

Legal Ethics in Court Practice

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What is meant by the expression “Legal Ethics”? What is the current public perception of the ethical standards of lawyers? Of judges? Why does the public perception matter? Where does counsel with an ethical problem go for guidance? Where does a judge go? What differences are there in the ethical principles governing the conduct of counsel and judges? What similarities? Should counsel plead/argue a hopeless case? When is a case hopeless? When may a case be an abuse of process? What information against interest should counsel provide to the court? What are the perceived bias conventions observed by judges leading to them disqualifying themselves? When should they not disqualify themselves? What bias is eradicable and what is not? How should counsel go about seeking the judge’s disqualification? What situations create a potential conflict of interest for counsel? What should counsel do when a potential conflict arises? What accountability mechanisms are in place for dealing with the improper conduct of counsel? Of a judge? How effective are those mechanisms? When should a judge censure or otherwise deal with counsel for acting improperly?

I am not suggesting that reading this paper will enable the reader to find the answers to these questions. I do hope that it will assist towards a more focused discussion about the issues they raise.

My brief

I have liberally interpreted my brief as permitting me to focus more particularly on ethical problems arising inside the court-room from the perspective of counsel and of the judge.

I have selected four cases to look at more specifically: *Hardie v Booth* [1992] 1 NZLR 356; *Black v Taylor* [1993] 3 NZLR 403; *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 and *Ridehalgh v Horsefield* [1994] 3 WLR 462.

Hardie and *Kooky* are decisions by judges of the High Court, *Black* by the Court of Appeal and *Ridehalgh* by the English Court of Appeal.

I have looked at six “practical issues” linked to the four cases: pleading the unwinnable cause; disclosing adverse decisions; judicial bias; conflicts of interest; counsel accountability; judge accountability.

I have prefaced the discussion of the issues with some reflections of a general character.

The four cases

First, a brief reference to the four cases. *Hardie* was an appeal against a decision of a District Court judge who had occasion to look at a without prejudice document on an interlocutory application. Arguments that the judge was biased and should not have

presided over the hearing proper, and that the respondent's counsel should have cited to the court a High Court decision were rejected.

In *Black*, the Court of Appeal dismissed an appeal against the making of a declaration that a practitioner should not act further as counsel because of the perception of a conflict of interest. *Black* is interesting for reasons that include: the Court's focus on the inherent jurisdiction of the court; its support for taking account of the perception as well as the proved existence of impropriety; its support for the Law Society's Rules; and its assistance on some other matters.

Matters such as: the levels of questionable conduct of practitioners; differences in the roles of counsel as against solicitors; the approach of a practitioner to self-disqualification; the level of possibility of conflict; the characteristics of the fair-minded observer; the level of knowledge of that observer; the apparent increase in applications for disqualification; the criteria of relationships meriting scrutiny.

Kooky is a partial report of an appeal from the District Court on a landlord and tenant dispute. The judge commented adversely on the situation where a practitioner appeared for a client where there was an actual or potential conflict of interest, and made an order for the respondent's costs to be paid by the appellant's solicitors. The decision is also of particular interest because it attracted some criticism from Donald Dugdale,¹ and because John Laurenson QC then took Donald Dugdale to task.²

Ridehalgh is a decision on six appeals from rulings requiring practitioners to personally pay costs. Submissions were put to the English Court of Appeal by the Law Society, the General Council of the Bar and the Attorney-General. *Ridehalgh* contains important messages for counsel and for judges about a number of matters including: the need for achieving balance when reviewing safeguards to the litigation process; what the court termed "satellite litigation"; the hopeless case; and the role of Rules of Professional Conduct.

My limits

I suggest below some sources to which judges and counsel may go to look for guidance on how they should behave or conduct themselves ethically or otherwise. The sensitivity of so many areas touched on means that the style of most writers is to mix personal opinions with propositions expressed less rather than more authoritatively. Putting propositions as to what other judges and as to what counsel must or may not do is a highly judgmental exercise. I am far from being in a position to do that.

Although I have a fascination and a little experience in dealing with ethical problems, I did not practise as a barrister sole, I am still a relatively junior judge and I am acutely aware that the subject of legal ethics is highly sensitive, and of judicial ethics even more so. I was asked last year to chair a committee of the Australian Institute of Judicial Administration (AIJA) supervising the preparation of a discussion paper on judicial ethics.

1 LawTalk 405, 12, 22 November 1993.

2 LawTalk 407, 16, 7 February 1994.

The more I have come to know, the more I have come to appreciate how much I don't know or have difficulty articulating adequately. I hope that the limitations of writing from afar do not show too obviously. I have tried to avoid assuming that what applies in Australia ought to, or even might well, apply in New Zealand. I recognize that some things that puzzle me, like one Wellington lawyer's involvement in more than one capacity in several cases I refer to, will not puzzle locals.

Scope of ethics

I am struggling at the first hurdle of defining "legal ethics". Does it include conduct which is illegal? Does it include conduct which is merely a breach of etiquette? I obviously concur with Sir Owen Dixon that conduct goes beyond ethics.³ I sympathize with Dr David Wood, who is drafting the AJJA discussion paper. He has said that he prefers not to try to define "judicial ethics" but to side with Aristotle who said: "It is a mark of the educated man and a proof of his culture that in every subject he looks for only so much precision as its nature permits."⁴

That approach is echoed in what the Court of Appeal said in *Ridehalgh*, p 480, to the effect that it is sometimes relatively easy to see whether conduct falls on one side or another of the line marking the bounds of propriety, but hard to define where the line is.

In canvassing issues of conduct and ethics, it is difficult at times to find the right word and easy to use generalizations to excess. I use "judge" instead of "judge or magistrate or master or senior tribunal member" or "judicial officer", because it is easier to do so. That may mask the very important point that the problems facing such "judges" at their different levels, and the options for addressing those problems can be very different. At times I use the word "greed" where it might have been preferable to use a euphemism.

Comparing lawyers and judges

Writing and talking about ethics would be difficult enough if one was doing so for an audience of only lawyers or only judges. The difficulties are compounded when one does so for an audience of both lawyers and judges. All the polls I have seen as to the public perception of the integrity, etc, of professional groups which have included judges and lawyers have judges at the top and lawyers near the bottom. Why is that so, and what are the implications? One implication is that the pressures on lawyers to change is high, while the pressure on judges is relatively low.

In Australia, in the last two years, lawyers have come under increasing scrutiny, with a series of inquiries by individuals or bodies looking at reforming the profession. As is often the case, although a few recommendations of such inquiries have been implemented, other reforms have occurred ahead of the proposed changes. For example, the Victorian Bar has recently altered its rules, previously considered unalterable, to abolish the two counsel rule, and bans on advertising, direct professional access and co-advocacy. The Victorian Attorney-General has recently stated that she proposes to take the conduct of disciplinary proceedings substantially out of the hands of the legal professional bodies.

3 *Jesting Pilate* (1967) 129.

