conduct by judicial officers. Under the stimulus of contests which can enliven high emotions, it is all too easy to lapse in the observance of these rules. Under the pressure of busy court lists and concern for the rights of other litigants awaiting hearing, impatience can occasionally lead to error. Judicial officers and advocates exercise important responsibility. The interest of justice of the litigants is at stake. But so too is the interests of the appearance of justice and the observance of the proper forms and procedures which have been developed over centuries to facilitate its attainment. It does not become counsel to lose his or her temper in court. Still less does it become a judicial officer to depart from proper procedures no matter how provocative may be the ill-judged conduct of those before the court."

[12] The best way to examine the concept of professionalism is to look at examples of unprofessional conduct (or misconduct).

[13] There are countless examples of cases before the Disciplinary Tribunals or the courts where sanctions have been imposed on legal practitioners because of a lack of professionalism.

[14] In *Bradshaw v Attorney-General*[5] the respondent barrister said "Jesus" when a ruling went against him; said "I'm not your boy" when the judge said "Watch yourself my boy"; and then later said "The crown come along here because White DCJ is on the bench and they chuck up this nonsense." The respondent was fined $500 by the judge but on appeal the conviction was set aside as natural justice had not been accorded to the barrister.

[15] In *Attorney-General v Lovitt*[6] the Respondent, Queen's Counsel, called a magistrate a cretin in the court. He was fined $10,000 for this contempt of court.

[16] In *Legal Services Commissioner v Hackett*[7] the respondent, a barrister, swore a misleading affidavit used in District Court proceedings. He was the chair of a management committee of a body corporate at the Gold Coast, his wife owning one of the units. The affidavit incorrectly referred to the body corporate proceedings in respect of which there was a dispute. It was noted at page 8:

> "Turning to the characterisation of this misconduct, it was plainly professional misconduct, though not characterised by dishonesty. It was a case of gross carelessness or sloppiness, dereliction which has no place in the preparation of any affidavit, but especially one to be

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5 [1998] QCA 224.
6 [2003] QSC 279.
7 [2006] LPT 15.

> sworn by an officer of the court. That it was prepared in haste is in the end irrelevant."

[17] Ultimately, because of the four year delay, a fine of $5,000 together with a public reprimand was imposed.

[18] In *Legal Services Commissioner v Thomson*[8] the respondent was charged with misleading a federal magistrate. The respondent appeared on behalf of the husband in a matrimonial matter. The matter came on for a directions hearing before a federal magistrate. The respondent misinformed the court that his client would consent to a particular course when he had no instructions to that effect. It was ultimately held in light of the good character of the respondent that he had made an error but the tribunal was not satisfied that he was dishonest because he did not focus on the actual question asked by the federal magistrate. He was publicly reprimanded and ordered to pay costs.

[19] In *Legal Services Commissioner v Puryer*[9] the respondent was in a relationship with another person and they shared a lease. The relationship ended in acrimonious circumstances. The respondent purported to exercise an option to renew the lease but the co-tenant notified him she would not consent to the renewal. She then commenced proceedings in the small claims tribunal seeking to be released from her obligations under the lease. On 28 July 2006 the tribunal removed her name from the lease. The order was made without notice to the respondent. The respondent commenced proceedings in the Supreme Court for judicial review of the tribunal decision. Despite an agreement with the co-tenant he issued an application in the Supreme Court seeking an order that she indemnify him for one half of the rent, outgoings and services under the *Residential Tenancy Agreement*. The respondent when he appeared in the court (the co-tenant did not appear) failed to draw the court's attention to letters which established the agreement. As a result of this the tribunal decision was set aside but there was an appeal to the Court of Appeal which set aside the order. By that time it had been discovered that the material relied on by the respondent had been misleading. As a result disciplinary proceedings were brought against the respondent. The respondent was struck off.

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8 [2011] QCAT 127.
9 [2012] QCAT 48.

