Professional insights

ETHICAL OBLIGATIONS AND DUTIES IN FAMILY LAW

This article addresses a number of current ethical issues faced by lawyers in the family law context, in particular: dealing with demanding clients; clients who draft affidavits; and making serious allegations and complaints. Referring to applicable rules of conduct and relevant case authority the article offers observations and suggestions for family lawyers who are faced with such issues.

INTRODUCTION

Family law presents a number of unique challenges for lawyers, yet at the same time family lawyers are governed by the same ethical obligations and duties as all lawyers. This article addresses a number of current ethical issues, but in particular focuses on lawyers' responsibilities in relation to: dealing with demanding clients; affidavits generally but, in particular, clients who draft affidavits; and making serious allegations and complaints.

Throughout the article reference is made to the Barristers Conduct Rules and the Australian Solicitors' Conduct Rules. There are conduct rules that have been adopted by several jurisdictions throughout Australia and have been developed by the Australian Bar Association and the Law Council of Australia respectively. They have been adopted in New South Wales and Victoria as part of the "national" legal profession legislation in those two States.[1]

Although not directly applicable in all States, both the Barristers Conduct Rules and the Australian Solicitors' Conduct Rules generally reflect, in codified form, the common law ethical obligations and duties of lawyers and as such inform the requirements and expectations of lawyers in all jurisdictions, including those in which they have not been formally adopted. Of course, with family law being a national jurisdiction, judges from interstate jurisdictions that have adopted the rules will be more likely to demand compliance with them. The rules obviously apply when appearing in jurisdictions that have adopted them.

DEALING WITH DEMANDING CLIENTS

Clients can be very demanding, including at times not listening to advice and wanting to conduct their litigation in a particular manner. There are numerous obligations imposed on lawyers by both the Barristers Conduct Rules and the Australian Solicitors' Conduct Rules regarding what is appropriate and what is not appropriate in the conduct of litigation. Those rules guide how lawyers are to behave, regardless of the views or wishes of the client. Compliance with the conduct rules is mandatory. The instructions of a client cannot override those rules no matter how firm, demanding or difficult the client is. Professional responsibilities and a lawyer's duty to the court are paramount and, if need be, those duties should be explained to the client.

For barristers, the issues are relatively easy to deal with. Rule 105(g) of the Barristers Conduct Rules permits a barrister to refuse or return a brief to appear before a court if "the barrister's advice as to the preparation or conduct of the case, not including its compromise, has been rejected or ignored by the instructing solicitor or the client, as the case may be". In essence, a barrister can simply give advice as to the manner in which a case is to be prepared or conducted and, if that advice is rejected, may return the brief.

For solicitors the situation is a little different because of the nature of the retainer with the client. A solicitor is bound to follow the lawful, proper and competent instructions of the client (see r 8 of the Australian Solicitors' Conduct Rules). Obviously a solicitor is not obliged to follow unlawful,

[1] See *Legal Profession Uniform Conduct (Barristers) Rules 2015* <http://www.legislation.nsw.gov.au/regulations/2015-243.pdf> and *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* <http://www.legislation.nsw.gov.au/regulations/2015-244.pdf>.

improper or incompetent instructions. A client cannot give instructions to require a solicitor to act contrary to the solicitor's professional obligations, and a solicitor must refuse to act on any such instructions.

Generally, a solicitor is required to continue to act for the client for the duration of a matter and there are only limited circumstances in which a solicitor may terminate the retainer. One basis upon which a solicitor is entitled to terminate the retainer is for just cause and on reasonable notice. That reason is also reflected in r 13.1 of the Australian Solicitors' Conduct Rules. Continued or repeated demands that a solicitor act contrary to the solicitor's ethical obligations would, in the author's view, constitute just cause if the client's demands persist notwithstanding the solicitor's ethical obligations having been explained to the client.

While this article does not address possible practical methods of dealing with difficult clients, when issues arise that might put a lawyer's ethical obligations and the client's instructions in conflict the author suggests that the client have it explained to them that the lawyer's ethical obligations take precedence. If necessary that explanation should be quite forceful.