4 Dr Wood's source: *Nicomachean Ethics* Book 1 Ch 3, 27-28 (Thomson translation, 1953).

The character of the pressures on judges is quite different. I reflected after reading the report of the interview of Eichelbaum CJ on 2 March last⁵ that it did seem that the problems facing the judges in New Zealand were relatively under control. I think that much the same can be said in Australia. That is certainly so by contrast with the 1980s when several trials and inquiries into the conduct of judges and magistrates were held.

One area of pressure relates to the lawmaking role of judges. In Australia, it is being put more often and more forcefully that at least the High Court is going too far. Last year, Justice Beverley McLachlin of the Supreme Court of Canada said:⁶

The judges in modern society are not potentates whose edicts from on high must be uncritically accepted as just and fitting; they are rather servants of the people in the highest and most honourable sense ... their lawmaking role has dramatically expanded ... they are required to decide complex social policy questions ... they must be in touch with the society in which they work ... they must be prepared to work hard ... It is its institutional and individual independence, coupled with integrity, which has made the judiciary the important institution it is.

Her point as to complex social policy questions is graphically illustrated by reference to an address by Lord Justice Balcombe, "Judicial decisions and social attitudes", published in *The Commonwealth Lawyer* of May 1994.

He argues that in the field of family law, judges are faced with having to make difficult value judgments on matters where they may have strong personal beliefs different from society at large. The dilemma is accentuated by the concern that the result of recognizing certain changes in social attitudes may accelerate the rate of change, with results which may not be generally welcome. His message is brought home by a cartoon which shows a young girl saying: "As an intransigent heterophobe I demand the right to live with my homosexual dad."

Judges are coming under increasingly intrusive media scrutiny. The changed media attitude has arisen in part from the increasing activity of members of lobby groups who now see judges as vulnerable targets, and the more so because of the convention that the judges do not retaliate. Attacks on judges as to gender neutrality issues reached a peak in Australia in May 1993.⁷ The position of judges who resign or retire is increasingly being commented on critically. Some are seen as double-dipping. Some are seen as using their positions as judges earlier to better position themselves later.

There is increasing encouragement for judges to take a more active role in educating the community. That means moving further away from the traditional position of almost invariably shunning the media, to making themselves regularly accessible. The ethical problems so created are part of the subject of a paper I am to deliver on Friday next to the first Australian Judicial Orientation Programme.

5 [1994] NZLJ 86.

6 "The Role of Judges in Modern Commonwealth Society" (1993) 110 Law Quarterly Review 260.

7 For example see editorials in *The Melbourne Age* on 7 May "Back to school, Judge Bland" and in *The Melbourne Sunday Age* on 23 May "Time to open up the judiciary".

Although I have devoted more space to the pressures on judges than to those on lawyers, it should be apparent that relatively they are minimal compared with the latter.

At this point I would take you to an article written by the editor of the American Bar Association Journal⁸ on the results of a 1993 survey of how the public perceives American lawyers. It contained mainly bad news. It noted that between 1973 and 1993, the percentage of Americans surveyed who had “great confidence” in law firms fell from 25% to 8%.

Three other associated and troubling findings were that lawyers were seen as being greedy, as having used the freedom to advertise to generate more litigation in their greed to get more money, and as having poor ethical standards and enforcement.

To the public, acting for a confessed criminal was seen as unethical, while unethical behaviour also covered poor communication skills and fee disputes, whereas to lawyers it covered only non-adherence to the Rules of Professional Conduct and being subject to disciplinary proceedings.

The survey confirms points made by David Pannick QC in *Advocates*⁹ that there is a conflict between the professional and the lay approach to the ethics of advocacy, and that the layman’s concern is that the law should achieve morally and socially acceptable results.

To the extent that the result of a court case is seen to be unjust as where a villain gets off, the advocate who has helped to achieve that result is seen as getting his fee by morally dubious practices.

Why are judges held in such high esteem, and lawyers the contrary? Is it just that judges must, and are almost always perceived to, observe not just high but the highest of standards? Sir Winston Churchill said in 1954:¹⁰

A form of life and conduct far more severe and restricted than that of ordinary people is required from judges.... The judges have to maintain ... a far more rigorous standard than is required from any other class.

Is the main reason for the difference just that the numbers are so much fewer? The smaller the group, the more likely it is that high standards can be maintained by little more than peer pressure. Is it that judges must largely conduct themselves in open court where their actions are patently open to scrutiny? Is it that the mechanisms which are in place to keep judges accountable for their conduct are much more effective than those there to keep lawyers accountable? Is it that greed is, if not non-existent, much less a factor with judges than with lawyers? If so, is that because of the often-repeated wisdom that judges make huge financial sacrifices on moving to the bench? Is it that judges do not have to bear the burden of the advocate of the perceived amorality of defending the indefensible?

8 Gary Hengstler, “Vox Populi. The Public Perception of Lawyers: ABA Poll” September 1993 ABA Journal 60.

9 (1992) 164.

10 Debates in the House of Commons 23 March 1954, 1062–1063.

Does the answer lie in the emphasis placed on the impartiality of the judge as the terms of the judicial oath makes clear: "... I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will...."

I digress to note that impartiality has its benefits. As a judge I have a strong sense that I am now acting to promote the common good, as against the good of the client. However, the burdens are heavy. They serve to make the work, as Sir Owen Dixon said on this retirement, "hard and unrewarding".¹¹ They include isolation, and a schedule which is rendered unbalanced by excessive reading, researching and writing at least for any individual who prizes contact with people beyond critically assessing witnesses, arguing with counsel, and pontificating to juries.

One must not overlook the similarities. The oath of office of lawyers, like the judicial oath requires them to act according to law. So far as criminal conduct is concerned, what is serious enough to warrant a judge being removed is likely to be serious enough to see a lawyer being struck off, and vice versa. A comprehensive review of conduct warranting striking off is set out in Orkin.¹²

As to judges, Shetreet advances a number of propositions.¹³ They include that conviction for an offence involving moral turpitude requires immediate resignation, and an unattributed suggestion that a judge committing a heinous crime should resign or commit suicide! Shetreet also provides a number of examples of traffic offences committed by some English judges who chose not to resign.

Noting recently a news item stating that the Lord Chancellor had issued "guidelines on acceptable behaviour" for the judges of England and Wales, I asked for a copy. I was told that the guidelines were not made public. The Lord Chancellor's Office later sent me a copy of a letter forwarded on 19 July last to the Lord Chief Justice and other judges. It provides a guarded classification of seriousness of behaviour including: conviction for an offence involving violence to persons, dishonesty or moral turpitude; conviction for an offence while driving under the influence of alcohol or drugs; behaviour amounting to sexual harassment; behaviour which could cause offence, particularly on racial or religious grounds; and conduct leading to a charge on a criminal offence other than parking or speeding without aggravating circumstances.

It will suffice at this stage to say that it is in the mutual interest of judges and lawyers that both groups work in unison to maintain high standards. In that light it is understandable why the judge gave the warning that he did in *Kooky*, and why the Court of Appeal in *Black* invoked the inherent jurisdiction of the court and stressed as much as it did the importance of perceptions.