[20] In *Legal Services Commissioner v Lim* [2011] QCAT 291 the respondent, a young lawyer, swore a false affidavit in proceedings in a Sydney court. In 2009 she took instructions from a client to commence debt proceedings in the local court. Her client was claiming $5,400. The defendant filed a defence and cross-claim but she did not file a defence to the cross-claim within the prescribed period. She later filed a notice of motion on affidavit in which she attempted to explain the failure to file and the delay. She swore that the failure to file the defence was due to an administrative error stating that the document had been sent to her New South Wales agent in mid-December but posted to an incorrect address. This was a false claim. The tribunal referred to the decision of *Hackett* and some other decisions. Ultimately she was publicly reprimanded and ordered to pay $7,000 together with costs.

[21] In *Legal Services Commissioner v Bevan*[10] the respondent was charged with unsatisfactory professional conduct or professional misconduct by misleading a federal magistrate. The matter was listed for hearing on 29 August 2012. The respondent advised the court that his client's failure to appear was because of a sudden conditional injury requiring medical treatment. In fact he failed to inform the court he had previously spoken to his client in the precinct of the court and advised her not to appear. The opposing solicitor told the court immediately that his client had observed her in the court precincts earlier that morning. The respondent immediately apologised for his conduct. He made admissions to misleading the court. It was found "as the respondent has intentionally misled the Federal Magistrates Court I am satisfied that the conduct of the respondent is such that it would justify a finding that the respondent has substantially fallen short of the standard reasonable competence and diligence required from a legal practitioner. Accordingly the respondent has committed professional misconduct [16]."

[22] Ultimately, the respondent was publicly reprimanded and ordered to pay a penalty of $6,000 together with costs.

[23] In *Legal Services Commissioner v Bosscher*[11] the respondent was charged with professional misconduct and/or unsatisfactory professional misconduct. He appeared before the Queensland Child Protection Commission of Enquiry and during the appearance tendered an outline of submissions including an attachment called "the

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10 [2015] QCAT 290.
11 [2016] QCAT 75.

Rofe QC Audit of the Heiner affair". The Rofe audit included allegations that the Chief Justice as counsel assisting the Ford Commission of enquiry was guilty of the offence of official corruption. There was absolutely no justification for such a statement. It also stated that Justice Holmes should be removed from the bench of the Supreme Court. The respondent did not attempt to redact the Rofe audit. As a result of the tender the allegations were published in the Australian newspaper on 11 August 2012. The tribunal referred to the definition of "unsatisfactory professional conduct"[12] and the definition of "professional misconduct."[13]

[24] It was held that the respondent was guilty of unsatisfactory professional conduct. Ultimately, the respondent was publicly reprimanded.[14]

[25] In *Legal Services Commissioner v Winning*[15] the solicitor during a District Court trial made comments about a Crown prosecutor which were offensive, discourteous, provocative and compromised the integrity and reputation of the legal profession. There was use of four profanities in court. The tribunal ordered he be publicly reprimanded, be mentored by a QC and undertake psychological treatment including anger management counselling.

[26] In *Legal Services Commissioner v Cooper*[16] the respondent filed a notice of child abuse in the Federal Magistrates Court when there was no justification for this. In noting whether the conduct was professional misconduct, the tribunal referred to *Adamson v Queensland Law Society Incorporated*[17] where Thomas J stated:

> "The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency."

The Tribunal noted at [25]:

> "The practitioner's paramount duty is to the court and to the administration of justice. The legal practitioner must exercise the forensic judgment called upon during a case independently and consistently with the paramount duty to the court and the administration of justice and must not simply be a mouthpiece for a client.
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> …

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12 Section 418 of the *Legal Profession Act*.
13 Section 419 of the *Legal Profession Act*.
14 *Legal Services Commissioner v Bosscher (No. 2)* [2016] QCAT 413.
15 [2015] QCAT 510.
16 [2016] QCAT 122.
17 [1990] 1 Qd R 498 at 507.

> [27] The practitioner will breach these duties if the practitioner knowingly advances a case which, as the commissioner puts it, is hopeless and unarguable. In particular where the solicitor's conduct appears to be associated with an improper collateral purpose unrelated to proper conduct of court proceedings, or properly asserting a client's rights such as, improper timewasting and delay.
> …
> [32] Whether conduct amounts to unsatisfactory professional conduct or professional misconduct (or either) is assessed by a reference to the facts of each case. As between unsatisfactory professional conduct and professional misconduct, it is a matter of degree."

