Council of the NSW Bar Association v EFA [2021] NSWCA 339: Can conduct outside the course of legal practice amount to professional misconduct?

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Introduction

1. This paper considers how conduct outside the course of legal practice can amount to a finding of professional misconduct, and in more serious cases result in the removal from the roll of legal practitioners.

2. Before considering the recent decision of the NSW Court of Appeal in *Council of the NSW Bar Association v EFA* [2021] NSWCA 339, examples of the kinds of conduct outside of legal practice that have been the subject of disciplinary proceedings before the courts will be highlighted by reference to the decisions of *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 and *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279.

3. The relevant provisions in the *Legal Profession Uniform Law (NSW)* relating to disciplinary proceedings with respect to conduct that may constitute unsatisfactory professional conduct or professional misconduct will then be outlined. Reference will also very briefly be made to the NSW Supreme Court's inherent jurisdiction in the supervision of the legal practice and its power of admission and removal from the roll.

4. The facts and key issues on appeal in *EFA* will then be considered, which was an example of conduct occurring outside of legal practice in which the Court of Appeal upheld the NSW Civil and Administrative Tribunal's finding of unsatisfactory professional conduct, but not professional misconduct.

5. The paper will conclude with a brief reference to rule 123 of the *Legal Profession Uniform Conduct (Barristers) Rules*, regarding discrimination, bullying and sexual harassment, and a very recent proposed expansion of the scope of the rule from conduct of a barrister *in the course of* legal practice to now include conduct *in connection with their profession*.

6. *EFA* was an appeal by the Council of the NSW Bar Association from 2 decisions of the Tribunal in respect of disciplinary proceedings brought by the Council regarding certain conduct of a practicing barrister.

7. The conduct in *EFA* was *not* conduct by the lawyer *in* the course of but rather *outside* the course of their legal practice. The fact that the conduct in question of a lawyer might take place outside of legal practice does not mean that the lawyer cannot be the subject of disciplinary proceedings of the legal profession and any sanctions that may follow. Quite the opposite.

8. There are many examples of where conduct outside of legal practice has brought the lawyer before the court or tribunal in disciplinary proceedings leading to findings of professional misconduct and in some cases being removed from the roll. This has often attracted the inherent jurisdiction of the Supreme Court by which it has the power to admit to and remove persons from the roll. As the Court of Appeal observed in *EFA* at [125]:

> Consideration of professional misconduct (other than under statute) stems from cl X of the 1823 Charter of Justice, which authorised the Supreme Court to admit "fit and proper Persons to appear and act as Barristers, Advocates, Proctors, Attorneys and Solicitors". A power of removal or suspension is incidental to that power: *In Re Davis* (1947) 75 CLR 409; [1947] HCA 53. The "critical criterion" is that of a "fit and proper person" to remain on the roll. That jurisdiction is preserved by s 264 of the Uniform Law. Fitness to remain on the roll remains the criterion to be applied where the inherent jurisdiction of the Supreme Court is invoked in relation to the supervision of members of the legal profession.

Examples of conduct outside the course of legal practice: *Ziems* and *Cummins*

9. One such example of a case involving conduct outside of legal practice, which featured in the Court's consideration in *EFA,* was *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279. Mr Ziems was a practicing barrister for 20 years. He was convicted of manslaughter for causing the death of a person while driving whilst intoxicated, for which he was sentenced to a term of imprisonment. The Supreme Court found he was not a fit and proper person to remain on the roll. However, the High Court by a majority of 3 to 2 found that he was a fit and proper person, accepting that he should be suspended from practice rather than removed from the roll.

10. Kitto J said at 297-298:

> The issue is whether the appellant is shown not to be a fit and proper person to be a member of Bar of New South Wales. It is not capable of more precise statement. The answer must depend upon one's conception of the minimum standards demanded by a due recognition of the peculiar position and functions of a barrister in a system which treats the Bar as in fact, whether or not it is also in law, a separate and distinct branch of the legal profession.