At the end of the day, lawyers cannot allow their ethical standards and obligations to be compromised. If clients cannot accept that, then the only realistic option is to terminate the retainer.

CLIENTS WHO DRAFT AFFIDAVITS

Affidavits are the primary method of giving evidence-in-chief in the family law jurisdiction. One of the greatest advantages of affidavit evidence is that the use of affidavits reduces the length of a trial because the evidence-in-chief and many documents are tendered at the commencement of a witness's evidence without the need for lengthy *viva voce* evidence. That is a particularly important consideration in an over-stretched and under-resourced court, which both the Family Court of Australia and the Federal Circuit Court of Australia are. Trials on affidavit also mean that the other side has had the opportunity to consider and respond to the evidence before the trial commences.

That said, there has been a shift away from the extensive use of affidavits in jurisdictions such as the Federal Court of Australia, where the current trend is to use witness statements and for witnesses to give their evidence *viva voce*. That has been for a number of reasons, but one is that the judges formed the view that when there are contested questions of fact, and a need to make credit-based findings arises, it is preferable to make those findings after hearing the witnesses' examination-in-chief and cross-examination rather than simply the cross-examination.

It is not within the scope of this article to discuss the merits of whether clients should draft affidavits, or whether only lawyers should do so. There are different schools of thought on that issue. Regardless of which side of the fence a lawyer might sit, the affidavit must be settled by the lawyer and the lawyer takes responsibility for the affidavit when filing it.

Note that many of the observations made here are equally applicable considerations when lawyers draft affidavits.

There are many issues relating to the preparation of affidavits that lay clients are unlikely to appreciate or understand. That is likely to present considerable difficulties when they prepare their affidavit because the task of settling it is likely to become quite onerous and often tedious.

Relevance is the most important factor. If evidence is not relevant it is not admissible. A trial in the family law jurisdiction is not an inquisition into all of the trials and tribulations of a relationship that has broken down. It does not involve a search for the cause of the breakdown of a relationship nor does it seek to allocate blame for that occurrence. Rather, a trial is a legal method of dispute resolution that will be determined by a lawyer (the judge) within a legal framework and applying legal principles. What is relevant will be determined by the nature of the dispute and the relief sought.

Irrelevant material must be kept out of affidavits. For example, in cases where it is proposed that the children live with both parents for equal amounts of time, many allegations relating to the other parent's capacity to parent will be irrelevant. In a property case, generally it is difficult to see how one party's alleged excessive use of alcohol would be relevant.

Obviously every case is different and there are no absolute rules as to what is relevant or irrelevant by reference to particular categories of case. What is important, however, is that only

evidence that is relevant to the issues that the court is called on to determine should be contained in affidavits. To do otherwise has the potential to waste enormous amounts of the court's time and also to cost the parties an unnecessary amount in legal costs.

Barristers have particular duties in relation to the efficient administration of justice. Rule 58 of the Barristers Conduct Rules provides as follows:

> 58. A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to:
> (a) confine the case to identified issues which are genuinely in dispute;
> (b) have the case ready to be heard as soon as practicable;
> (c) present the identified issues in dispute clearly and succinctly;
> (d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and
> (e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

If clients draft their own affidavits it should carefully be explained to them the issues that they need to address, and what they do not (or perhaps, should not) address. From the author's experience, affidavits drawn by lay witnesses tend to be emotive, rambling and fail to focus on the issues in dispute. All of these tendencies should be avoided.

Whatever the circumstances of a particular case, if a client insists on drafting their own affidavit it is imperative that the affidavit be settled by the solicitor filing it, or by counsel. The affidavit must still comply with all of the usual ethical obligations that lawyers have. Even if settled by counsel, the solicitor filing the affidavit still assumes responsibility for it (albeit in conjunction with counsel). That is because affidavits are a document filed in the court by the solicitor on the record.