[27] It was ultimately held that as this was not a consistent failure and the respondent corrected the error within a matter of weeks, this was unsatisfactory professional conduct. The respondent was publicly reprimanded and ordered to pay a fine of $2,500.

[28] There is another case of *Legal Services Commissioner v Turley*[18]. In that case the solicitor had made scandalous submissions about the Department of Child Safety to the effect that the Department was allowing children to be killed by a psychologist and that the Department was a "coven of witches." The solicitor, in an ex parte letter to the Magistrate, said he should disqualify himself. The solicitor was suffering from depression and at the time of the disciplinary hearing was receiving appropriate treatment. On his undertaking to continue to receive counselling and be supervised he was publicly reprimanded and ordered to pay $1,500 costs.

[29] In *Attorney-General v Di Carlo*[19] a barrister was fined $4,000 for making contemptuous comments to a magistrate. While representing a client in a bail application last year, he accused a Brisbane Magistrate of being cranky and said: "And that's why you don't do things according to law".

Conduct of judicial officers

[30] In the Australian Institute of Judicial Administration "Guide to Judicial Conduct"[20] a number of important points are noted. The guiding principles applicable to judicial conduct have three main objectives.

(a) to uphold public confidence in the administration of justice;

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18 [2008] LPT 4.
19 [2017] QSC 171.
20 "Guide to Judicial Conduct" 2nd edition 2007.

(b) to enhance public respect for the institution of the judiciary;

(c) to protect the reputation of individual judicial officers and of the judiciary.

[31] There are said to be three basic principles against which judicial conduct should be tested to ensure compliance with the stated objectives namely:

(a) impartiality;

(b) judicial independence;

(c) integrity and personal behaviour.

[32] As to conduct in the courtroom the AIJA's Guide notes that it is important for judges to maintain a standard of behaviour that is consistent with the status of judicial office and does not diminish the confidence of litigants, and the public in the ability, the integrity, the impartiality and the independence of the judge.[21] Punctuality, courtesy, tolerance and good humour should be displayed. Litigants and witnesses should be treated in a way which respects their dignity.

[33] A judge must be firm but fair and be even handed in the conduct of a trial.

[34] The principle of natural justice should be observed.

[35] The judge should protect a party from any display of racial, sexual or religious bias or prejudice.

[36] Whilst it is often necessary for a judge to question a witness or engage in a debate with counsel, it is important that a judge not descend into the arena and appear to be taking sides or have reached a premature conclusion. The statements of principle made in the "Guide to Judicial Conduct" reflect commonly understood principles of the law.

[37] In *Antoun v The Queen*[22] the appellant's conviction for extortion is quashed by reason of the bias of the trial judge. In that matter the accused was charged with extortion. Counsel for the accused foreshadowed to the trial judge he would be making a no case submission at the close of the Crown case. The trial judge said once hearing this that the application would be refused, before the judge heard any submissions on the point. The trial resumed the next day and both appellants asked the judge to disqualify himself by reason of his statements the day before. The trial judge rejected the

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21 "Guide to Judicial Conduct" 2nd edition 2007 Paragraph 4.1.

22 (2006) 224 ALR 51.

applications. Also during the defence case, the trial judge expressed the opinion that the Crown case was a very strong one and he was considering revoking bail. He made these observations without application by the Crown. The statements were entirely at the initiative of the trial judge. A further application to disqualify was made but was refused. The High Court held that bias and pre-judgment had been shown by the trial judge and the trial judge should have recused himself. It was clearly not appropriate for the trial judge to make the comments which he did. The High Court though did note that it is preferable that a trial judge should express tentative or preliminary views to the parties so they might address the judge on such matters.[23] Indeed in the USA judicial silence has been held on occasions to constitute a denial of due process.[24]

[38] In *Jones v National Coal Board*[25] the trial judge frequently intervened during the evidence of a defendant's witness, conducting the examination in chief himself and protecting the witness during cross-examination by plaintiff's counsel. Judgment was given in favour of the defendant. The plaintiff appealed. It was held by the Court of Appeal that the trial judge's interventions were excessive and ill-timed. Lord Denning said:

> "If a judge should himself conduct the examination of a witness he so to speak descends into the arena and is liable to have his vision clouded by the dust of conflict."

