
Advocacy

The Hon Justice Trevor Riley

NORTHERN TERRITORY BAR ASSOCIATION: THE DUTY OF PROFESSIONAL COURTESY

Sir Owen Dixon once observed that the Bar is no ordinary profession or occupation. He went on to say that “the duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of the Bar and of judges”.¹

The “duties and privileges of advocacy” are to be exercised with appropriate professional restraint and decorum. They are not to be abused. The point was powerfully made by the High Court in *Clyne v NSW Bar Assn* (1960) 104 CLR 186 where it was said:²

It is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion. From the point of view of the common law, it is right that the person attacked should have no remedy in the courts. But from a point of view of a profession, which seeks to maintain standards of decency and fairness, it is essential that the privilege and power of doing harm, which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustifiably occasioned.

In order to ensure that the system of justice continues to work effectively and efficiently, and in order to preserve and maintain the duties and privileges of advocacy so necessary to that system, it is vital that barristers maintain the highest standards of professional conduct. The highest standards of professional conduct include providing full recognition to the duty of professional courtesy.

In an address in 2006,³ Spigelman CJ of the Supreme Court of New South Wales expressed concern that pressures of modern practice are threatening the traditions of courtesy and respect which are to be expected in the courts and within the profession generally. The Chief Justice observed:

Civility remains on daily display in our courts and throughout the legal system. All legal practitioners must, and generally do, treat judges, clients, witnesses and each other with respect. We must all ensure that proper conduct remains a principal characteristic of our legal discourse. Ours is a profession of words. We must continue to express ourselves in a way that demonstrates respect for others.

Civil conduct in the law is manifest in the language of advocacy, both in addressing judges with appropriate honorifics and in communication with opponents and witnesses. It would never cross the mind of a barrister to address me in court, or

¹ *Re Davis* (1947) 75 CLR 409 at 420.

² *Clyne v NSW Bar Assn* (1960) 104 CLR 186 at 200-201.

³ Spigelman JJ, *Opening of the Law Term Dinner, 2006* (Address to the Annual Opening of Law Term Dinner of the Law Society of New South Wales, Sydney, 30 January 2006) http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman300106 viewed 15 June 2009.

generally outside court, by my first name. That is a privilege reserved for 18 year olds in telephone call centres. All too often rudeness is justified as a form of egalitarianism.

The tradition of civility in the legal profession goes well beyond the requirements of appearance in court. It is to be found in the full range of discourse between practitioners, both oral and in correspondence. This tradition has been maintained in the law to a greater degree than other areas of social discourse. It is recognised as a fundamental ethical obligation of a professional person.

The concern expressed by the Chief Justice was followed by the publication of a paper from the Office of the Legal Services Commissioner in New South Wales⁴ in which it was noted that complaints of practitioner rudeness were running at about 90 complaints per annum in that jurisdiction. The author of the paper observed that significant numbers of complaints were made by practitioners against each other and there were an increasing number of complaints from judges. Examples of complaints of professional discourtesy from around the country were gathered to emphasise the nature of the problem. This article draws on that paper and refers to some of those instances.

In the Northern Territory there have been very few complaints concerning rudeness and discourtesy by practitioners. However, it is appropriate that practitioners take the time to remind themselves of the obligations imposed upon members of the profession to ensure that there is no decline in this jurisdiction in the traditions to which the Chief Justice referred and that practitioners, as individuals, ensure that they maintain the highest standards of professional courtesy.

In recent years in the United States of America there has been academic and judicial discussion of what some commentators have referred to as “a crisis of civility” in the legal profession. This has led, in some jurisdictions, to the implementation of detailed codes of civil conduct. Australia has not reached that point in any jurisdiction.

Over the years there have developed rules governing the conduct of barristers and others who appear in the courts so as “to preserve and strengthen the Bar’s priceless capital of integrity and independence”.⁵ Those rules do not amount to a detailed code of civil conduct. They are not exhaustive, reflecting part only of the obligations accepted by members of the Bar and other advocates appearing before the courts.

As specialist advocates in the administration of justice, barristers are required to act honestly, fairly, skilfully, diligently and fearlessly.⁶ In addition, there are obligations imposed upon all legal practitioners (including those practising exclusively as barristers) to ensure that communications between them are conducted in a manner consistent with their professional obligations. In all their dealings with the courts, other practitioners and members of the wider legal

⁴ Office of the Legal Services Commissioner, *Civility and Professionalism – Standards of Courtesy and Addendum* (Paper researched by Tahlia Gordon and presented by Lynda Muston at the Conference of Regulatory Officers, Sydney, 9-10 November 2006) http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches viewed 15 June 2009.