Sources

Where does counsel or a judge go to become better informed on what the high standards expected of him or her are, or to obtain more guidance on how to deal with an ethical

11 Op cit n 3, p 256.

12 *Legal Ethics* (1957) 201ff.

13 *Judges on Trial* (1976) 367.

dilemma? The starting point for any practitioner must be the Law Society's Rules of Professional Conduct. In an age where there are books published on such a wide variety of legal subjects, including some that focus on a very narrow field, it is a little puzzling that there is relatively little available on legal ethics.

For counsel, Australia has little to offer. Sir Gregory Gowan's book on the Victorian Bar published in 1979¹⁴ offers little help. Lewis & Kyrrou¹⁵ provide some assistance, but only incidentally for counsel. In many areas, *Advocates*¹⁶ by David Pannick QC is invaluable. In others it disappoints but it is always pleasant reading. *Legal Ethics* by Orkin¹⁷ is valuable as to old authorities, but it is very much out of date. I can go no further, save to say that it is a pity that *Rondel v Worsley* [1967] 1 QB 443 and [1969] 1 AC 191 does not come with an index.

For judges the position is only marginally better. There is a great deal of writing on the subject from North America. I suggest that much of it is of relatively little value. While international comparisons may be useful, one must be wary. For a start, it is essential to know the criteria for the appointment of judges.

Much information from the United States needs careful scrutiny. A good example of this is to be found in the Mahoney JA and McGarvie J papers on *The Accountability of the Australian Judiciary*,¹⁸ where there is a detailed review of certain Californian practices. I would mention two exceptions. For more than ten years until 1992, newly appointed Federal judges in Canada received from the Canadian Judicial Council a small book titled *A Book for Judges* written by a retired provincial Chief Justice. Since 1992, new judges have received a book titled *Commentaries on Judicial Conduct* prepared by a committee chaired by the Chief Justice of Alberta.¹⁹ For me, there is particular value in the *Commentaries* because the book contains diverse views expressed in response to a questionnaire sent to over 100 Canadian judges.

I would commend three books with a primary focus on the English judiciary: *The Judge* by Lord Devlin,²⁰ *The Courts on Trial* by Shimon Shetreet²¹ and *Judges* by David Pannick.²² There is much of value in Shetreet. However the book was written nearly 20 years ago specifically as to the English judiciary. At times that shows, as where he sets out the practice of English judges as to disqualification for bias in these terms: "... very rarely have judges disqualified themselves at the instance of parties. Barristers do not raise such objections." That is far from the recent Australian experience.

Of most value to Australian judges is *Judicial Ethics in Australia* written by Thomas J of the Queensland Supreme Court.²³ I would have preferred that more attention had been

14 (1979).

15 *Handy Hints on Legal Practice* (1993).

16 Op cit n 9.

17 Op cit n 12.

18 (AIJA 1989).

19 Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991).

20 (1979).

21 Op cit n 13.

22 (1987).

23 (1988).

given to Australian cases, but that reflects my own disposition to look to the maximum extent possible to the decided cases.

Three other Australian books which may be found to be of some value are *Judges* by Justice Kirby,²⁴ *The Judges* by Robert Thompson²⁵ and *Judging the World* edited by Chubb & Sturgess.²⁶

Some judges to whom I have spoken relative to the AIJA discussion paper have sought to persuade me that it is not in the interests of the judiciary that a paper be published. They say that any publication would potentially be used by the media to further undermine the independence of the judiciary. They also say that no suitable author could be found to write a paper as no academic could understand the subtleties of the subject matter, no active judge would have the time, and no retired judge would still be in touch with the current climate affecting serving judges. I am confident that a discussion paper will be available by this time next year.

Not without qualification, I accept that the most appropriate sources to consult will be experienced colleagues. The qualification is that even senior colleagues can be wrong. An interesting illustration of that is to be found in *McKaskell v Benseman* [1989] 3 NZLR 75.

Code or Rules of Conduct

I turn to the subject of the role and value of a Code or Rules of Conduct for lawyers, and for judges. Lawyers are being increasingly regulated. Extensive Rules or Codes are being established or refined, reducing the capacity to operate otherwise than according to the standards set by the rules. Law Society publications are seen to have an increasingly significant role in setting standards leading to a greater uniformity in practice.²⁷ The seemingly inevitable consequence is that of increasing negligence claims where there has been a departure from the standards.

As Alastair Campbell has pointed out, while a code is likely to be criticized as being either so general that it has little practical application or so detailed as to be inflexible, it can provide helpful signposts to guide the practitioner in a general way through the moral complexities of everyday practice.²⁸

The courts are increasingly referring to such Rules as in *Black, Kooky and Ridehalgh*. In *Black*, Richardson J said, p 409, that, while the ethical code did not impose legal obligations or have the force of law it expressed the profession's own collective judgments as to the standards to be expected of practitioners and was some indication of relevant public policy concerns. McKay J referred, p 418, to Rule 1.06 as being relevant as a statement by the responsible body of the profession as to what is an appropriate standard of conduct in a conflict situation.

24 (1983).

25 (1986).

26 (1988).

27 Jackson & Powell *Professional Negligence* (3rd ed, 1992) 339.

28 "Without Fear or Favour: the Challenge of Judicial Ethics" (paper read to the National Conference of District Court Judges, 6 April 1991, Waitangi, New Zealand) 2, 5.

In *Ridehalgh* the Court of Appeal when considering the meaning of “improper”, p 478, said that it included, but was not confined to, any significant breach of a substantial duty imposed by a relevant code of professional conduct.

In Australia, one academic has been pressing for the preparation of a code of judicial conduct.²⁹ The American Bar Association has published a code long ago. An extract is set out as an appendix in Thomas.³⁰ Last year, the Queensland Magistrates prepared their code for insertion in their Bench Book.

There are judges strongly of the opinion that the less that is written about standards of judicial conduct the better, that any text may well be treated as having more authority than it deserves, and that it might well be used to make life more difficult for judges.

Some say that a code of conduct is totally unnecessary as judges are, or at least tend to be, chosen from the ranks of individuals who are naturally disposed to conduct themselves according to high standards. They say that there are just not enough examples of unacceptable conduct. Further, they point to the difficulties of drafting provisions as to the types of conduct which can extend from trifling breaches of etiquette to serious misbehaviour meriting removal.

The arguments are not unpersuasive. The contrary arguments include that having a code will, like other writings on the subject of judicial conduct, in time lead to a better understanding of the principles which govern the conduct of judges, whether those principles are founded on law or convention, and that that will advantage the judiciary, the profession and the community.

In Australia, consideration of the desirability of a code is likely to be deferred until after the preparation of a discussion paper, and then a surveying of judges as done in Canada.

The hopeless case

The first ethical issue likely to be encountered in practice which I turn to is that of pleading or arguing the hopeless or unwinnable or unarguable case. I confess that my own experience in this area is somewhat limited. It was mainly in the area of advising people who wished to initiate libel proceedings.

In that role, I was conscious of the need to act as a kind of filter or screen attentive to hidden agendas and other considerations not essentially legal in character. There are plenty of judicial and other comments as to the duty of counsel in this area. I have great difficulty reconciling many of them.