SERIOUS ALLEGATIONS AND COMPLAINTS

There are two key aspects in this area. They are: making serious allegations of misconduct by the other party to proceedings; and making serious allegations or complaints against other lawyers.

Serious allegations of misconduct by parties

The family law jurisdiction by unfortunate necessity often involves serious allegations of misconduct being raised by the parties. Such misconduct includes allegations of sexual assault, domestic violence and child abuse or neglect. Many of the allegations that arise in family law cases involve allegations of criminal conduct by one or other of the parties.

The common law imposes strict obligations on lawyers when making such allegations. In *Y v M*, the making of serious allegations in a family law context was considered by Temm J who said:

> In my judgment on appeal [1993] NZFLR 609, 645-646 I referred to a lawyer's duty in terms which I repeat here for convenience:
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> > It appears to be a misconception of some prevalence that a solicitor's only duty is to the interests of the client. That is not right. The lawyer undoubtedly has a duty to the Court that the Court be not misled. There is a wider public duty allied to that, by which a lawyer is under an obligation to refuse to make allegations that are not sufficiently based. It can be unprofessional conduct to make allegations of dishonesty without a proper basis. It is equally unacceptable for a solicitor to make accusations of fraud or of criminal activity such as sexual abuse without adequate grounds for doing so. An assertion unsupported by evidence is not enough. An accusation is not evidence.
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> The authority for this expression of a lawyer's duty is to be found in the speech of Lord Reid in *Rondel v Worsley* [1969] 1 AC 191 in which it was stated:
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> > Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information.

> And:
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> The same public duty applies when drawing pleadings or conducting subsequent stages in a case as applies to counsel's conduct during the trial.
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> That statement of the law was considered by a Full Court in New Zealand in the case of *Gazley v Wellington District Law Society* [1976] 1 NZLR 452, in which their Honours said, speaking of Lord Reid's admonition:
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> > Clearly, in our view, what is said applies to a practitioner acting as both barrister and solicitor in the conduct of litigation in New Zealand. (at p 454)
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> Accusations of wrongdoing against a citizen are not to be made lightly. Solicitors who are instructed by a client to make such allegations in guardianship proceedings or otherwise should proceed with care and apply these principles.[2]

When making a serious allegation of improper, dishonest or criminal conduct against any person it is, therefore, a lawyer's obligation to take extreme care and to be personally satisfied that the allegation can be substantiated, and that there is a reasonable and proper basis for making it. It is insufficient in discharge of a practitioner's duty to simply act on the allegations of the client and to parrot those allegations.

How particular allegations are assessed in any given circumstance will depend on the particular case at hand. It may be that there is corroborative evidence, either documentary or from other witnesses, which would be sufficient to discharge the practitioner's duty. It may be that the client can give such a detailed account, which is internally consistent and consistent with other facts known by the practitioner, to satisfy the practitioner that the allegation can be substantiated; although, in the case of particularly serious allegations, even that may not be sufficient.

In a family law context the consistent use of affidavits at least means that the client's instructions will ultimately be given on oath or affirmation. In all cases it would be prudent to obtain detailed written instructions and, dependent upon the seriousness of the allegation to be made, consideration should be given to having the client confirm their instructions by way of statutory declaration or affidavit (ie on oath or affirmation).

It would be quite improper to convey a client's allegations of serious conduct, such as engaging in criminal behaviour, where those allegations are vague and uncertain. If such an allegation is to be made it should contain full particularisation of the alleged conduct so that the recipient can fairly respond to it. In short, extensive enquiries should be undertaken by lawyers to satisfy themselves of the allegations to be made before they are made. That includes the making of serious allegations by letter as well as in documents filed in the court.

In making a serious allegation it should also be borne in mind that, if the allegation needs to be tested, a court or tribunal will apply the *Briginshaw* test and thus require a high degree of satisfaction that the allegation has been proved.[3] It would be prudent for a practitioner who is instructed to make such an allegation to apply that same test when determining whether or not he or she is satisfied to the requisite degree that the allegation can be substantiated and that there is a reasonable or proper basis for making it.