⁵ Australian Bar Association, *Code of Conduct* (1993).

⁶ See preamble in Northern Territory Bar Association, *Conduct Rules* (2002) (the *Conduct Rules*).

community, all legal practitioners are required to act with honesty, fairness and courtesy. They must adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.⁷

According to the learned authors of *Halsbury's Laws of Australia* there are no specific duties as between legal practitioners at common law⁸ and the relationship is, in general terms, governed by the obligations of professional conduct spelled out in the rules of conduct governing the profession. However, it is clear that the rules are but a part of the regime. Further guidance is to be found in the authorities addressing such matters.

An example of such guidance is to be found in the famous case of *Clyne v NSW Bar Assn*.⁹ In that case Mr Clyne had been the subject of an order by the Supreme Court of New South Wales that his name be struck off the roll of barristers upon the ground that he had been guilty of such grave professional misconduct as showed him not to be a fit and proper person to practise as a barrister. In a unanimous judgment rejecting his appeal the High Court observed that the rules governing a body such as the Bar of New South Wales may be divided roughly into two classes. One class was described as “mainly conventional in character” designed to regulate the conduct of members of the profession in their relations with one another. Many of those rules were said to have been reduced to writing. The court went on to say:¹⁰

Rules of the other class are not merely conventional in character. They are fundamental. They are, for the most part, not to be found in writing. It is not necessary that they should be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness. To the Bar in general it is more a matter of “does not” than of “must not”. A barrister does not lie to a judge who relies on him for information. He does not deliberately misrepresent the law to an inferior court or to a lay tribunal ... He does not, in cross-examination to credit, ask a witness if he has not been guilty of some evil conduct unless he has reliable information to warrant the suggestion which the question conveys.

In more recent times in the New South Wales case of *NSW Bar Assn v di Suvero* [2000] NSWADT 194,¹¹ the relevant Disciplinary Tribunal, when considering the case of a barrister who, inter alia, was discourteous and disrespectful to a court, made offensive and insulting statements to the Crown Prosecutor and alleged dishonesty by the Crown Prosecutor, expressly considered the kind of behaviour that could amount to unsatisfactory professional conduct in such circumstances and indicated the following would suffice:¹²

⁷ See “Relations with other lawyers” in Law Society Northern Territory, *Law Society Rules* (2002) (the *Law Society Rules*).

⁸ *Halsbury's Laws of Australia* (LexisNexis, looseleaf service) at [250]-[715].

⁹ *Clyne v NSW Bar Assn* (1960) 104 CLR 186 at 202.

¹⁰ *Clyne v NSW Bar Assn* (1960) 104 CLR 186 at 200.

¹¹ See also *NSW Bar Assn v di Suvero (No 2)* [2000] NSWADT 195.

¹² *NSW Bar Assn v di Suvero* [2000] NSWADT 194 at [48]-[51].

- (a) the making of unsubstantiated allegations of dishonesty against another legal practitioner;
- (b) the making of insults directed to another legal practitioner or the judge, or of unsubstantiated allegations of bias on the part of the judge;
- (c) the unjustified attribution of bad motives to another legal practitioner in the conduct of a trial; and
- (d) conduct which aims without justification to procure a discharge of a jury.

While there may be rules governing matters of that kind the obligation to avoid such conduct would continue to exist in the absence of such rules.

In determining what is and is not consistent with the exercise of appropriate professional courtesy it is necessary to go beyond the rules of the relevant professional bodies. However, in any consideration of the content of the duty of professional courtesy owed by one barrister to another, to the courts and to others, it is convenient to commence with a consideration of the rules that govern the profession and, in particular, the conduct of practising barristers. While the relevant professional conduct rules cover the whole of the professional conduct of barristers, the obligation of professional courtesy imposed upon legal practitioners is to be found in the rules dealing expressly with professional courtesy and those governing communications between opposing lawyers, communications with the court, undertakings and communications with the clients of others.

In the Northern Territory there are two rules governing the profession. The first is the *Conduct Rules* (the *Conduct Rules*) issued by the Northern Territory Bar Association in March 2002 and the other is the *Law Society Rules* (the *Law Society Rules*) of the Law Society Northern Territory, introduced in January 2002 and effective 10 April 2002.

