LEGAL PROFESSION REGULATION 2005

REG 176

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Regulation 176 of the Legal Profession Regulation 2005 deals with the necessary risk management practices that barristers and solicitors, as employers, employees or sole traders, need to develop in relation to matters dealing with discrimination, harassment, work safety and general employment law issues. These are matters which we all need to understand and follow. Even though this paper is under the framework of Continuing Legal Education the object of the regulation is not that we may advise others about these principles but that we follow them ourselves. The primary purpose of the regulation is to manage our practices consistent with these principles, (reg 176(1) (e)). This is so, whether we are lawyers employed in the public sector, by a corporation, by a firm of solicitors or engaged at the private bar.

As one can see by the breadth of the matters required to be dealt with under the regulation one can't cover them all in any real detail. Accordingly, I intend to focus upon a specific matter which straddles a number of these areas. As this conference has as its focus those who appear in court my aim is to deal how such issues might be relevant to the work we do in and about the courtroom. My intention therefore is to examine as litigators issues which touch upon our own health and safety. Every industry has its own particular hazards truck drivers run the risk of road accidents, abattoir workers cut their hands, nurses hurt their backs. One of the chief hazards facing lawyers is to suffer a work-related psychological injury.

It is some years ago now that I wrote an article about bullying in the courtroom for the NSW Law Society Journal (December 2004) entitled "*Of Dinosaurs and Bullying Judges*". The article received close attention by both the print and electronic media. I received many letters and phone calls from practitioners about the piece. A few days after its publication, a former head of my chambers, who had become a judge in the Supreme Court passed me on Phillip Street and said "Good morning Jeffrey, I read your article, we all did". Ominously, he then said "We are waiting for you".

The subject of bullying in the workplace has been the subject of much comment and litigation over the past twenty years or so. Depending upon a victim's pre-disposition or fragility bullying behaviour can be the cause of psychological injury. The legal test as to whether an event can cause psychological injury is undemanding. In *State Transit Authority of NSW v Chemler* [2007] NSWCA 249 Spigelman CJ said that employers take their employees as they find them. There's an 'egg-shell psyche' principle which is equivalent to the 'egg-shell skull' principle [40]. Further, Justice Basten said that where events actually occurred in the workplace, if perceived by the victim as creating an offensive or hostile working environment, and a psychological injury followed, it is open to conclude that causation is established. [69].

This paper deals with not just bullying by judges, but also by lawyers in the courtroom. Such behaviour occurs with respect to the following relationships, lawyer against lawyer, lawyer against client, lawyer against witness, and judge against any of the above. In his confirmation hearings before the United States Senate, Chief Justice John Roberts said that:

> "Judges are like umpires. Umpires don't make the rules. They apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire."

He went on to say that his role on the Supreme Court would be characterised by "modesty and humility".[1] If the judge is the ultimate umpire of a courtroom it is up to the judge to set the tone of proceedings. Provisions exist to make sure that the advocates and the witnesses behave themselves with respect to each other and to the court. The difficulty always arises when it is the judge whose behaviour causes concern. Ian Barker QC writing in chapter 22 of *Appealing to the Future: Michael Kirby and his Legacy*[2] said:

> "Personally I have found practice as a barrister to involve as much unpleasantness as goodwill. To say "I love the law" rather glosses over the many occasions when loving the law is as difficult as loving some of its judges. As I see it, if a barrister does not enter the profession suffering from some bipolar disorder, the chances are he or she will eventually leave it enduring at least some form of depression."

He went on to describe displays of judicial bullying exhibited by at least two members of the Court of Appeal which was dealing with an application to strike off a barrister for misconduct.[3] Barker recounts the application made by the barrister's counsel, L J (Bill)

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[1] "NO MORE MR. NICE GUY" *The Supreme Court's stealth hard-liner* by Jeffrey Toobin (The New Yorker 25 May 2009).
[2] edited by Ian Freckleton and Hugh Selby, Thomson Reuters, Lawbook Co 2009.
[3] *Bar Association (NSW) v Livesey* [1982] 2 NSWLR 231.

Priestley QC, who applied to have the President Sir Athol Moffit and Justice Ray Reynolds disqualify themselves because of pre-judgment of the conduct of the barrister in an adverse finding in the Wendy Bacon trial. Barker said that their reaction to this application as being "sarcastic, contemptuous and personally abusive of counsel". As observers saw it, the conduct of the two judges, particularly Moffit P was a disgraceful display of "judicial savagery"[4] He contrasted their behaviour to the change in the atmosphere of the NSW Court of Appeal when Michael Kirby was appointed its President. He quotes from a speech made by another judge of the Court of Appeal, Dennis Mahoney at the unveiling of a portrait of Kirby in the Bar Association common room:

> "During the Kirby Presidency there was a change in the kindness.....the courtesy... shown to the Bar. In earlier times, when I was in practice at the Bar, one did not expect kindness from the Bench. That was not the custom. Those who remember their appearances before Sir Alan Taylor, Sir Frank Kitto and later before Sir Garfield Barwick will understand what I mean. The Court of Appeal, understandably perhaps, adopted a similar ethos. The Moffit Court believed that one procured most help from the Bar by the whip rather than a kind word. Perhaps that was right.
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> Under Kirby's Presidency that changed. The Court of Appeal became a different place. There was courtesy amounting often to kindness. I do not argue whether this was a good thing. One may argue for and against discipline. But under the Kirby Presidency the ethos of the Court changed. And a patient courtesy in a Court is no small thing. For myself I found the Court to be a more pleasant place in which to be."

Despite the courtesy and change of tone evidenced by the Kirby Court of Appeal excesses can still occur, more recent, infamous examples in New South Wales were the two magistrates whose behaviour caused them to appear before the NSW Parliament pleading for their positions. One of the magistrates as reported by Richard Ackland in *The Age* of 17 June 2011, was plainly abusive of an unrepresented person, whereas another delighted in embarrassing litigants and pressuring them to resolve their matters. Perhaps these magistrates' cases, because of the existence of the Judicial Commission legislation, may give other judges cause to be concerned that their own courtroom behaviour may come under such scrutiny.

This is not only an Australian problem. In the same *New Yorker* article quoted above it was said that when Antonin Scalia was appointed in 1986 he brought a new "gladiatorial spirit" to

[4] As above, footnote 2, pp 564-565.

the US Supreme Court. However, in the Senate confirmation hearings of President Obama's choice of Sonia Sotomayor to the Supreme Court in 2009 she was closely questioned about her temperament by Senator Lindsey Graham (Republican-South Carolina). He put to her an article which said that she was a terror on the bench, a bit of a bully. "You stand out on the 2nd Circuit like a sore thumb". Sotomayor agreed she was a challenger of counsel and asked tough questions, but the 2nd Circuit was a "Hot bench" she said. It was stated about her in the *New York Times* of May 27 2009 by Gerard N Magliocca, "But a judge who does not probe a lawyer's case and expose its weaknesses is not doing her job". Judge Sotomayor was confirmed. However, a year later a real Judge Judy, Judge Judith Raub Eiler was suspended from her judicial duties by the Washington State Supreme Court for five days without pay on charges brought by the State Commission on Judicial Conduct for engaging in "a pattern or practice of rude, impatient and undignified treatment" of people who appeared before her.

One can understand in many courts how judges can have their patience tried by rude litigants, ill prepared or impunctual practitioners or practitioners engaging in bullying behaviour themselves. Some lawyers can be infuriating. To set a better tone in the court room cross-examination needs to be conducted in a more civilised manner than what has been the robust approach in the past. Cross-examiners who shout or abuse witnesses should be stopped by the judge acting as a true umpire. Even Rugby League has abolished the shoulder charge. Many practitioners once they step foot in the courtroom seem to have a bad case of "white line fever" common in the sporting arena and regard cross-examination as the last legal blood sport. Counsel who have high-conflict personalities may infect the whole process and in turn may become judges with high conflict personalities. One can understand that in a busy courtroom and in difficult cases tempers can get frayed. One is not expecting lawyers and judges to sign up with the World Kindness Movement. Stress in our work and in the court room is necessary and assists to get work done efficiently, but one needs to learn and note the signs when stress turns to distress. Too much work with poor administrative assistance affects many in our profession. Many courts are being squeezed by government budgetary restraints. In many courts more cases are being tried by less judges. As judges and advocates we must, like anyone else demand safer workplaces. We must treat each other better and with dignity. Litigation should not be another form of unarmed combat . We must stand up for our rights to demand safer workplaces otherwise the depressed fate of lawyers as identified by Ian Barker awaits many of us.

The judges are responding to this well-recognised problem in our society. In early February this year at the National Judicial College of Australia devoted its annual conference at the Australian National University to '*Managing People in Court'*. One of the sessions dealt with

"*Overbearing Conduct in Court by Judges and Lawyers'*. Justice Glenn Martin of the Queensland Supreme Court who had formerly been President of the Queensland Bar Association had been confronted with a complaint from a relatively junior barrister who when he stood up to make his final submissions was met with this remark by the judge; "You're an idiot. Do your clients know you're an idiot ?".

That was an extreme example of rudeness. In dealing with such behaviour Justice Martin said:

> "There is a line between rudeness and the judicial anxiety to move a case along. There is a line between the proper management of a trial and bullying. These lines can be sharp and bright or broad and grey. The nature of the lines is dependent upon the circumstances of the trial, the nature of the matter being adjudicated, the stage which the trial has reached, the length of the trial, the complexity of the trial and a myriad other circumstances which can develop and which are so varied that any definition of bullying or overbearing conduct will necessarily be very permeable."