Many serious allegations that arise in a family law context will be such that there may often be little or no corroborating evidence. The insidious nature of child sexual abuse and family violence is such that it is often shielded from the view of the outside world. The fact remains, however, that the courts recognise that such allegations are easy to make and difficult to disprove. It is also accepted that some people manage to convince themselves that something untoward has occurred, or is occurring, when the conduct complained about is entirely innocent. On occasions, allegations may be made up or grossly exaggerated. See *Majid v Sunil*[4] for a recent example. That is why lawyers need to exercise extreme care when taking instructions to make such allegations.

[2] *Y v M* [1994] 3 NZLR 581, 586.

[3] See *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34.

[4] *Majid v Sunil* [2016] FamCA 274.

Relevant to this issue, r 65 of the Barristers Conduct Rules provides:

> 65. A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
> (a) available material by which the allegation could be supported provides a proper basis for it; and
> (b) 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.

That rule is in identical terms to r 21.4 of the Australian Solicitors' Conduct Rules.

Rule 61 of the Barristers Conduct Rules and r 21.2 of the Australian Solicitors' Conduct Rules also require lawyers, when making decisions about whether or not to make such allegations, to ensure that doing so is, *inter alia*, appropriate for the robust advancement of the client's case on its merits.

In essence, as with all other matters, when making serious allegations it is necessary to determine that it is appropriate to make the allegation at all. If it is not, maybe because it is irrelevant to the client's case, then it should not be made. If it is to be made then great caution should be exercised in doing so. The obligation to be satisfied, that there is factual material to support the making of a serious allegation (or indeed any fact), is also reflected in r 64 of the Barristers Conduct Rules which provides:

> 64. A barrister must not allege any matter of fact in:
> (a) any court document settled by the barrister;
> (b) any submission during any hearing;
> (c) the course of an opening address; or
> (d) the course of a closing address or submission on the evidence;
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> unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.

That rule is replicated in r 21.3 of the Australian Solicitors' Conduct Rules.

Serious allegations against legal practitioners

Legal practitioners hold a privileged position in society and at times are called upon to make serious allegations against other people regarding their conduct. On occasions, those allegations may need to be made in respect of fellow legal practitioners.

The making of a complaint regarding the professional conduct of a fellow practitioner can and should be considered as a matter of seriousness. In that regard, the decision whether or not to make a complaint is a difficult one and one which should not be taken lightly. All of the usual considerations and obligations relating to the making of serious allegations are relevant to making a complaint to the Legal Profession Board or other appropriate regulatory authority against another lawyer.

If a complaint is to be made at the behest of a client, extreme care should be taken by a legal practitioner to ensure that they are satisfied that the complained-of practitioner has engaged in the conduct alleged, or at least that there is a sufficient and proper basis for making the complaint. It is not appropriate for legal practitioners to simply repeat the allegations of their clients. Rather, a legal practitioner's obligation is to treat other practitioners with the utmost fairness and courtesy. It is a general duty not to make allegations of improper conduct against any person without a reasonable or proper basis for doing so. That is a higher duty when the allegation is made against a legal practitioner, whether or not that legal practitioner's conduct arises out of the course of his or her practice. That is because legal practitioners remain subject to the disciplinary regime established under the *Legal Profession Uniform Law* or *Legal Profession Act* applicable in their jurisdiction, regardless of whether the conduct occurred as a part of his or her legal practice or outside it, particularly if the conduct goes to a suitability matter. It is exceptionally serious to accuse fellow legal practitioners of engaging in dishonest or fraudulent conduct because, if established, that could lead to the most severe of disciplinary consequences.