The Law Society Rules

It is convenient to start with the *Law Society Rules* as they have more general application and to then consider the *Conduct Rules*. There is a degree of overlap between the two.

The *Law Society Rules* have been adopted by the Law Society Northern Territory pursuant to the transitional provisions of the *Legal Profession Act 2006* (NT).¹³ There is, at present, a review of such rules being conducted nationally and it is likely that the Law Society will adopt the national model once the rules have been settled.¹⁴ The underlying principles are unlikely to be significantly different from what presently applies.

The existing Rules commence with a proposition that legal practitioners, in their dealings with other practitioners, should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.

The Rules then go on to make specific provisions regarding those matters. The first of which is that a practitioner, in dealing with other practitioners, must

¹³ Section 756 of the *Legal Profession Act 2006* (NT).

¹⁴ This will occur under s 693 of the *Legal Profession Act 2006* (NT).

take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct.¹⁵ The standard by which such language and conduct will be judged is by reference to that expected of a legal practitioner acting in his or her professional capacity. Language and conduct which may be acceptable in another context may amount to professional misconduct if occurring in a professional context.¹⁶

An example of such conduct is to be found in the case of *Re Karageorge* (Solicitors Statutory Committee, Case No 12 of 1986) where Mr Karageorge was dealt with for a series of six separate and unrelated complaints regarding his conduct. He managed to insult one solicitor by referring to him as "you fucking Arab" and, showing balance, another by saying "you are a fucking Jew". In relation to one of the complaints, Mr Karageorge maintained that he did not have a professional duty towards a member of the public who was not a client and to whom he referred as "a fucking lousy Arab". In determining that such conduct amounted to professional misconduct the Solicitors Statutory Committee found that the view of Mr Karageorge of his professional duty towards a member of the public was misconceived and went on to say:¹⁷

If the solicitor in pursuit of his profession deals with a member of the public he should do so in accordance with the profession's standards as to how its members should conduct themselves in such circumstances. It may be that the conduct complained of would amount to reprehensible rudeness or churlish discourtesy if it were conduct on the part of someone other than a solicitor. There may be some acts which, although they would not be disgraceful in any other person, yet if they are done by a solicitor in relation to his profession may fairly be considered disgraceful and dishonourable conduct.

However, contemporary standards must apply in determining what is and what is not acceptable as is explained in the judgment of Cummins J in *Anissa Pty Ltd v Parsons* [1999] VSC 430. In that case Mr Parsons, a solicitor, was in dispute with his parents over a boundary between their rural properties in the LaTrobe Valley in Victoria. In order to make a point in a very dramatic fashion the solicitor had a bulldozer driver run a large D9 bulldozer along the boundary line causing damage. Beach J of the Practice Court in Victoria issued an ex parte injunction to prevent continuation of the conduct. A solicitor at the scene in the LaTrobe Valley read the terms of the injunction aloud to Mr Parsons. Mr Parsons then said, "Justice Beach has got his hand on his dick" and "tell him, because if you don't I will". When that was reported back to the court, Mr Parsons was charged with contempt. Cummins J found, in all the circumstances, including that Mr Parsons was a solicitor, the words read to him were an order of the court and the words spoken by him were directed at a solicitor reading a court order in the presence of other persons enforcing the law, the actions of Mr Parsons were capable of amounting to contempt. However, the issue was whether the words

¹⁵ *Law Society Rules*, r 18.

¹⁶ *Allinson v General Council of Medical Education & Registration* (1894) 1 QB 750 at 761.

¹⁷ *Re Karageorge* (Solicitors Statutory Committee, Case No 12 of 1986) discussed in Office of the Legal Services Commissioner, n 4.

uttered by Mr Parsons in fact constituted contempt of court. Cummins J said:¹⁸

The matter must be judged by contemporary Australian standards. It may be offensive, but it is not contempt of court, for a person to describe a judge as a wanker. The words uttered by the defendant, albeit particularised, say just that. The words spoken by the defendant do not undermine confidence in the administration of justice. They undermine confidence in the persona of the solicitor who spoke them. The words “tell him, because if you don’t I will” are arrogant but not literal. The defendant interrupted but did not prevent oral service upon him of the Court process. He then complied with it. His words were gratuitous and offensive but they fall short of contempt of Court.

