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Education, Ethics and Statutory Regulation

PAPER

THE PORTAL

by

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Education, Ethics and Statutory Regulation

The Portal

1. The entry to the legal profession is the start of a professional journey. It sets the direction, and importantly the standards, of what is to follow. There is, generally speaking, a tripartite requirement for entry to the legal profession: academic qualification, practical legal training, and ethical standards (often known as the requirement to be 'of good fame and character').

2. That this is so is because the legal profession is a learned profession, which practises, and which has imposed on all its practitioners a network of ethical duties. That network of ethical duties is what distinguishes the profession of law from commerce, business, trade and industry. The network of ethical duties is personally reposed upon legal practitioners. Personal ethical duties cannot be deflected, avoided or diminished by the corporate veil.

3. The network of ethical duties personally reposed upon legal practitioners involves four elements. First, the duty to comply with the law. It is the practitioner's primary duty to comply with the law. This includes not being a conspirator with a client to break the law. This duty does not involve the practitioner agreeing with the law. Laws are imperfect and in continuous need for reform. But they need to be obeyed by lawyers. The second duty is the practitioner's duty to the court. That duty, which derives from the admitted practitioner being an officer of the court, is not to knowingly mislead the court on the facts or the law. Not knowingly misleading the court on the facts does not involve that the practitioner is a judge of the client. It is satisfied if the practitioner acts on the factual instructions of the client; but on the matters of strategy and law, it is the practitioner's duty not to knowingly mislead the court. This can lead to difficult relations with the client; but the duty to the court is paramount. The third duty is the practitioner's duty to the client. This duty is to place all the practitioner's skill, knowledge and effort in the service of the client. No matter how difficult the judge or how unpopular or undesirable the client; but never to be dishonest for, or to conspire with, the client. The duty comprehends the observance in the client's proper interests of legal professional privilege - better termed client professional privilege, as it is the privilege not of the lawyer but of the client. The fourth duty is to fellow practitioners. This is a duty of honest dealing and of fair behaviour. This duty is subservient to the three primary duties stated above. It is this network of ethical duties which makes legal practice the practice of a profession, and not the conduct of commerce, business, trade or industry.

4. Across the various jurisdictions, the detail, arrangements and methodology of admission to legal practice, and of control over legal practice, vary. But the essentials are uniform. They are the bedrock upon which the structure is built. Attached to this Paper is a short summary of relevant provisions.

5. The nature of legal practice in Australia was stated by Gordon J in *Ex Parte Meagher*[1] in 1919. The words are the words of another time and place – gender specific, and too flowery for today. But the elements remain true:

> The relations between a solicitor and his clients are so intimate, and so confidential, and so open to abuse, that before any person can practice as a solicitor he must be authorised by the Court so to practice. In this respect a solicitor stands in a different position to a person desirous of earning his living in almost every other profession or walk of life…. By the words "fit and proper persons" is meant persons who have been proved to the satisfaction of the Court not only to be possessed of the requisite knowledge of law, but above all to be possessed of a moral integrity and rectitude of character, so that they may safely be accredited by the Court to the public as fit, without further inquiry to be entrusted by that public with their most intimate and confidential affairs without fear that that trust will be abused.

The citations in this Paper, variously expressed in relation to solicitors and advocates, apply generally to all Australian lawyers.

6. In another New South Wales case, *Skinner v. Beaumont*[2], Hutley J. in more epigrammatic idiom than Gordon J. half a century earlier, stated:

> The maintenance of professional ethical standards requires not kindness but hardness, not flexibility but intransigence.

This statement itself is a little intransigent, explained perhaps by the circumstance that it was a medical case, in which further considerations arise than in legal profession cases.

7. Perhaps the fullness of Gordon J.'s formulation, and the severity of Hutley J.'s formulation, can be distilled into one word: strictness. The maintenance of necessary professional standards in the legal profession requires strictness.

8. The public rationale of the standard of admission is appropriately reflected in the rationale of professional discipline. In *New South Wales Bar Association v.Evatt*[3] the High Court of Australia stated:

> The power of the Court to discipline a barrister is, however, entirely protective, and, notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved.

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[1] (1919) 19 NSWR 433 at 442.
[2] [1972] 2 NSWLR 106 at 109.
[3] (1968) 117 C.L.R 177 at 183-184.

Thus there is no double jeopardy in a lawyer being convicted of an offence and the lawyer being disciplined professionally. The respective proceedings have wholly different functions, and different standards of proof. This was explained in the High Court of Australia in *Clyne v. New South Wales Bar Association* thus:

> Although it is sometimes referred to as 'the penalty of disbarment', it must be emphasised that a disbarming order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege.[4]

In that correct analysis, it is appropriate that the public function is given priority – 'for the protection of those who require protection' – and that the professional consequence is secondary – 'in order that abuse of privilege may not lead to loss of privilege'. In *Clyne*'s case, the abuse was misusing absolute privilege in court. Although not as significant as public protection, let us not be sanguine about the consequences to the profession of failure to fulfil proper professional standards: whether in court, chambers or office.