11. Kitto J discussed the special nature of the Bar as a profession, the privileged position of its members in relation to the judiciary, and the commensurate need for high standards of conduct, and continued at 298 onwards:

> If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person... But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.

12. Turning to Mr Ziems' conduct, his Honour said:

> The conviction is of an offence the seriousness of which no one could doubt. But the reason for regarding it as serious is not, I think, a

> reason which goes to the propriety of the barrister's continuing a member of his profession. The conviction relates to an isolated occasion, and, considered by itself as it must be on this appeal, it does not warrant any conclusion as to the man's general behaviour or inherent qualities. … It is not a conviction of a premeditated crime. It does not indicate a tendency to vice or violence, or any lack of probity. It has neither connexion with nor significance for any professional function. Such a conviction is not inconsistent with the previous possession of a deservedly high reputation, and, if the assumption be made that hitherto the barrister in question has been acceptable in the profession and of a character and conduct satisfying its requirements, I cannot think that, when he has undergone the punishment imposed upon him for the one deplorable lapse of which he has been found guilty, any real difficulty will be felt, by his follow barristers or by judges, in meeting with him and co-operating with him in the life and work of the Bar.

13. Another well-known example of conduct outside of legal practice was the failure to lodge income tax returns as was illustrated in *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279. A barrister, John Cummins QC, failed to lodge tax returns for thirty-eight years. The Bar Association successfully brought proceedings seeking declarations that Cummins was not a fit and proper person to remain on the Roll and was guilty of professional misconduct as well as an order that Cummins be removed from the roll.

14. Spigelman CJ (with whom Mason P and Handley JA agreed) stated at [56]:

> There is authority in favour of extending the terminology 'professional misconduct' to acts not occurring directly in the course of professional practice. That is not to say that any form of personal conduct may be regarded as professional misconduct. The authorities appear to me to suggest two kinds of relationships that justify applying the terminology in this broader way. First, acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice. Secondly, conduct outside the course of practice may manifest the

presence or absence of qualities which are incompatible with, or essential for, the conduct of parties. In this second case, the terminology of 'professional misconduct' overlaps with and, usually it is not necessary to distinguish it from, the terminology of 'good fame and character' or 'fit and proper person'.

15. In the case of Cummins, Spigelman CJ held at [66]:

> The preparation and filing of tax returns is closely related to the earning of income, including professional income. The link is 'sufficiently close' to justify a finding of professional misconduct on the basis of Mr Cummins' failure to lodge returns for thirty-eight years.

16. And at [28]:

> …the barrister's complete disregard of his legal and civic obligations with respect to the payment of income tax was such that he must be regarded, at the present time, as permanently unfit to practice.

Relevant statutory context

17. The principal legislation relating to professional conduct and disciplinary matters is found in Chapter 5 of the Uniform Law. Section 260 sets out the objectives of the Chapter which relevantly include:

    a. to provide a scheme for the discipline of the Australian legal profession, in the interests of the administration of justice and for the protection of clients of law practices and the public generally; and

    b. to monitor, promote and enforce the professional standards, competence and honesty of the Australian legal profession.

18. The Uniform Law distinguishes between 2 kinds of conduct, "unsatisfactory professional conduct", and the more serious "professional misconduct".

19. "Unsatisfactory professional conduct" is defined by s 296 to include:

conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

20. "Professional misconduct" is defined by s 297(1) to include:

    a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

    b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

21. Subsection 297(2) provides:

    > For the purpose of deciding whether a lawyer is or is not a fit and proper person to engage in legal practice as referred to in subsection (1)(b), regard may be had to the matters that would be considered if the lawyer were an applicant for admission to the Australian legal profession or for the grant or renewal of an Australian practising certificate and any other relevant matters.

22. The definitions of both unsatisfactory professional conduct and professional misconduct are expanded by s 298 to include certain other categories of conduct, including a contravention of *the Legal Profession Uniform Conduct (Barristers) Rules*.