Care must be taken before relying too heavily upon that judgment when discussing the merits of individual judges because, while the conduct may fall short of contempt of court, it may amount to unsatisfactory professional conduct. In *NSW Bar Assn v di Suvero* the Disciplinary Tribunal observed:¹⁹

The courts, in our opinion, have made it clear that if a barrister insults a judge that may be a contempt of court, but mere rudeness or arrogance would not necessarily be a contempt of court. In our opinion, rudeness and arrogance by a barrister directed to a judge, whilst it may not be sufficient to ground a charge of contempt of court, may be sufficient to ground a complaint of unsatisfactory professional conduct.

The *Law Society Rules* spell out further obligations imposed upon all legal practitioners in dealing with an opponent. They provide that a practitioner must not knowingly make a false statement to an opponent in relation to a case. If a false statement has been made unknowingly to the opponent then it shall be corrected and all necessary steps in that regard shall be taken as soon as possible after the practitioner becomes aware that the statement was false. However, there is a rider to that provision to the effect that a practitioner does not make a false statement to his or her opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent.²⁰

In a similar vein strict obligations are imposed upon practitioners in relation to the giving of undertakings to another practitioner. It is part of the duty of professional courtesy owed by one practitioner to another that undertakings will be honoured and there has now grown a substantial body of law around this issue. The Rules themselves provide that, where there is a communication which expressly or by necessary implication constitutes an undertaking on the part of a practitioner to ensure the performance of an action or obligation, in circumstances where it might reasonably be expected that the other practitioner will rely upon it, then that undertaking must be honoured strictly in accordance with its terms and, if no reasonable time is imposed, then within a reasonable time.²¹ A practitioner should not give to another practitioner an undertaking in circumstances where compliance requires the cooperation of a third party who is not a party to the undertaking and whose cooperation cannot be guaranteed by the practitioner. Similarly, a practitioner should not seek such an undertaking from

¹⁸ *Anissa Pty Ltd v Parsons* [1999] VSC 430 at [22].

¹⁹ *NSW Bar Assn v di Suvero* [2000] NSWADT 194 at [180].

²⁰ *Law Society Rules*, r 17.35 et seq.

²¹ *Law Society Rules*, r 19 et seq.

another practitioner.²² A legal practitioner may not withdraw from an undertaking without the consent of the person in whose favour it is made, or by order of the court. Generally, a court will only release a legal practitioner from an undertaking where there are special circumstances.

Of course it is well known that a practitioner, including a barrister, shall not deal directly with the client of an opponent unless the opponent has consented or the circumstances are so urgent as to require the practitioner to do so and the dealing would not be unfair to the client of the opponent. Obviously, a practitioner may deal directly with an unrepresented person including to inquire whether the person has obtained representation or is intending to do so.²³

There are many special considerations applying to the relationship between a barrister and a litigant in person. Those considerations have been dealt with by other observers.²⁴

The Conduct Rules

The present *Conduct Rules* replace the former *Code of Conduct* of the Australian Bar Association which had been adopted by the Northern Territory Bar Association in 1992. The new Rules are quite differently expressed when compared with their predecessor. In the earlier Rules there was an express obligation imposed upon barristers to treat other practitioners with courtesy and fairness. The primary rule under the heading “Relations with other Barristers” was that a barrister shall not publish, orally, in writing or otherwise, an opinion of the professional characteristics of fellow barristers or any of them in such a way or in such circumstances as to impugn the dignity and high standing of the profession.²⁵ While that formulation is not to be found in the current Rules, and the current Rules expressly declare that they are not to be read by reference to former Rules, the obligation nevertheless remains. It is a formulation that reflects “a generally accepted standard of common decency and common fairness”.²⁶

As is acknowledged in r 9, the Rules are not formulated as a detailed code of conduct and other standards remain, including those to be enforced in the inherent disciplinary jurisdiction of the Supreme Court. There exists in the Supreme Court an inherent jurisdiction in relation to the control and discipline of practitioners including the power to suspend or disbar a practitioner. That jurisdiction is said to be protective in function with punishment being foreign to its purpose.²⁷

In the preamble to the *Conduct Rules* it is acknowledged that barristers owe duties to the courts, to other bodies and persons before whom they appear, to their clients and to their barrister and solicitor colleagues.

²² *Law Society Rules*, rr 19A, 20.

²³ *Law Society Rules*, r 17.38 et seq.