In *Legal Profession Complaints Committee v Chin*, the Western Australian State Administrative Tribunal said:

> While it is the undoubted duty of a practitioner to carry out the instructions of a client, that duty is not an unbridled one. Where a client informs a practitioner that the opposing party has committed fraud,

> great care must be taken by that practitioner to satisfy himself that a proper basis for such an allegation has been made. It is certainly not sufficient for the practitioner to accept the say-so of his or her client and to merely repeat that assertion, for to do so would, in our view, constitute misconduct of the most serious kind. Where, as in this case, the allegation of fraud or dishonesty is made by a client against a fellow practitioner, the duty to make extensive precautionary enquiries in order to verify the allegation before levelling an accusation of the kind made in the letter becomes paramount. Moreover, should such investigations fail to satisfy the practitioner that such a serious allegation can reasonably be made, the practitioner must refuse to make it, notwithstanding the insistence of his client. Should the client persist in requiring the practitioner to make such an allegation in the absence of supporting evidence, the practitioner should refuse to act for that client.
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> In the case before us, no evidence, whether oral or documentary, was adduced which would justify a reasonably competent practitioner making the allegations contained in the letter. The assertion that his client does not make false allegations does not begin to satisfy the duty incumbent on a practitioner. We do not accept the evidence of the practitioner that there was a report by a private investigator supporting those allegations when neither the nameless investigator was called nor was the alleged report or its contents placed before us.
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> We accordingly find that the practitioner failed to treat a professional colleague with the utmost fairness and courtesy and that he made allegations of improper conduct against fellow practitioners without a reasonable or proper basis for doing so. We find further that his conduct involved a substantial failure to reach or maintain a reasonable standard of competence and diligence and that he is accordingly guilty of professional misconduct.[5]

In that case the practitioner was struck off by the Full Court of the Supreme Court of Western Australia.

Care needs to be taken when making a complaint against another practitioner because it can be professional misconduct itself to make an allegation of professional misconduct against another practitioner without a proper basis for having done so.[6] This is also expressly addressed in r 32 of the Australian Solicitors' Conduct Rules which provides:

> **32. Unfounded Allegations**
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> 32.1 A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.

The same considerations should be taken into account if a lawyer is considering making a complaint against a legal practitioner in her or his personal capacity as opposed to acting on behalf of a client. There are, however, other considerations that come into play if another practitioner has behaved in a manner which may give rise to a complaint to the appropriate regulatory authority.

The first consideration is to be satisfied that the conduct and circumstances are assessed as objectively and impartially as possible. The reality is that, unfortunately, in the heat of battle, there may be a tendency to lose sight of objectivity. Accordingly, the author strongly recommends that, before making any complaint, a lawyer seeks independent advice or at least independent views of the situation. That need not necessarily be legal advice in the sense of obtaining counsel's opinion or the like, but rather having the matter considered by partners of the firm or another legal practitioner with a view to ensuring that, when viewed impartially and objectively, the allegation can still be substantiated. That approach should also provide some further guidance as to whether the views on the seriousness of the alleged conduct that were first formed are correct or appropriate.

For employed solicitors the author strongly recommends that they always obtain the views of their employers before making complaints. Indeed, in most circumstances it would be preferable, if a complaint is to be made, for the complaint to actually be made by a partner of a firm rather than an employed solicitor.

[5] *Legal Profession Complaints Committee v Chin* (2012) 81 SR (WA) 150; [2012] WASAT 77, [67]-[69].

[6] See *McLaren v Legal Practitioners Disciplinary Tribunal* (2010) 234 FLR 421.

The next issue is to consider whether a complaint is warranted. This can be a difficult issue. Every little thing that is said or done should not be subject to a complaint. In that regard, the author generally advocates that if it is possible to resolve issues of alleged misconduct by other practitioners through other means, then that should be done. In general terms, making a complaint should be seen as something of last resort. There are numerous ways in which such allegations could be dealt with, eg by writing to the other practitioner, having a partner of the firm speak to that practitioner or a partner of that practitioner's firm, or the like.

In short, the author generally advocates against making complaints unless it is necessary to do so and, even then, it should not be done lightly.

Are legal practitioners obliged to make complaints against fellow practitioners in certain circumstances?

The final issue for discussion in this article is the vexed question of whether a legal practitioner is under a duty or obligation to make a complaint to the Legal Profession Board against a fellow practitioner in certain circumstances. There is little guidance on this issue. The comments in this article are the author's personal views and the author acknowledges that there are practitioners who hold competing views.