23. Chapter 5 of the Uniform Law also establishes a procedure by which complaints about lawyers may be made, investigated, and dealt with by the Legal Services Commissioner. By s 266 a person or body, including the Council, may make a complaint that relates to any issue about any conduct to which the Chapter applies. The complaint is made to the Legal Services Commissioner, who, in the case of complaints against barristers, by delegation, refers the matter for investigation and determination to the Bar Council.

24. Under its delegated authority, the Council has power, by s 299(1) to make a finding that a lawyer has engaged in unsatisfactory professional conduct, and to make certain orders, including a caution, reprimand and/or the imposition of a fine not exceeding $25,000.

25. By s 300 the Council may initiate and prosecute proceedings against a lawyer in the Tribunal if in its opinion:

    a) the alleged conduct may amount to unsatisfactory professional conduct that would be more appropriately dealt with by the Tribunal; or

    b) the alleged conduct may amount to professional misconduct.

26. Section 302 of the Uniform Law empowers the Tribunal, if it has found a lawyer guilty of unsatisfactory professional conduct or professional misconduct, to make any orders that it thinks fit, including those that the Council may make under s 299. In addition to those, it includes certain other orders including relevantly an order recommending that the name of the lawyer be removed from the roll: s 302(1)(f).

27. As already mentioned, the Supreme Court of NSW has inherent jurisdiction with respect to the supervision and disciplining of legal practitioners and this includes a power of admission to and removal from the roll of legal practitioners. That jurisdiction is preserved by s 264 of the Uniform Law.

Conduct outside of legal practice: *EFA*

28. Turning now to *EFA* itself, the relevant conduct took place at a dinner in 2017 to mark the conclusion of a conference of barristers' clerks held earlier that day. The attendees at this dinner were barristers' clerks, barristers and other invited guests. The attendees included the respondent (EFA), a male barrister (referred to as A in the proceedings) who was a friend of the respondent, a male clerk (referred to as W) and a female assistant clerk (referred to as H). The respondent's barrister friend, the clerk and assistant clerk were from the same floor of barristers.

29. Just before 11pm, the respondent, in a state of intoxication, approached a table at which were seated the respondent's friend and the assistant clerk. The respondent greeted his friend in a fashion that the Tribunal found to be "a ritualised greeting which, in part, parodied oral sex": *EFA* [12]. The respondent then moved closer to the assistant clerk, stood behind her, and placed his left hand on the back of her head.

30. What then took place was the subject of dispute. The Council claimed, which the respondent denied, that the respondent took hold of the back of the assistant clerk's head, moved her head "to and from his crotch area" and said certain words taken to mean a request for oral sex. The conduct in question was recorded on two closed circuit television cameras from different angles, but without audio.

31. The assistant clerk almost immediately made a complaint with respect to the respondent's conduct. She spoke to the clerk giving an account of what she said had occurred. A few days after the incident, the assistant clerk and clerk each made written statements regarding the event. A short time later, the respondent apologized in writing to the assistant clerk.

32. On 3 December 2019, the Council filed an application in the Tribunal seeking inter alia a finding that by reason of his conduct towards the assistant clerk, the respondent was guilty of unsatisfactory professional conduct within s 296, professional misconduct within s 297 and/or at common law.

33. On 4 March 2021, the Tribunal found that the respondent's conduct amounted to unsatisfactory professional conduct, but not professional misconduct. In resolution of the disputed events of that evening, the Tribunal found that the respondent had not placed his right hand near his crotch area whilst standing behind the assistant clerk, that he had not guided her head towards his crotch, but that he had said to her the words "requesting oral sex". In reaching its conclusions, the Tribunal relied on the CCTV footage and the assistant clerk's immediate complaint to the clerk.

34. On 18 June 2021, the Tribunal reprimanded the respondent under s 299(1)(b) and ordered that he pay the Council's costs. The Tribunal did not make orders imposing a fine or undertaking a course of counselling.