²⁴ See Mildren D, *Don't Give Me Any LIP – The Problem of the Unrepresented Litigant in Criminal Trials* (Paper presented at the Criminal Lawyers' Association of the Northern Territory 7th Biennial Conference, Bali, 28 June to 2 July 1999), also published in (1999) 19 Aust Bar Rev 30.

²⁵ Australian Bar Association, *Code of Conduct* (1993), r 11.1.

²⁶ *Clyne v NSW Bar Assn* (1960) 104 CLR 186 at 200.

²⁷ *Clyne v NSW Bar Assn* (1960) 104 CLR 186.

The *Conduct Rules* include only a small section devoted to the topic entitled “Duty to opponent”. However, there are numerous relevant rules to be found elsewhere in the document. Under the heading “Duty to opponent” it is provided that a barrister must not knowingly make a false statement to his or her opponent in relation to the case. In the event that a barrister has inadvertently made a false statement to an opponent, the barrister must correct that statement as soon as possible after becoming aware that the statement was false.²⁸ However, a barrister is not to be regarded as having made a false statement to an opponent simply by failing to correct an error on any matter stated to the barrister by the opponent.²⁹

Notwithstanding that in those circumstances the barrister may leave an opponent in the dark, the same option is not available in relation to dealings with the court. A barrister must not knowingly make a misleading statement to a court on any matter³⁰ and must take all necessary steps to correct any misleading statement made to the court as soon as possible after becoming aware that a statement was misleading.³¹ A barrister is required “at the appropriate time in the hearing” to inform the court of any binding authority, any authority decided by an intermediate Court of Appeal in Australia, any authority on the same or materially similar legislation, and any applicable legislation of which the court has not yet been informed, where the barrister has reasonable grounds to believe that the material is directly in point against the case of his or her client.³² By way of exception to this rule it is not necessary for the barrister to inform the court in relation to those matters in circumstances which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.³³

The Rules provide scope for preservation of a tactical advantage by not requiring a barrister to inform the court of the matters referred to above when the opponent tells the court that the opponent’s whole case will be withdrawn or the opponent will consent to final judgment in favour of the client unless, of course, the appropriate time for the barrister to have informed the court of such matters in the ordinary course has already arrived or passed.³⁴ In the event that a barrister becomes aware of the matters referred to above at a time when the judgment or decision has been reserved and remains pending, the barrister must inform the court of the matter and must provide to any opponent a copy of any letter to the court. Alternatively, of course, the court can be asked to relist the matter for further hearing provided the opponent is informed of the request.³⁵

²⁸ *Conduct Rules*, rr 51, 52.

²⁹ *Conduct Rules*, r 53.

³⁰ *Conduct Rules*, r 21.

³¹ *Conduct Rules*, r 22.

³² *Conduct Rules*, r 25.

³³ *Conduct Rules*, r 28.

³⁴ *Conduct Rules*, r 26.

³⁵ *Conduct Rules*, r 27.

Further, in civil proceedings, an obligation is imposed upon a barrister to inform the court, and therefore his or her opponent, of a misapprehension by the court as to the effect of an order which the court is making as soon as the barrister becomes aware of the misapprehension.³⁶ Similarly, in civil proceedings, a barrister is required to take all necessary steps to correct any express concession made to the court by an opponent in relation to any material fact, case law or legislation. However, this only applies in circumstances where the barrister knows or believes on reasonable grounds that the concession is contrary to what should be regarded as the true facts or the correct state of the law and if the barrister believes that the concession was in error. The correction need not occur there if the instructions of the client support the concession.³⁷

The *Conduct Rules* prohibit a barrister from abusing his or her privileged position by alleging matters of fact amounting to criminality, fraud or other serious misconduct in court documents, submissions, opening or closing addresses unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.³⁸ An extreme example of a barrister abusing his privileged position in a manner contemplated by this rule is to be found in the case of *Clyne v NSW Bar Assn* where Mr Clyne was struck off the roll for misconduct arising out of the commencement of prosecutions on behalf of a client against the solicitor acting for the client's wife in divorce proceedings as a means of intimidating that solicitor into ceasing to act for the wife. In opening the proceedings the barrister had deliberately used the occasion to make a savage attack on the professional character of the solicitor when he knew he had no evidence to substantiate the allegations. The matter went all the way to the High Court.³⁹