Further quoting Lord Chancellor Bacon:

> "Patience and gravity of hearing is an essential part of justice; an over-speaking judge is no well-tuned symbol."

[39] It should also be borne in mind that, save in the most exceptional circumstances, there should be no communication or association between the judge or one of the parties (or one of the legal representatives or witnesses of a party) except in the presence of or with the knowledge and consent of the other party (once a case is underway). Thus there should not be any approach to a judge by the lawyers for one party without the presence or knowledge and consent of the other party.

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23 Kirby J at [31].
24 Kirby J at [32].
25 [1957] 2 QB 55.

[40] In *Re JRL Ex parte CJL*[26] a family court judge was approached in private chambers by a court counsellor in the absence of the parties expressing views favouring one parent. Gibbs CJ noted at page 346 that it is a fundamental principle that a judge must not hear evidence or receive submissions from one side behind the back of the other side.

[41] Leaving aside now questions of bias, I turn to the topic of judicial bullying. There is no doubt that psychological health in the work place is a very important goal. A courtroom is to be regarded as a work place. There have been instances of judicial bullying with serious consequences. For example in 2010 in New South Wales a young female lawyer took her own life in the weeks after being berated in court by a magistrate.[27]

[42] What are the causes of such bullying? It has been observed previously that in a busy courtroom and in difficult cases tempers can get frayed. Judicial stress is far more recognised in the present day than previously.

[43] Justice Michael Kirby in "Judicial Stress and Judicial Bullying"[28] noted that recent studies had showed evidence of high levels of stress amongst law students and legal practitioners.[29]

[44] As Jeffrey Phillips SC said in his paper "Judicial Bullying":[30]

> "Michael Kirby asked whether such egregious behaviour could be linked to an impact of stress upon members of an over-stressed profession? His Honour noted that some of the stress involved in being a judge these days related to crushing caseloads, novel and complex legal issues, increasing and critical media scrutiny with relatively few voices lifted to defend Australia's judges. In addition to this, there are long hours at work, pressures to perform in public and high expectations which now coincided with repeated attacks upon the judicial status which calls into question the idealism and the past perceptions of it are still generally held by the holders (of such office). The kinds of people who get appointed to judicial officers are, or tend to be, perfectionistic. They have high expectations of themselves and others; they are worriers – conscientious people who represent the

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26 (1986) 161 CLR 342.

27 The Sydney Morning Herald, 23 March 2013.

28 (2013) 87 ALJ at 516.

29 "Law Students Motivations, Expectations and Levels of Psychological Distress: Evidence of Connections" (2012) 22 Legal Education Review 71 at p 76-79; "Feeling the Pressure" Lawyers Weekly 8 February 2013, p 24; "Poor Mental Health Programs Failing Lawyers" Lawyers Weekly 19 February 2013, p 2.

30 4 August 2017, Annual Conference of New South Wales Magistrates under the auspices of the Judicial Commission of New South Wales.

> classical profile of stress prone individuals. They have to make many decisions and cannot or should not delegate very many. As it has already been stated … the judiciary's work involves an inescapable component of stress. Urgent, complex matters, elements of high drama, long criminal trials, civil cases worth millions of dollars, people's livelihoods, cases involving access and custody of children and the like necessarily produce stress in all concerned. Justice Kirby acknowledged such occasions test the capacity both of lawyers and of judges to act with efficiency, courtesy, restraint and mutual respect. Occasionally the performances of each will leave something to be desired."

[45] It should be borne in mind that stress leading to judicial bullying has no doubt always existed. There is the example of the judge in the Los Angeles courts who was severely and publicly censured by the California Judicial Commission for "temperament problems including the arrest of people who had been whispering in his courtroom." There is also the example of the former Chief Justice of the State of New York who in 1992 was convicted and imprisoned for harassing his ex-lover including by threatening to kidnap her teenaged daughter, demanding a ransom and threatening to mail a condom to her.