35. The Council appealed both of the Tribunal's decisions, seeking an order that the respondent's conduct at the dinner did constitute professional misconduct at common law and/or pursuant to ss 297 and 298. In addition to the reprimand, the Council sought an order that the respondent pay a fine and undertake a course of counselling. The respondent filed a Notice of Contention challenging the Tribunal's finding that he said to the assistant clerk certain words requesting oral sex.

36. In a unanimous decision of Bathurst CJ, Leeming JA and Simpson AJA, the Court of Appeal dismissed the appeal and Notice of Contention.

37. The key issues on appeal were:

    a. whether the respondent said to the assistant clerk certain words requesting oral sex;

    b. whether there was a distinct category of "professional misconduct" at common law, separate to that within s 297;

    c. whether the respondent's conduct would justify a finding that he was not a fit and proper person to engage in legal practice; and

    d. whether the Tribunal had erred in its assessment of the seriousness of the respondent's conduct by imposing only a reprimand.

38. Before addressing each of these, it is worth noting that the respondent admitted that his attendance and the conduct at the dinner were in connection with the practice of law: *EFA* [41]. However, the Court observed (at [39]) that connection with the practice of law is not necessary for proof of professional misconduct either as defined in s 297(1)(b) or as defined in s 298, the latter of which includes, relevantly, conduct constituting a contravention of the Barrister Rules.

39. The Court of Appeal also made non-publication orders for a period of 20 years from the date of judgment pursuant to s 7 and s 8(1)(c) of the *Court Suppression and Non-publication Orders Act 2020* (NSW). The Court's reasons for making such orders are found at the end of its judgment from [201] to [255].

Did the respondent say to the assistant clerk, H, certain words requesting oral sex the subject of the Notice of Contention?

40. The Court held that it was in as good a position as the Tribunal to determine the factual issue of whether the respondent said to the assistant clerk those words. The Court undertook an examination of the CCTV footage and was satisfied that the respondent made the offensive remark to H as alleged by the Council: *EFA* [97]. The Court held there was no explanation for the assistant clerk's immediate distress and complaint to the clerk other than that it was an accurate reflection of what the respondent said to her: *EFA* [102].

Is there a distinct category of "professional misconduct" at common law, separate to that incorporated within s 297 of the Uniform Law?

41. The Court found there was not.

42. The Court found that "professional misconduct" at common law was incorporated into the inclusive statutory definition of "professional misconduct" within s 297 of the Uniform Law. In reaching its conclusion, the Court reviewed the legislative history culminating in the present statutory formulation of professional misconduct as found in ss 297 and 298 of the Uniform Law: *EFA* [112]-[121].

43. The Court then considered the question of what was the "traditional common law definition" of professional misconduct that was included within the statutory definition: *EFA* [121]. The Council contended that the common law definition of professional misconduct was conduct which would be considered by peers of good repute and competency in the profession as disgraceful or dishonourable. This formulation was derived from the English Court of Appeal decision of *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 This formulation, so the Council argued, was a separate and distinct category of professional misconduct: *EFA* [124].

44. The Court undertook a comprehensive review of a number of authorities which considered the issue of professional misconduct and fitness to remain

on the roll: *EFA* [122]-[161]. Following its review, the Court reached the conclusion that at common law in NSW, conduct that is regarded as "disgraceful or dishonourable" by professional peers, the formulation as contended for by the Council, was not a separate category of professional misconduct divorced from the test of a "fit and proper person to engage in legal practice": *EFA* [149].

45. The Court explained at [150]:

> It may be accepted that the *Allinson* formulation plays an important part in the application of the "critical criterion" of fitness. What it does not do is create, for NSW, a category of legal professional misconduct to be assessed otherwise than in accordance with the fit and proper person test endorsed repeatedly over the years, most recently by the High Court in *A Solicitor.*

46. The "critical criterion" for professional misconduct at common law remains that of "fit and proper person", although a finding of professional misconduct made in the application of that test does not necessarily result in removal from the roll: *EFA* [151]. The criterion of fitness was the benchmark by which legal professional misconduct, in the inherent jurisdiction of the Supreme Court, is judged: *EFA* [155].