Let me illustrate by paraphrasing instances of a sympathetic attitude taken from Pannick on *Advocates*³¹ (with his page references): the great tradition of advocacy is to make mountains out of molehills, to find a point of law where none had previously been known to exist (5); apparently hopeless cases are occasionally won with skill, judgment,

29 Morabito, “Time for an Australian Code of Judicial Conduct” (Law Institute Journal 1993) 614.

30 Op cit n 23, p 105.

31 Op cit n 9.

inspiration and luck (5); finding a position advanced by counsel to be frivolous must not lead to counsel being disciplined as that might inhibit the bar from vigorous advocacy (94).

Compare those with these, also from Pannick, illustrating an unsympathetic attitude: it is the duty of counsel to say so when a point is unarguable (94); counsel have a responsibility to the court not to use public time in the pursuit of submissions which are really unarguable (94); (Lord Denning) counsel must only advise proceedings if there is a reasonable case to be made (106); counsel should not draft grounds of appeal without being certain that there were arguable grounds (108); counsel has a duty to avoid making a submission which has no foundation in sense, reason or law (216).

I digress slightly to note a striking Australian case of an apparently unarguable point succeeding. The leading Australian case on a barrister's immunity for negligence is *Gianarelli v Wraith* (1988) 165 CLR 543. The defendants included counsel, two senior, who had apparently assessed as unarguable an objection to the admissibility of evidence. The objection was not taken at the committal, trial or appeal to the Victorian Court of Criminal Appeal. The point was taken before the High Court which quashed the conviction.

Ridehalgh is of particular interest because the Court of Appeal was concerned with the provisions of Rules which permitted the awarding of costs against practitioners, which rules were said, p 477, to be clearly aimed at the problem of expense being caused by the unjustifiable conduct of litigation by lawyers. The Court opted for a substantially sympathetic position indicating, p 479, that a lawyer was not acting improperly, unreasonably or negligently simply because he or she acted for a party who was pursuing a claim or a defence which was plainly doomed to fail.

It quoted approvingly what had been said in *Orchard v South Eastern Electricity Board* [1987] QB 565 to the effect that it was not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before the litigant can put his complaint or defence before the court, although no solicitor or counsel should assist a case brought in bad faith or for an ulterior purpose or which was otherwise an abuse of process.

Two New Zealand cases merit a mention at this point. In *Gazley v Wellington District Law Society* [1976] 1 NZLR 452, the Full Court adopted part of a statement of Lord Reid in *Rondel v Worsley* [1969] 1 AC 191:

Counsel ... 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.... The same public duty applies when drawing pleadings ... as applies to counsel's conduct during the trial.

In *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84, Cooke J said that the position was that counsel had an absolute privilege in drawing pleadings and in presenting a case in court, that counsel had a professional responsibility not to make

allegations without a sufficient basis or without reasonable grounds, and that if counsel breached that responsibility the proper sanction was to take disciplinary proceedings before the appropriate professional body.

The important question is not whether a case is hopeless or not, but whether a case is hopeless or it amounts to an abuse of process.

In *Ridehalgh* the English Court of Appeal, p 479, suggested that it was not entirely easy to distinguish by definition, but in practice it was not hard to say which is which. The court emphasized that a lawyer would be acting improperly: in issuing or pursuing proceedings for reasons unconnected with success in litigation; in pursuing a case known to be dishonest; in knowingly failing to make full disclosure on an ex parte application; in knowingly conniving at the incomplete disclosure of documents.

There have been some interesting recent cases as to abuse of process in New Zealand and Australia,³² but only *New Zealand Social Credit Political League Inc v O'Brien* focused on the role of the lawyer.

One final note about *Ridehalgh* is that the point was made there, p 479, that a judge should not assume that a hopeless case was being litigated on the advice of the lawyers involved. The role of the lawyer was to present the case on instructions. The role of the judge was to judge it. The court also said, p 483, that judges were not to be encouraged to initiate their own inquiries.

Disclosing the law

I turn next and briefly to the subject of the duty of counsel to draw the attention of the court to relevant information, even such as will harm counsel's cause.

In *Hardie*, it was put that counsel below had failed in that duty. Tipping J did not have need to refer to any authority as to the principle he was called on to apply. He concluded that the case not drawn to the attention of the judge below had arisen in a wholly different factual and legal context and that its citation would have made no difference.

The House of Lords said in *Glebe Sugar Refining Co Ltd v Greenock Port & Harbour Trustees* [1921] AC 66 that it was extremely improper to withhold from the court any authority or any possibly important relevant statutory provision which cast light upon the matters under debate, whether or not it assisted the party aware of it. It said that if it were not so, the court would be just a debating assembly upon legal matters providing a decision founded upon imperfect knowledge.

In many circumstances, the judge may need little encouragement, following a disclosure against interest, to show his or her capacity to creatively distinguish authorities or construe statutory provisions where they are not clearly determinative of the matter.

32 *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8, *Williams v Spautz* (1991–1992) 174 CLR 509, *Madderer v Urawera School Board of Trustees* [1993] 2 NZLR 478 and *Coe v The Commonwealth [The Wiradjuri Claim]* (1993) 68 ALJR 110.

Bias

I turn next to the subject of judicial bias, an understanding of which is, or ought to be, important to counsel as well as to judges. As I noted above, the words in the judicial oath “Without fear or favour, affection or ill will” focus on the subject of impartiality or bias.

Based on my experience, every judge is likely to have to turn his or her mind often to the possible need for disqualification in any proceeding in which the judge’s impartiality might reasonably be questioned.

That might arise where the judge might have, or reasonably be perceived to have, a personal bias concerning a party or a material issue, or personal knowledge of disputed evidence, or where the judge has served the party as a lawyer, or where the judge has had a family, social, business or professional relationship with a party or a lawyer for a party to the proceeding, or where the judge or a close relative could have a financial interest or any other interest in the case.

I suggest that a close working knowledge of the cases on bias is important for any judge not just because the judge may have to apply the principles when an application is made to do so, but because the cases contain the most reliable source of guidance for judges as to how they should conduct themselves on and off the bench.

There have been many recent reported cases in New Zealand and Australia on bias. To *Hardie*, I would add *Police v Pereira* [1977] 1 NZLR 547, *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146, *Inform Group Ltd v Fleet Card (NZ) Ltd* [1989] 3 NZLR 293, *Thornton Hall v Shanton Apparel* [1989] 3 NZLR 304, and *R v Cullen* [1992] 3 NZLR 577.

A good number of the Australian cases were noted by the High Court in *Webb v The Queen* (1993–1994) 122 ALR 41.

I am intrigued that, given that there have been so many cases, the subject seems to have received relatively little analysis outside of the cases. An exception is an article by Gerard Kelly, to which I will refer later.³³

The Australian case most commonly cited is *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 where the High Court concluded that there was ostensible bias on the part of members of the New South Wales Court of Appeal in ordering that a barrister be struck off.

In *Webb v The Queen*, the Court said that the test for juror bias was the same as for judges and for persons who exercise non-judicial functions: “Whether fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case”.