In considering why judges behave poorly in court Justice Martin said it may be more for the opinion of a psychologist than of another judge however it was well recognised that:

> "Some judges seem to need to vent for the first half hour or so, after which the day settles into a reasonably harmonious programme. Others are more Vesuvian, and are liable to unexplained and irregular eruptions which can cover the courtroom with judicial ash. Was it due to a lack of maternal love or are they just miserable bastards?"

However, one is necessarily reluctant to complain however that is a function that the Bar Association or Law society are set up to do, in theory to protect their members. Justice Martin went on to say that:

> "Most judicial officers who engage in this type of behaviour are repeat offenders. They are known to the profession and, often, to the head of jurisdiction. With respect to one such person, I was encouraged to report any complaints because the head of that court was concerned and wanted to have a case to put to the judge in question. Even if such a request is not made it is tactically better, and more likely to reduce the likelihood of repercussion to individuals, to provide as many examples as possible. It is the same as mounting any sort of case. Detailed particulars and the use of only the strongest examples will be more likely to result in success."

Of course in New South Wales in addition to these informal processes we have the Judicial Commission. Although the ultimate remedy of dismissal of a judicial officer is cumbersome. It is curtailed by the need for that to be done by a Parliament which in New South Wales is colloquially known as the “Bear Pit” and is hardly the best body to deliberate upon bullying behaviour.

At the same National Judicial College conference earlier this the ANU’s Professor Tony Foley spoke of recent studies of anxiety amongst recently admitted legal practitioners. He offered the tragic 2010 example of a young solicitor employed by The WA Legal Aid Office who had been berated by a magistrate whose behaviour was causally linked to the solicitor’s suicide.

Professor Foley identified that:

> “As a consequence, that Office has put in place a proactive support scheme to protect their young lawyers and provide them with some resilience strategies. Their policy and practice for addressing the issue provides one example of how to respond to judicial bullying:
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> What Legal Aid WA management is essentially doing is accepting that from their young lawyers’ point of view that it is an issue. They have sought to raise awareness that bullying is unacceptable, and they have developed some policies to address its occurrence. They have normalised a culture that says bullying is not acceptable, which says ‘we are not going to accept that our young lawyers or indeed our lawyers generally are bullied’.”

To address allegations of bullying they have implemented what they say is a routine ‘Incident reporting protocol’. So if a young lawyer claims they have been bullied in court, when they come back to the practice reporting the incident is standard practiced. They are counselled and the complaint is taken seriously. The Office obtains a transcript – occasionally including the audio tape (lawyers would be well aware that often the transcript might not pick up what might be some aggressive language in the courtroom). If they feel that there is a foundation for a complaint then a complaint is made to the relevant chief judge or magistrate. In addition to this responsiveness there has been initial safety and effective interaction training for their lawyers and paralegals conducted designed to assist their lawyers to feel confident in their own capacity. These were followed by group sessions led by a psychologist to encourage the young lawyers to consider questions such as ‘How well am I? How do I get help?’ and provide them with tools and insights designed to improve their resilience.

Legal Aid WA continues to monitor the safety and resilience of their young lawyers. Part of the training program for their graduate lawyers is a weekly training day and a compulsory and regular part of that training program now includes a session on 'How are you travelling?' 'What have been your experiences in the courtroom?'

All this is positive. Having a program and actively implementing anti-bullying processes works. Research confirms such processes can have a significant and positive effect on the prevalence of workplace bullying, including in the lawyer's workplace of the courtroom.[5]"

However, despite these studies it is just not only junior lawyers who can suffer from anxiety and depression contributed to by events in and around the courtroom. Many of us older lawyers perhaps have had coping mechanisms in place for many years to steel one for the courtroom drama. After years of managing a busy practice it can all get too much. Burn out, self-medication or worse may occur. Sometimes coping mechanisms can malfunction if there are other pressures of a personal or financial kind imposing themselves upon one's psyche. A bad day in court before a recalcitrant, bullying judge may be the psychological tipping point. The foregoing is useful to comply with our own and if relevant our employers' duties under the Work Health and Safety Act(NSW) 2011. Under that statute one must identify risks in our workplaces and to remove or moderate them. However, more fundamentally it is far more beneficial for own and our colleagues' health and welfare to be aware of this problem, to call it for what it is and to do our part to change the culture which permits it to happen.

[5]Christopher Kendall, Report of the Ad Hoc Committee on Psychological Distress and Depression in the Legal Profession The Council of the Law Society of Western Australia, 2011 http://www.lawsocietywa.asn.au/visageimages/multimedia/News/Report%20of%20PDD%20Ad%20Hoc%20Cttee%20FINAL%20Public%20Release%2016%20May%202011.pdf accessed 25 February 2013