[46] The USA gives us other examples.

[47] Judge Kent, a United States District Judge based in Texas, allegedly bragged of his ability to intimidate people and that "everyone was afraid of him." He ended up spending 33 months in prison in 2009 after pleading guilty to obstruction of justice as part of a plea bargain in exchange for the dismissal of multiple sex crime charges including allegations of sexual assault of two women on his staff.

[48] Judge Littlejohn, a Mississippi Chancery Court Judge, in October 2010 jailed a lawyer for contempt after the lawyer failed to stand and pledge allegiance in court. The lawyer spent 5 hours in jail before he was released to appear on behalf of another client. The Judge later admitted his conduct violated the lawyer's first amendment rights. The judge was publicly reprimanded and fined $100.

[49] Another example of the impact of stress may be the delay in delivery of judgments. In 1998 Justice Bruce of the New South Wales Supreme Court was brought before the bar of the parliament and was called on to show cause why he should not be removed. In 16 cases he had taken 11-13 months; 18-19 months in 2 cases and 30-36 months in 3 cases. Justice Bruce explained that he had suffered from depression but

that he was now receiving treatment. The Council voted 24 to 16 not to remove him. He resigned shortly thereafter.

[50] Also in 2011 two magistrates were brought before the parliament in New South Wales after complaints had been made about their judicial conduct. The Magistrates were not removed- one was suffering bipolar and the other depression.

[51] Despite the issues of stress, Justice Kirby noted:[31]

> "Judicial officers (judges, magistrates and some tribunal members) are subject to particular risks of stress, depression and pressure. That is so, however some of them may deny that fact. Moreover, responding to the pressures exerted on them, some judicial officers become part of the problem. Some are bullies. Some misuse their power and create intolerable pressures for lawyers and others working in the law. Most are decent and polite. It is time that judges were added to the agenda of a national wellness forum. Particularly if they are the cause of unwellness in others, it is time for the law to provide appropriate responses."

[52] Jeffrey Phillips SC in his paper[32] noted that Associate Professor Anthony Foley with the Australian National University College of Law referred to a project conducted which followed a group of young lawyers through their first 12 to 18 months of practice. When they were asked as to how they went in their first year they did not say specifically that bullying was a problem but there was an acute anxiety when they had to appear in court which was the most distressing and taxing. This anxiety had the potential to affect their mental health. As to the topic of bullying, Associate Professor Foley said:

> "Turning more specifically to the topic of bullying. Powers at the heart of bullying in the workplace and for lawyers the workplace includes the courtroom. The relationship between the bench and the lawyer appearing in court is not an equal one. Judicial officers, if they are bullies, are no different from any other bullies. They pick the weak and the vulnerable and the young lawyer is perhaps their easiest target."

[53] There have been many instances of judicial bullying over the years. Leaving aside the example of the young lawyer who took her own life, in 2010 Justice Glen Martin noted in his paper at the National Judicial College Seminar Managing People in Court Conference 2013 of a judge where junior counsel was greeted with the comments:

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31 (2013) 87 ALJ 516 at p 517.

32 4 August 2017, Annual Conference of New South Wales Magistrates under the auspices under the Judicial Commission of New South Wales.

"You're an idiot. Does your client know you're an idiot?"

[54] The barrister saw Justice Martin (when His Honour was president of the Bar Association) and was anxious the judge not become aware of his complaint because he frequently appeared in that jurisdiction.

[55] The fact is that judicial bullying is entirely inconsistent with the requirements of appropriate judicial conduct.