The cases show divergences in the selection of words in the formulation of the test, with comments at times that the differences may not often affect the substantive result.

There are differing views as to matters such as: whether “suspect” is as appropriate as

33 “Reviewing the Observer of Bias” (1993) 67 ALJ 340.

“apprehend”; why “danger” is inappropriate; and why the hypothetical observers are reasonable not ordinary.

Gerard Kelly,³⁴ in his analysis of cases on bias, notes that many expressions have been used to cover the fair-minded observer. He suggests: that the reasonable man is more analytical and reflective; that the ordinary man is more intuitive and reactive to impressions; and that the latter should be the observer, while the courts have opted for the former.

He also queries why the level of the observer’s knowledge has been seen to vary as between: being totally uninformed; having a sketchy outline; being moderately well informed; being acquainted with most facts; being acquainted with facts in great detail.

Kelly provides a helpful analysis of factors potentially to be considered in determining whether there is a relationship or association which is indicative of bias on the part of a judge: the character of the link; its intensity; the character of information passed on; the duration of the link; the time which has passed since the link was severed; and the relative directness of the link, including whether it comes through a spouse or partner.

A helpful summary of some of the conventions to be born in mind when considering disqualification is provided by Kirby P in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 369. Familiarity with those conventions is important to the judge and to counsel. The risk of embarrassment is reduced if the problem is seen and addressed as early as possible. In that same case, Kirby P elaborated, p 373, on aspects of the exceptions of statutory authority, necessity and waiver.

A categorization of the different circumstances in which an apprehension of bias may arise was undertaken by Mahoney JA in *Allen v Corporate Affairs Commission* (1988) 14 ACLR 632, and Mildren J in *Precision Fabrication Pty Ltd v Roadcon Pty Ltd* (1991) 104 FLR 260. It is appropriate to echo the statement in the later case that the categories are not closed.

One case which merits attention because it illustrates well how a judge can bow out more or less gracefully is *Mann v Northern Territory News* (1988) 88 FLR 194. The judge was asked to disqualify himself from hearing a defamation action because he was said to be outspoken and emotively critical of the defendant (and more). The request was handled with an impressively frank level of public soul-searching.

The Australian High Court has made clear its objection to a judge automatically disqualifying himself or herself when requested by one party to do so on the ground of a possible appearance of bias.

To what Mason CJ, Brennan, Gaudron and McHugh JJ said in *Re J R L: Ex parte C J L* (1986) 161 CLR 342, 352 and to what the Court said in *Re Polites: Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78, 87–88, can be added the decisions in *Fitzgerald v Director of Public Prosecutions* (1991) 24 NSWLR 45 and *Metcalf v Vickridge* (Full Court of the Supreme Court of Western Australia, unreported, 20 June 1994).

34 Ibid.

In both of the last two cases, the judge decided to disqualify himself, only to be told that he should not have done so. As to the impact of the bias principles on the conduct of a judge on the bench, there have been plenty of cases which have turned on the judge's handling of a proceeding at different stages.

Judges will not normally have to disqualify themselves as a result of having ruled on issues earlier in the instant case, or of having decided a case involving parties linked to the same events as in the instant case, or of having presided over an earlier trial of the same party whether or not based on the same events as in the instant case.

Applications for disqualification in those circumstances rarely succeed. An exception was *Police v Pereira* [1977] 1 NZLR 547, where Mahon J allowed the appeal, exercising his customary flair for eschewing the customary constipated legalese, holding that an attentive fair-minded observer might well conclude that the magistrate's decision to convict was in part founded on the magistrate's knowing that the allegations matched the defendant's proclivities.

In *Inform Group Ltd v Fleet Card (NZ) Ltd* [1989] 3 NZLR 293 it was said that a judge may have to consider disqualification if the judge has expressed an opinion in a separate case on a significant fact or the credibility of a witness, but not where he had necessarily to do so at an earlier stage of the same case.

In *Thornton Hall v Shanton Apparel* [1989] 3 NZLR 304 the expression by the judge of a view of an issue to arise at a later stage did not warrant disqualification.

There are a number of Australian cases where the courts have considered claims of bias based on the judge's past legal links. They include *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, *Pikor v Barrett* (1990) 11 MVR 345, *Precision Fabrication Pty Ltd v Roadcon Pty Ltd* (1991) 104 FLR 260 and *Re Polites: Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78.

It seems from the last of those cases, and from what was said in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* by Kirby P, that the court looks carefully at a lot of factors affecting the questions of whether a judge can be decontaminated and how long it takes, as where a judge is called on to sit in a jurisdiction where he or she customarily practised before appointment.

Whether a judge should disqualify himself or herself when a friend, former client or the like is a party, or when a friend appears as the lawyer for a party, must depend on how close and how personal the relationship is. The judge must decide whether he or she both feels personally capable of disregarding the relationship and can conclude that others can reasonably be expected to believe that he or she will disregard the relationship. A helpful collection of Canadian cases on disqualification and bias is contained in the *Commentaries*.³⁵

Membership of judges in certain private organizations can present problems. Social clubs or other organizations that exclude people on the basis of their race, religion, sex or

national origin are or may be perceived as prejudiced. Membership by a judge of such a club could create at least the appearance that the judge is biased against the excluded groups. Exceptions may be clubs that do not discriminate invidiously as where the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate concern to its members, or purely informal and private groups like bridge clubs.

Suppressible preconceived opinions

I turn to the subject of eradicable bias, which can be described in a number of other euphemistic ways. Under the sub-species “gender bias” it has recently been a source of fascination to numerous Australian journalists and members of lobby groups. The query of Donald Dugdale in his LawTalk comments on *Kooky* about the judge’s views on conflicts prior to appointment adds a different angle.

A leading Sydney silk, Tom Hughes, acknowledged in Thomson³⁶ that he played on judges’ prejudices. A judge quoted without identification in Thomson³⁷ said: “Different judges have differing likes for the style of argument.... Lines are cast to hook the judge.” Another judge quoted, speaking of counsel, said:³⁸

There are people whose cast of mind is similar to your own, whose capacity you appreciate, and there are those whose capacity is not there.... There is no way of eliminating human attraction and antipathy.

I construe the Hughes reference to prejudices as not just one to style, or to a preference for orderliness, or conciseness or the like.

The received doctrine in Australia as stated shortly by Dawson J, is that privately held views are not seen as an impediment to a judge exercising his function.³⁹

In *R v Watson: Ex parte Armstrong* (1976) 136 CLR 248, 264, Barwick CJ, Gibbs, Stephen and Mason JJ said that there were some matters on which a judge might have preconceived opinions and yet be qualified to sit.

Kirby P said in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 367 that the case books are replete with statements about the capacity of judges to throw off actual bias upon their appointment.

In *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 116 Dixon CJ, Williams, Webb and Fullagar JJ said:

Bias must be “real”. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties.... It has been said that “preconceived opinions—though it is unfortunate that a judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded” . . .

36 Op cit n 25, p 206.

37 Ibid, p 205.

38 Ibid, p 206.

39 “Judges and the Media” (1987) 10 UNSW Law Journal 17, 22.