It is the author's view that practitioners hold duties to the court, the public and the profession to ensure that the good reputation of the profession is maintained and that people who are not fit and proper persons to be legal practitioners are not held out as such. In *Law Society of Tasmania v McDougall*, Evans J said:

> The power of the Court to make consequential orders is entirely protective in character and no element of punishment is involved. The powers are to be exercised for the purpose of, and in a manner seen likely to achieve, the maintenance of that high standard of conduct within the profession which will continue its good reputation and so protect, not only the future of the profession, but also its clients and others who deal with members of the profession.[7]

The importance of protection of the reputation of the legal profession was also considered in *Law Society (SA) v Rodda*.[8] Mr Rodda had been convicted by a magistrate of two counts of indecent assault of a minor and sentenced to a period of eighteen months imprisonment, wholly suspended. The assaults were that he kissed a young girl and, on the second occasion, briefly touched her breast on the outside of her clothing. The magistrate found that Mr Rodda was not a sexual predator. On the Society's application that Mr Rodda be struck off, Doyle CJ said:

> The reputation and standing of the profession in the public eye are important. Public confidence and trust in the legal profession is important to the effective functioning of the profession. That confidence and trust rest in part on the reputation and standing of the profession. The public could not view with respect, and have complete confidence in, a person with such serious and recent convictions. Were the Court to continue to hold Mr Rodda out as a fit and proper person to remain a member of the profession, the standing of the profession as a whole would suffer. The public would rightly doubt the standards of a profession which permitted a person who has recently committed such serious offences to remain one of its members.[9]

In *Ziems v Prothonotary of the Supreme Court*, Kitto J said:

> The issue is whether the appellant is shown not to be a fit and proper person to be a member of the Bar of New South Wales. It is not capable of more precise statement. The answer must depend upon one's conception of the minimum standards demanded by a due recognition of the peculiar position and functions of a barrister in a system which treats the Bar as in fact, whether or not it is also in law, a separate and distinct branch of the legal profession. It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and

[7] *Law Society of Tasmania v McDougall* (2007) 17 Tas R 1, [9].

[8] *Law Society (SA) v Rodda* (2002) 83 SASR 541.

[9] *Law Society (SA) v Rodda* (2002) 83 SASR 541, 546.

> advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar.
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> Yet it cannot be that every proof which he may give of human frailty so disqualifies him. The ends which he has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them. It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession, or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails.[10]

With those observations in mind, the author takes the view that if a practitioner becomes aware that another practitioner has engaged in conduct which *prima facie* would render that other practitioner unsuitable to remain held out as a fit and proper person, the practitioner is under a duty or obligation to bring that conduct to the attention of the appropriate regulatory authority by way of complaint.

In short, it is inappropriate for practitioners to turn a blind eye to conduct which should result in a fellow practitioner potentially being struck off or severely disciplined. Obviously, the practitioner would first need to have a high degree of satisfaction as to the factual circumstances before in fact making a complaint.

The types of conduct that would give rise to an obligation to make a complaint include stealing, committing dishonesty offences, committing other indictable offences, or other matters which go to the suitability matters set out in s 9 of the *Legal Profession Act 2007* (Tas) and its equivalents in other jurisdictions, and which, if established, would disqualify the person from practice.

In relation to other misconduct, including professional misconduct, practitioners have discretion as to whether or not to make a complaint. In that regard there is a clear tension between, on the one hand, the undesirability of practitioners regularly making complaints against one another, particularly given the public stigma attached to a finding of unsatisfactory professional conduct or professional misconduct; and, on the other hand, the necessity to protect the reputation of the profession and to protect the public. That is why the author draws a distinction between conduct which renders a practitioner unsuitable to remain a member of the legal profession and conduct that falls short of that degree of seriousness.

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[10] *Ziems v Prothonotary of the Supreme Court (NSW)* (1957) 97 CLR 279, 297-298; [1957] HCA 46.