In these days of ever closer management by the courts of proceedings it is interesting to note that the *Conduct Rules* impose upon a barrister, who has "reasonable grounds" to believe that there will be an application on behalf of his or her client to adjourn any hearing, an obligation to inform the opponent of that fact. In addition, with the opponent's consent, the barrister must inform the court of the application promptly.⁴⁰

The *Conduct Rules* provide that a barrister must not take any step to prevent or discourage prospective witnesses or witnesses from conferring with his or her opponent or being interviewed by or on behalf of others involved in the proceedings.⁴¹ However, it is not a breach of this Rule to tell a prospective witness or a witness that the witness need not agree to confer or to be interviewed.⁴² There is obviously a fine line being drawn and care should be taken not to overstep the line.

³⁶ *Conduct Rules*, r 31.

³⁷ *Conduct Rules*, r 23.

³⁸ *Conduct Rules*, rr 36-38.

³⁹ *Clyne v NSW Bar Assn* (1960) 104 CLR 186 at 202.

⁴⁰ *Conduct Rules*, r 42B.

⁴¹ *Conduct Rules*, r 49.

⁴² *Conduct Rules*, r 50.

There is an obligation imposed upon barristers to maintain the confidentiality of communications held with other legal representatives.⁴³ Of course a barrister must not communicate with the court concerning any matter of substance in connection with current proceedings in the absence of an opponent unless with the approval of the opponent or in circumstances where the court has first communicated with the barrister in such a way as to require the barrister to respond.⁴⁴

Prosecutors

The role of the prosecutor in the administration of justice is unique. It is a vital element of the proper functioning of the justice system that prosecutors strive to regard themselves as “ministers of justice, and not to struggle for a conviction”.⁴⁵ The prosecutor is called upon to present the case fairly and honestly and not to use tactical manoeuvres to secure a conviction. The function of the prosecutor “is not to tack as many skins of victims as possible to the wall”⁴⁶ but to present the case fairly and completely.⁴⁷

Within the Rules there is a specific category of duties imposed upon prosecutors⁴⁸ and these cover obligations which are to be expected of prosecutors. Most of the Rules encompass the usual requirements for fairness expected of a prosecutor, however, some deal with the relationship between the prosecutor and his or her opponent. For example, an obligation of disclosure of all relevant material is spelled out. Such an obligation exists in relation to all material of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused. There are exceptions such as where disclosure would seriously threaten the integrity of the administration of justice or the safety of any person and the prosecutor believes on reasonable grounds that such a threat could not be avoided by confining disclosure to the opposing legal practitioner on appropriate conditions. Where a prosecutor decides not to disclose such material the prosecutor must consider whether the defence of the accused person could suffer by reason of such nondisclosure, whether the charge to which the material is relevant should be withdrawn and whether the accused should be subject only to a lesser charge to which such material would not be relevant.

Prosecutors are required to exercise restraint in the presentation of cases. For example, a prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude.⁴⁹ Of significance in relation to the issue of courtesy, a prosecutor is obliged to correct any error made by an opponent in address on sentence and must inform the court of any relevant

⁴³ *Conduct Rules*, r 58A.

⁴⁴ *Conduct Rules*, r 56.

⁴⁵ *King v The Queen* (1986) 161 CLR 423 at 425.

⁴⁶ *Donnelly v DeChristofor* 416 US 637 at 648-649 (1974).

⁴⁷ *R v Thomas (No 2)* (1974) 1 NZLR 658 at 659 (Wild CJ).

⁴⁸ *Law Society Rules*, r 17.46 et seq; *Conduct Rules*, rr 62-72.

⁴⁹ *Conduct Rules*, r 71.

authority or legislation bearing on the appropriate sentence.⁵⁰ In circumstances where counsel for an accused person fails to honour those obligations he or she will be in breach of the Rules.

Conclusions

The role of an advocate before the courts, whether as a member of the Bar or otherwise, is a vital part of the system of justice enjoyed in this country. The system relies heavily upon the participants to ensure that it flows smoothly, fairly and effectively. Underpinning the system is the requirement that advocates accord professional courtesy to all involved. This does not mean that arguments should not be presented forcefully. It does not mean that those who should be denounced may not be denounced. Rather, it requires those exercising the privileges of the advocate to maintain high standards of decency, integrity and fairness. Counsel must provide full recognition to the duty of professional courtesy.

⁵⁰ *Conduct Rules*, r 71.