In *Re R and His Honour Judge Leckie: Ex parte Felman* (1977) 52 ALJR 155, 160, Jacobs J said:

... a judge is selected for judicial office because of his learning and training in the law, his integrity and capacity for impartiality. The combination of these factors results in a judge being assumed to be able to bring a detached mind to his task of judgment....

In *Vakauta v Kelly* (1988) 13 NSWLR 502, 527, McHugh JA spoke of the capacity of judges heightened by training, tradition, oath or affirmation, to shed preconceived views.

In *R v Cullen* [1992] 3 NZLR 577, Eichelbaum CJ said that it was inevitable that defendants will appear more than once before the same judge, and that judges are well able to put out of their minds, at a later appearance, matters that might have arisen on the earlier occasion which were not relevant.

It seems that whether the opinions of a judge might warrant disqualification will depend on such considerations as the character of the issues or other matters which are the subject of the opinions, how strongly the opinions are felt, and whether and to whom the opinions have been voiced.

Where is the line to be drawn on subject matter? Clearly opinions of a general character concerning the protection of the innocent, the punishment of the guilty and the like cannot disqualify a judge from sitting. Presumably the same can be said for all or almost all of a judge's values, philosophy and beliefs about the law, so long as they can be, and can be seen to be capable of being, set aside. Of course juries are customarily being told by judges that they must set aside their prejudices and private opinions.

In *JRL; ex parte C J L* (1986) 161 CLR 342, 372, Dawson J noted that suspicion of bias through preconceptions existing independently of the case might well be ineradicable in the sense of necessarily incapable of correction as to fairness and as to the appearance as well as the fact of impartiality.

In *Vakauta v Kelly* (1988) 13 NSWLR 502, 515 Mahoney JA referred to kinds of prejudgment that were ineradicable.

Shetreet argues that a judge who has shown partisanship or is known to have strong convictions on a matter expressed extrajudicially should disqualify himself or herself.⁴⁰ He showed how difficult it is to draw the line by going on to say that strong convictions on a matter of public policy, on legal principles, or based on religious beliefs or membership of a racial group do not require disqualification or disclosure.

Where is the line to be drawn on strength of conviction? Frankfurter J of the Supreme Court of the United States of America disqualified himself from sitting on a case as to trams transmitting radio programs saying that he had strong feelings as a victim of the practice, and he was concerned that those feelings might operate on his judgment, or that other people might believe the feelings would so operate.⁴¹

40 Op cit n 13, p 309.

41 Quoted in Pannick op cit n 9, p 41.

In a recent article, Lawrence Maher called in aid the writings of Sir Zelman Cowen to support his argument that Sir John Latham's deeply held personal views on communism were such that he ought not to have sat on the Communist Party Dissolution Case.⁴²

It seems that, to warrant disqualification, the bias must be such that there is a real risk that it would result or be seen to result inevitably in a decision on the merits of the case or on an essential element in the case arrived at regardless of the evidence or submissions.

The significance of the circumstance of whether the opinion has been voiced, and to whom, lies in the importance attached to the perception or appearance, as well as the fact, of impartiality.

I give as the last word on bias, McLachlin J⁴³, speaking last year on the demands on judges. She included the demand for new efforts of objectivity, and urged that although a judge may have strong personal views on issues to be decided, which it was impossible to eliminate, the judge must act imaginatively, setting aside preconceptions and prejudices to look at the issue afresh in the light of the evidence and submissions.

Judge bias from counsel's perspective

Before making an application to the judge to self-disqualify, counsel ought to allow plenty of time to review the authorities. For reasons to which I have adverted, those which are pertinent may not be readily located. Care must be taken in determining precisely what information is to be placed before the judge, and how the application is taken up with opposing counsel and with the judge.

Special care should be taken in obtaining instructions to check the facts which are to be relied on to substantiate the request for disqualification so as to minimize the prospect that the application could be seen to have been made for a collateral tactical purpose. The application should be made as soon as possible.

In the light of what was said in *Vakauta v Kelly* (1989) 167 CLR 568, the right to object can be waived, although, as Kirby P pointed out in *Goktas v GIONSW* (1993) 31 NSW 684, 687, there is authority in the United States to the contrary.

If opposing counsel does not draw the attention of the court to the recent cases cautioning a judge against too readily agreeing to accede to a request for disqualification, the applicant's counsel's duty might be to do so.

Conflicts of interest

I turn to the subject of conflicts of interest noting that I have little of value to offer. More than ten years of assisting in making Ethics Committee rulings on conflict situations left me with a fascination for the subject. More than six years heading a committee supervising the handling of negligence claims against solicitors who had ineptly handled conflicts problems filled me with dismay. Involvement at times in attempts to draft rules to try to reduce the number of such problems left me despairing.

42 "Tales of the Overt and the Covert: Judges and Politics in early Cold War Australia" (1993) 21 Federal Law Review 151, 201.

43 Op cit n 6, p 266.

There are so many variables. There are three basic categories, being those addressed by the New Zealand Rules 1.03, 1.04 and 1.06. But there are many sub-categories, and some situations that really don't fit into the basic three. Some variables are common to all situations, while others only apply in limited circumstances. In this area, I have not confined myself to counsel conflicts. My justification is that all kinds seem to finish up in the courtroom.

I may best convey what I mean by variables by posing some questions, the very nature of which illustrates that they may not apply or will require modification from case to case. Are "country practitioners" involved? Is greed a factor, patently or inferentially? Is an alternative practitioner reasonably readily available? Could tactical considerations be behind an attempt to move a practitioner out? With a past relationship, what was its character and how long was it in place? Will any future link be for a long or a short period? If a crisis might occur, what warning time can be expected? Is the obtaining of prior informed consent an effective option? How effectively can it be shown to be achieved? Likewise for providing for a limited retainer? As to the communication of confidential information what can be proved to have occurred? What might be perceived to have occurred?

As in relation to problems of conduct and ethics generally, there are levels of seriousness to be assessed. At the top of the range of seriousness are the situations where the practitioner borrows from the client or is in some other way jointly involved in a transaction with the client. Close to the top are those situations where the practitioner acts for two clients in a transaction clearly involving a high risk of future problems as with mortgages and terms contracts of sale.

Section 33 of the Victorian Sale of Land Act contains a proscription of solicitors acting for both vendor and purchaser under a contract of sale of land on terms. It is qualified in certain respects, one of which is that it does not apply to solicitors practising more than 50 kilometres from Melbourne!

Also close to the top are the situations like matrimonial disputes where a practitioner's attempts to hang in will rarely succeed, perhaps because of the unforgiving attitude of the disputants.

There is then a vast grey area. I suggest that there are many situations where the risk of prejudice, if one practitioner (or two practitioners behind Chinese walls) looks after more than one interest, will be remote or small rather than real or serious, and where that risk can be suitably provided for.

The mere mention of Chinese walls, as defined and analysed by Tompkins J in *McNaughton v Tauranga County Council (No 2)* (1987) 12 NZTPA 429 prompts me to stress the need to keep in mind the importance of the perception as well as the fact of prejudice, as was done again and again in *Black*. I share the suspicion shown by many judges, and reflected in Rule 1.06, towards Chinese walls.