9. In conclusion, may I return to strictness. The High Court of Australia, in *Tuckiar v. The King*, spoke of it. The passage is in a joint judgement of Gavan Duffy C.J., Dixon J., Evatt J. and McTiernan J. Even so, one senses the hand of the great Sir Owen Dixon moving across the page:

> Our system of administering justice necessarily imposes upon those who practice advocacy duties which have no analogies, and the system cannot dispense with their strict observance.[5]

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[4] (1960) 104 C.L.R 186 at 201-202.
[5] [1934] 52 C.L.R 335 at 336.

BRIEF SUMMARY of ADMISSION and CONDUCT PROVISIONS

Australia

Basal admission criteria are set out in legislation in Australia as a common thread but in differing forms. Thus, the *Legal Profession Uniform Law 2014 NSW* (and Victoria) Part 2.2 (Admission to the Australian Legal Profession) (s.15 Objective; s.16 Admission; s.17 Prerequisites for compliance certificates; s.18 Exemption from certain prerequisites; s.19 Compliance certificates, and s.20 Conditional admission of foreign lawyers); the *Legal Profession Uniform Admission Rules 2015*, in particular R.10 (Determining whether someone is a fit and proper person); *Legal Profession Uniform Rules 2015 NSW* (and Victoria); and *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 NSW* (and Victoria). Other Australian jurisdictions have like, but not identical, provisions. The academic component, known as the Priestley 11 (after the distinguished NSW Supreme Court judge, Justice Priestley who was influential in their initial formulation in 1992), require demonstrated knowledge in eleven core areas of law. They are set out in the Legal Profession Uniform Admission Rules 2015 Schedule 1: Academic Areas of Knowledge. The eleven core areas are attached, under the heading The Priestley 11.

England and Wales

Solicitors Act 1974

- Solicitors Regulation Authority (SRA) Admission Regulations 2011 requires compliance with the relevant training regulations and satisfaction as to character and suitability by completion of the SRA suitability test.

- SRA principles made by the SRA Board under the Solicitors Act 1974, the Administration of Justice Act 1985 and the Legal Services Act 2007 regulate the conduct of solicitors and their employees. There are 10 mandatory principles including to uphold the rule of law, act with integrity, and act in the best interests of each client.

Scotland and Northern Ireland

Solicitors (Scotland) Act 1980

- Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 requires solicitors to comply with the standards of conduct. There are 15 standards including to act with trust and personal integrity, in the interests of the client and with competence, diligence and appropriate skills.

Canada

- Individual provincial and territorial Law Societies oversee licensing

- Federation of Law Societies of Canada: all law societies are members and participate together to evolve professional regulatory issues, including –

    - Model Code of Professional Conduct

    - National Requirement for the Approval of Canadian Law Degrees

Acts legislating the legal profession differ across jurisdictions. Law Societies within each jurisdiction govern Canada's legal profession. The Federation of Law Societies of Canada's National Mobility Agreement 2013 facilitates temporary and permanent mobility of lawyers between Canadian jurisdictions. Most Canadian Law Societies have adopted the Federation of Law Societies (FLSC) of Canada's Model Code of Professional Conduct. Canada's Law Societies have agreed on a National Requirement that law school programs must abide by in

order to offer a law degree. Candidates for licensing apply to the law society of their choice, and must have a completed Canadian law degree from a program that is in compliance with the National Requirement, or have achieved a Certificate of Qualification from the National Committee on Accreditation, which is the qualifications equivalency authority assuring that international candidates have achieved at a level that will permit them to continue into one of the law societies' admission processes.

South Africa

Legal Practice Act 2014

The legal profession is regulated by separate statutes. The Legal Practice Act no. 28 of 2014 aims to unify the legal profession in South Africa, making it more representative of and accessible to the country's population. The Act also paves the way for the transitional National Forum, a regulatory authority of the legal profession in South Africa. The General Council of the Bar of South Africa has published Uniform Rules of Professional Conduct.

The Priestley 11 (for law degree subjects)

- Criminal Law and Procedure
- Torts
- Contracts
- Property
- Equity
- Company law
- Administrative law
- Federal & State Constitutional law
- Civil Procedure
- Evidence
- Ethics and Professional Responsibility

LAMENT

I lament that Jurisprudence is not included in the required core areas. A knowledge of the nature, purpose and function of law is essential to a living understanding of law – and as a subject itself, not only as a corollary of another subject area.