47. This criterion is now included in the statutory definition of "professional misconduct" by s 297(1)(b) which includes is "conduct … that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice". Put in another way, "professional misconduct" determined against the "critical criterion" of a "fit and proper person to engage in legal practice" is indistinguishable from "professional misconduct" as defined in s 297(1)(b) of the Uniform Law: *EFA* [160].

Did the respondent's conduct justify a finding that he was not a fit and proper person to engage in legal practice?

48. The Court concluded that it did not.

49. The Court held at [164]:

> Conduct that would *justify* a finding of unfitness is not necessarily conduct that *must* result in such a finding: there is a range of conduct that would justify, but not necessarily result in, such a finding; there is a range of conduct with respect to which reasonable minds might differ on whether it did, in fact, demonstrate unfitness. Section 297(1)(b) is concerned with the capacity of the conduct to constitute unfitness.

50. And at [169]:

> The question of fitness to engage in legal practice focuses not only on the objective circumstances of the conduct in question but also on the personal qualities of the lawyer in question, and other circumstances that bear upon the conduct. Unfitness is ultimately a finding about character, although conduct plays an important role in the evaluation of character.

51. The Court found that the respondent's conduct was an isolated instance of appalling conduct. The Court agreed with the Tribunal's finding that the conduct was poorly judged, vulgar, and inappropriate: *EFA* [172]. However it was not persuaded that the Tribunal was wrong to decline to characterise it as conduct that would of itself justify a finding of unfitness: *EFA* [173].

Did the Tribunal err in its assessment of the seriousness of the respondent's conduct by imposing only a reprimand?

52. The Court found that it did not.

53. The Court did not accept that the Tribunal failed to recognise the seriousness of the respondent's conduct. The Court accepted the Tribunal's characterisation of the respondent's conduct as "poorly judged, vulgar and inappropriate" and a very poorly judged attempt to include the assistant clerk in the ritualised greeting he had engaged in with his barrister friend: *EFA* [180].

54. The Court stated that the fact that the respondent said to the assistant clerk the words in question requesting oral sex, elevated the conduct into a new dimension calling for severe condemnation, which was not achieved by a

mere reprimand: *EFA* [181]. The Court considered that since they did not accept (and the Council did not suggest) that removal from the roll or suspension was warranted, all that was left for consideration was a pecuniary penalty: *EFA* [181].

55. The Council pressed for the imposition of a fine "in the order of $15,000 - $25,000": *EFA* [119]. However, the Court found that the need for such a pecuniary sanction was obviated by the very substantial financial penalty the respondent would suffer by reason of his new insurance terms including, for example, a dramatic increase in annual insurance premium from $4,654 to $66,077: *EFA* [183].

56. The Court stated at [194]:

> This Court does not underestimate the seriousness of the respondent's conduct, nor its implications. At its heart it is sexual harassment that has no place in any society, and certainly not in the ranks of an honourable profession. The conduct towards A was, as the Tribunal found, crass and vulgar. The conduct towards H was demeaning, humiliating and inexcusable. Intoxication afforded no excuse. The conduct called for sanction.