Statutory responses

[56] As Justice Kirby noted in "Judicial Stress and Judicial Bullying":[33]

> "To allege bullying is not to establish that it has occurred. Judges, like the rest of the population, have variable temperaments. And whatever their attitudes, they are entitled to express displeasure where they feel that a lawyer, or anyone else, is impeding the proper performance of the judicial function or the attainment of justice. There is less excuse for rudeness and disrespect on appeal, where judges and counsel have the luxury of more time to scrutinise the words and conduct of the court below. While holding the adversaries to a high standard and ensuring efficiency, there is no place for rudeness or insult. The supposed excuse that I have sometimes heard advanced is that appellate judges are cleverer and therefore entitled to demand brilliance from those appearing before them. However, displaying personal animosity, disrespect towards advocates or litigants or their arguments, courtroom rudeness, attempting to isolate or ignore a colleague, arrogance towards advocates of colleagues, gossiping and laughing in private conversations with other judges during argument, and forgetting the litigant and the impression that such conduct makes, are all conduct that amounts to forms of bullying. What can be done in response to it?"

[57] His Honour also noted that any system of complaints against judicial officers must be compatible with the independence of judicial power. His Honour recommends publicly available protocols to deal with these issues. His Honour also recommends that appropriate ways need to be considered to report such complaints. Consideration needs to be given to counselling, support and therapy for judicial officers. At page 525 His Honour noted:

> "Independent bodies would discipline the authority in respect of judges should initiate and publish, protocols for receiving complaints about judicial bullying and like misconduct. In serious or repeated cases, bullying by judicial officers should be recognised as an abuse of public office, warranting commencement of proceedings for

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33 (2013) 87 ALJ 516 at p 523.

> removal of the offender from judicial office, in accordance with the law."

His Honour noted that members of the legal profession should not supress complaints of bullying especially in serious and repeated cases and senior members of the profession have a responsibility to stand up to it.

[58] There are various approaches to issues of judicial misconduct. In 2012 the federal government passed the *Court's Legislation Amendments (Judicial) Complaints 2012* (Cth) which established a complaints system for judges in the federal system (except the High Court). The Act provides a legislative basis for the heads of jurisdiction to handle complaints and provides for legal protection. It permits for example the head of a jurisdiction to restrict a judge to non-sitting duties.

[59] In 1971 in Canada the Canadian Judicial Council was established which receives and investigates complaints. It may in serious cases recommend removal to the parliament.

[60] New Zealand established a judicial complaints system in 2005. A judicial conduct commissioner receives and investigates complaints. The commissioner may dismiss the complaint, refer it to the head of jurisdiction or recommend a judicial conduct panel be appointed to investigate more serious complaints.

[61] In 2006 a judicial misconduct review system was introduced in England and Wales which was modified in 2012. A judicial conduct investigations office and a judicial appointments and conduct ombudsman receive and investigate complaints. The Lord Chancellor (a cabinet minister) has the power to remove judges (except senior judges who may be removed by the parliament).

[62] Victoria[34] and New South Wales[35] are the only Australian states with independent judicial commissions. The commissions have the responsibility for investigating complaints, monitoring and issuing reports about sentencing, and the continuing education of judges. Complaints may be dismissed or referred to the head of jurisdiction or to the conduct division of the Commission. On completion of a report by the conduct division, the report is laid before the parliament for consideration.

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34 Judicial Commission of Victoria Act 2016 (Vic).

35 Judicial officers Act 1986 (NSW).

[63] In South Australia there is a Judicial Conduct Commissioner to whom complaints can be made.[36]

[64] In Western Australia there is a specific protocol in place for complaints against judicial officers of all court levels.[37]

[65] In Queensland complaints are normally dealt with through the President of the Bar Association or the Queensland Law Society President and then referred to the head of jurisdiction. There is however no legislative basis for this.

[66] As to Magistrates there is a specific complaints policy which involves writing to the Chief Magistrate.[38]

[67] In Queensland there is also a specific protocol concerning requests for delivery of delayed judgments.[39]

Conclusion

[68] In conclusion it is critical that both judges and lawyers act with dignity and respect in the performance of their duties. There is no place in the courtroom for bullying. It would be opportune for Queensland to examine whether there would be benefit in formalising a judicial commission like that in New South Wales.

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36 Judicial Conduct Commissioner Act 2015 (SA).

37 http://www.supremecourt.wa.gov.au/_apps/search/results.aspx?query=complaints

38 http://www.courts.qld.gov.au/courts/magistrates-court/complaints-policy

39 http://www.qls.com.au/Knowledge_centre/Delayed_judgments