I referred above to one of the variables being greed. It will ordinarily be impossible to do more than speculate as to whether greed is a factor. In judgments, it is customary to stress,

at the point that greed might be thought to warrant a mention, the undoubtedly valid consideration that clients ought to have the practitioner of their choice. Not usually referred to, perhaps balanced against greed, may be the consideration of tactical advantage, which is about equally difficult to prove.

There are many reasons why the subject of conflicts of interest merits close scrutiny by legal professional bodies. The decisions of the courts are demanding of high standards, whatever the situation. It is not just as in *Black*, and as in *Barrott v Barrott* [1964] NZLR 988 for trying to act against a former client, and as in *Kooky* for hanging in for a current client, but as in *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 for acting for both parties in a mortgage transaction. I do not see *Clarke Boyce v Mouat* [1993] 3 NZLR 641 as any form of retreat, but as an example of how attention to detail can save a practitioner who opts to take the risk.

There is a host of recent Australian cases dealing with the situation of the practitioners attempting to act against a former client. Most are summarized in an article by Rosemary Teele.⁴⁴

In *Kooky*, reference was made to a 1990 article by Miriam Dean and Christopher Finlayson.⁴⁵ It is a very comprehensive review of the cases to that time. An article by Paul Finn in 1992 covered much of the same ground.⁴⁶ Yet the Teele article was able to refer to more than ten cases decided after publication of the Dean/Finlayson piece.

I return to the attitude of the courts, to make the comment that rarely would a court in retrospect assess the risk of prejudice as remote, when the court will have before it the clear evidence that the risk was realized.

The texts on professional negligence like Jackson & Powell⁴⁷ and Dugdale & Stanton⁴⁸ understandably stress that the practice of acting for more than one party has been condemned by the courts. However, the former text does note that the 1979 Royal Commission on Legal Services considered that the dangers of acting for both parties in conveyancing transactions were overrated, and that there were usually savings in time and cost when it occurred.⁴⁹

With an unsympathetic attitude being maintained by the courts, it is inevitable that practitioners who act in conflict situations cause the premiums for lawyers' professional indemnity insurance cover to rise. In Australia at present the premium level is a source of great dissatisfaction within the profession.

One area on which I would have expected to see more attention focused is that of the level of possibility of prejudice. Often as in *Kooky*, and as in Rule 1.06, there is reference to a potential for conflict. Rule 1.05 refers to a conflict or likely conflict. In *Black*, McKay

44 "The Necessary Reformulation of the Classic Fiduciary Duty to Avoid a Conflict of Interest or Duties" (1994) 22 Australian Business Law Review 99.

45 "Conflicts of interest: When may a lawyer act against a former client?" [1990] NZLJ 43.

46 "Professionals and Confidentiality" (1990) 14 Sydney Law Review 317.

47 Op cit n 27.

48 *Professional Negligence* (1989).

49 Op cit n 27, p 345.

J referred to Ipp J in *Mallesons Stephen Jaques v KPMG Peat Marwick* [1990] 4 WAR 357 having adopted the test of “a real and sensible possibility that the solicitor’s duty and interest might conflict”.

That formulation sounds not unlike that applied in the field of contempt, where the possibility of prejudice must be real or serious rather than remote or small. See *Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 273, 298–299. Likewise the “real likelihood of bias” test reviewed in *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146.

I wish I could do more than say that the problem is a major one and that it is very difficult to address. I confess that during the time that I pressed for tighter restrictions in the major problem conflict areas where I saw that there was a real, rather than a remote, possibility of prejudice, I continued as a litigation solicitor to act for two parties (union and member plaintiff, publisher and journalist defendants, insurer and insured defendant) where I assessed as remote the prospect of a falling out. Assuredly, there were in place the mechanisms to bail out with minimal impact if remote became real.

It does not appear from the report why in *Kooky* the course was followed of investigating the issue of conflict of interest which seems to have been collateral to the issues presented by the parties. I can only assume that the judge was able to draw the inference from what was said before him by the practitioner and by the client that there was nothing in the nature of full disclosure.

Counsel accountability

Judges can and do take appropriate disciplinary measures against lawyers who conduct themselves in an improper manner. A review of some of the cases shows that there should be a wariness about doing so. There are at least four options: action for contempt; a wasted costs order; referral for disciplinary action by the relevant professional body; and criticism from the bench.

Am I justified in inferring that the reason for the presence of the endnote to Rule 8 of the New Zealand Rules of Professional Conduct is that New Zealand judges are particularly prone to censure practitioners?

I am not too troubled about censuring carried out by an appellate court, which is likely to have had ample time to weigh the matter. I have a mild reservation that different counsel appearing on an appeal might have good forensic reasons for not putting the position of the original counsel at its highest. I have not looked too hard for reported censures. One was administered in *R v McLoughlin* [1985] 1 NZLR 106 to unnamed counsel for disregarding his instructions. Likewise in *R v Wilson & Grimwade* (Victorian Court of Criminal Appeal, 22 April 1994) to unnamed counsel for wasting time. The trial went for over two years!

Censure by a trial judge, particularly when it is added to by a wasted costs order, as in *Kooky*, can be much more a matter of concern for reasons I will come to shortly. In 1970 I heard a blistering oral censure of counsel, after almost continuous bickering, administered by the judge in the presence of the jury immediately after the verdict was given.

Years later I found it quoted in full in *R v Keech* (Victorian Court of Criminal Appeal, 5 October 1989). The censuring judge relied in part on what was said in *Beevis v Dawson* [1957] 1 QB 195. I am quick to censure, slow to do more. In the long run that may be a vice, not a virtue.

The contempt option is one I would be particularly wary about. I am troubled by the strong action taken in *Jellicoe v Wellington District Law Society* (1900) NZPCC 310 and *Re Wiseman* [1969] NZLR 55. Before going any distance down the track of charging a lawyer with contempt I would read again *Lewis v Judge Ogden* (1984) 153 CLR 682, and particularly the penultimate paragraph where these points are made: the contempt power is exercised to vindicate the integrity of the court and of its proceedings; it is rarely, if ever, exercised to vindicate the personal dignity of a judge; and the summary power of punishing for contempt should be used sparingly and only in serious cases.

Another option is to refer the matter to the appropriate legal professional disciplinary body to investigate and act as it considers fit.

Having been heavily involved in two extensive reforms of the relevant processes in Victoria because of perceived inadequacies, having noted that a further and more extensive reform is now planned, having watched as reforms have been effected in many other jurisdictions, having reflected on what the Hengstler article disclosed,⁵⁰ I am now ready to accept that may be some point in the Thomson quip: “Unlike the Mafia, the legal profession does not deal quickly and cleanly with those of its own number who have breached the code of ethics.”⁵¹

There is the wasted costs order option. *Kooky* troubles me, perhaps because the report does not contain all the information I would like to have in front of me before I could be satisfied that I could have made such an order. In Australia the option of making against an offending lawyer a “wasted costs” order has been the subject of some attention.