57. The question the Court posed for itself at [195] was "what measure is called for to mark the Court's intolerance of conduct of the kind in question and to convey its intolerance to others who might be tempted similarly to engage in conduct that is demeaning to women and perpetuates unacceptable attitudes". Although acknowledging that the objective of disciplinary orders is protective and not punitive, the Court nevertheless considered it appropriate in this case to seek guidance from two principles of sentencing law: proportionality and extra-curial punishment: *EFA* [195]. The Court noted the level of extra-curial punishment that has already been experienced by the respondent and outlined these at [195]:

- a level of public notoriety and humiliation despite the granting of non-publication orders;
- a four year period of anxiety while the Council's investigations proceeded;

- a further period of anxiety since the filing of the Council's appeal;
- severe impact on the respondent's mental health as detailed in reports from a clinical psychologist and a clinical psychiatrist;
- the ending of the respondent's marriage and disruption to his family;
- a very significant quantifiable cost resulting from the variation in the terms of the respondent's policy of professional indemnity insurance for 2022, with an unquantifiable potential penalty in forthcoming years - already, the annual cost has dwarfed the maximum fine of $25,000 that the Court could impose; and
- an unquantifiable but real and significant impact on the respondent's practice.

58. The Court concluded at [196] that:

> Bad as the respondent's conduct was, and deserving of condemnation, so far as the evidence goes, it represents an isolated instance of departure from accepted norms of conduct. It is an instance of the "human frailty" that Kitto J recognised in *Ziems* and was again recognised by the High Court in *A Solicitor*. It needs to be seen in proportion to what the conduct has already cost the respondent in personal and emotional, as well as financial, terms.

59. The court declined to impose a fine. The Court also agreed with the Tribunal's conclusion that it saw no need for an order for counselling and agreed with its reasons, those being, essentially, that the incident was isolated, that the evidence showed insight by the respondent into his conduct, and that there was no likelihood that the respondent would conduct himself in a similar way in the future: *EFA* [198].

Recent changes to Bar Rule 123

60. As earlier mentioned, s 298 of the Uniform Law extends the categories of conduct capable of constituting unsatisfactory professional conduct or professional misconduct to include a breach of the Barrister Rules.

61. Rule 123 currently provides as follows:

> A barrister must not in the course of practice, engage in conduct which constitutes:
>
> (a) discrimination,
>
> (b) sexual harassment, or
>
> (c) workplace bullying.

62. This is confined to conduct in the course of legal practice, and as such would not have applied to the conduct in *EFA*.

63. The Australian Bar Association recently announced[1] proposed amendments to rule 123 to expand its application to include conduct of a barrister *in connection with their profession*. This would now include the conduct in *EFA*.

64. The proposed amendments are as follows:

> Rule 123
>
> (1) A barrister must not, in the course of practice or in connection with their profession, engage in conduct which constitutes:
>
> (a) discrimination,
>
> (b) sexual harassment, or
>
> (c) ~~workplace~~ bullying.
>
> (2) For the purposes of this rule, conduct in connection with a barrister's profession includes, but is not limited to:
>
> (a) conduct at social functions connected with the bar or the legal profession; and
>
> (b) interactions with a person with whom the barrister has, or has had, a professional relationship.
>
> Rule 125

[1] At URL https://austbar.asn.au/uploads/pdfs/Public_consultation_document.pdf accessed on 2 March 2022.

> ***~~workplace~~ bullying*** means unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate, or cause serious offence to a person ~~working in a workplace~~.

Conclusion

65. The Court of Appeal in *EFA* dismissed the Council's appeal, upholding the Tribunal's finding of unsatisfactory professional conduct, but not professional misconduct, and the Tribunal's order for a reprimand under s 299(1) of the Uniform Law.

66. The conduct in *EFA* was outside the practice of law, though having a degree of connection with the practice of law: it occurred at a dinner following a clerks conference attended by barristers and barristers' clerks. The Court held that having a connection with the practice of law was not necessary for proof of professional misconduct as defined in s 297(1)(b).

67. "Professional misconduct" is defined in s 297(1)(b) to include "conduct of a lawyer whether occurring *in connection with* the practice of law or occurring *otherwise than in connection with* the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

68. It necessarily follows that conduct outside the practice law, that does not have a connection with the practice of law, may nevertheless be capable of being the subject of a finding of professional misconduct, and in more serious cases result in removal from the roll.

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2 March 2022