In *Jachimowicz v Jachimowicz* (1986) 81 FLR 459 it was said that the degree of blameworthiness of the lawyer’s conduct must be beyond mere negligence and attract the censure of the court in a serious way or amount to a serious dereliction of duty.

In *Da Sousa v Minister* (1993) 114 ALR 708 an order was made by a judge who stressed that the jurisdiction was only to be exercised with care and discretion and only in clear cases.

In *Ridehalgh* six wasted costs orders were the subject of an extensive review. The lawyers came out of that case with a pretty satisfactory result. Judges were told, pp 482–483, that they should be slow to initiate inquiries, and quick to recognize the limitations on the capacity of counsel to tell the full story. Perhaps concern need only be felt by the very small minority of barristers who were the subject of an unsubstantiated belief that they conducted cases in court in a wholly unacceptable manner. See p 481.

To the extent that one can say so, in quite different contexts, the approach of the Court

50 Op cit n 8.

51 Op cit n 25, p 196.

of Appeal in *Black* (and of Thomas J in *Kooky*) is clearly more intrusive than that of the English Court of Appeal in *Ridehalgh*. In the shorter term, that might be resented. In the longer term, however, the case for resisting the introduction of a bureaucratic agency for complaint investigation may be advanced by the courts retaking some of the ground of supervision they earlier ceded.

Judge accountability

As to the accountability of judges, I believe that papers presented in 1987 by Mahoney JA and McGarvie J represent the best source as to the Australian position.⁵²

McGarvie J examined the formal and customary ways that judges were held accountable. The former include: the statutory mechanisms for removal; that judges are obliged to disqualify themselves if biased; that judges are obliged to give reasons; that judges are subject to appeal; that judges must almost always conduct hearings in open court; that judges bear a personal responsibility for their decisions; and that the decisions are susceptible to criticism by appeal courts, lawyers, academics and journalists. The customary ways include: the strong desire of each judge to retain a good reputation with other judges and with practitioners; the intervention in appropriate cases of the Chief Justice or other senior judicial officer; and the influence of bar associations and law societies.

I touched briefly above on one aspect of the subject of conduct which amounts to misbehaviour meriting removal, namely criminal conduct. At the highest level of being accountable to Parliament, Australia has the reports of the inquiries concerning Justices Murphy and Vasta to provide some light on what is encompassed by "misbehaviour".

While I accept that the subject merits close scrutiny because of its serious consequences, I justify its scant treatment because of its rarity. Much of what is put by McGarvie J to support his views has been supported or challenged by others, including McLelland J,⁵³ Kirby J⁵⁴ and Vince Morabito.⁵⁵

I infer from the 1983 articles by Ellis and Keith,⁵⁶ the presence of the endnote to Rule 8 of the New Zealand Rules of Professional Conduct, and the comments by Eichelbaum CJ about the Judicial Commission issue,⁵⁷ that the position in New Zealand is substantially as in Victoria, where there is nothing akin to the Judicial Commission of New South Wales, one of the functions of which is to investigate complaints about judges.

One Victorian academic seems intent on promoting the cause of having in place an effective complaint-investigating Judicial Commission,⁵⁸ but in recent years little interest

52 Op cit n 18.

53 McLelland J, "Disciplining Australian Judges" (1990) 64 ALJ 388.

54 Kirby, "Judicial Independence in Australia Reaches a Moment of Truth" (1990) 13 UNSW Law Journal 187.

55 Morabito, "The Judicial Officers Act 1986 (NSW): A Dangerous Precedent or a Model to be Followed?" (1993) 16 UNSW Law Journal 481.

56 [1983] NZLJ 206, 239.

57 Op cit n 5, p 91.

58 Op cit n 55.

has been shown in the subject, save that recently there has been floated the idea that an “Australian Conference of Chief Justices” might receive complaints about the conduct of judges across the country.

I mention only to pass over, conduct which causes merely the raising of an eyebrow, because it is only in breach of etiquette or the traditions or taboos of a particular court. I list by tagline some examples of my court’s traditions or taboos that have intrigued me: associate’s attendance; council table placings; front stairs; happy hour; J.s; library use; loos; rosette; upstairs/downstairs; welcomes/farewells. I will elucidate upon request.

The source of criticism of judicial conduct which, in my experience, seems to have most impact on trial judges is the appellate court. Shetreet spells out in some detail the reasons why he considers that the English Court of Appeal has played an important role in securing high standards in English courts.⁵⁹ The reputation of the Court of Appeal appears not to have suffered as greatly in the last few years as that of the Court of Criminal Appeal.⁶⁰ Sometimes appellate courts pull their punches when dealing with the conduct of a trial by a judge. Sometimes they do not. The difference in approach is strikingly illustrated by the treatment of the trial judge in *Goktas v GIONSW* (1993) 31 NSWLR 684 by Kirby P and Meagher JA. Only the former noted that personal criticism or denouncements were to be avoided.

It goes without saying that a judge may be criticized for conduct over a wide range. A favourite is intervening too much as with excessive questioning as in *Jones v National Coal Board* [1957] 2 QB 55. The judge below was found not to have gone too far down that track in *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146. But the trial judge can also be censured for not intervening enough as in *R v Wilson and Grimwade* (Victorian Court of Criminal Appeal, 22 April 1994), the two year trial.

It is difficult for an outsider to know where to look for such criticism in New Zealand. In *Waymouth v Ministry of Transport* [1982] 1 NZLR 358 the Court of Appeal mildly censured a judge for communicating information about prior convictions to an appellate court.

One example of a stinging rebuke by an appellate court of a named judge is *Re a Barrister* [1993] QB 293. Alastair Campbell makes the point that judges ought to improve mechanisms of informal peer control if they treasure their independence from external control.⁶¹ At least in Victoria, those mechanisms have been maintained at a level where there has been no pressure for reform.

Turning to external mechanisms for accountability brings me to criticism of the bench from various quarters. Criticism of judges by academics has not been of great moment in Victoria. That cannot be said in England. See *The Politics of the Judiciary* by Griffiths,⁶² and the article by Jamieson “Who Judges the Judges?”⁶³

59 Op cit n 13, p 201f.

60 Kennedy QC, *Eve Was Framed* (1992) 263ff.

61 Op cit n 28, p 6.

62 (1991).

63 [1982] NZLJ 416.

As I noted above, the media is increasingly prepared to act as a mouthpiece for the criticism by others of judges, and to add criticisms of its own, as to law-making, decisions on sentencing, and comments suggestive of gender bias.

Courts Information Officers have been appointed to assist many courts in Australia work better with the media. I chair a Courts Media Liaison Committee which tries to address some of the actual and perceived deficiencies on both sides.

Finally, may I say that I regard it as healthy that critical comment from a practitioner like that of Donald Dugdale about *Kooky* is published. Perhaps I would not be so enthusiastic if I was the subject of the criticism. On the other hand, I am just as pleased that John Laurenson saw fit to respond to Donald Dugdale.

The ethic or tradition that judges do not respond to criticism is, I think, more to be commended than condemned. But the arrival of a white knight, now a rarer event than in the past, is always a pleasure.