CHARACTER REVIEW OF INTENDING LAWYERS

By John Basten* and Paul Redmond**

In the context of concern over the ethical standards of members of the legal profession, the authors examine the system by which prospective lawyers are screened. Attention is focussed on the status of students-at-law, a stage preceding admission to the profession. The authors analyse a recent unreported case of particular significance in relation to the regulation of intending lawyers who have not yet applied to be admitted, and are thus arguably not officers of the court. Tracing the source of the supervisory jurisdiction of courts in cases of this nature, it is found that this jurisdiction rests on an ambiguous and probably unsound ground. The authors raise serious questions as to the fairness of the procedures involved in the supervision of students-at-law and the value of the present system with regard to character assessment. In particular they are critical of the vagueness surrounding the duty to disclose prior misconduct which is imposed on applicants for studentship and again when application is made for admission to the profession. The authors argue that either the attempt to vet the character of prospective entrants to the profession should be abandoned altogether, or an effective method of assessing potential professional integrity should be instituted, with a statutory basis for the jurisdiction of supervisory bodies, clarity of criteria and appropriate procedural safeguards.

I INTRODUCTION

Section 10 of the Third Charter of Justice of 1823 authorised the Supreme Court of New South Wales "to admit so many . . . fit and proper persons to appear and act as Barristers, Advocates, Proctors, Attorneys and Solicitors as may be necessary". Although the authority of the Charter has been diminished by the passage of time and by statute, in each Australian jurisdiction admission to legal practice remains a judicial function. In particular, current legislation and rules of court prescribing standards of character qualifications still resort to the formula employed in the Charter of "fit and proper persons", although in most jurisdictions these words have been supplanted or supplemented by reference to "good fame and character".

There are, of course, requirements for admission to practice apart from moral fitness, the principal being completion of prescribed academic and skills courses. However, the concern of this article is solely with the standards of good character and the process for reviewing

* LL.B. (Hons.) (Adel.), B.C.L. (Oxon.); Senior Lecturer in Law, University of New South Wales.

** B.A., LL.M. (Syd.); Senior Lecturer in Law, University of New South Wales.

the character of intending lawyers and in particular, the emerging supervisory jurisdiction over those admitted in New South Wales and Queensland as students-at-law.

While the formal power of admission remains with the Supreme Courts, there are admission boards in each jurisdiction, usually dominated by judges of the local Supreme Court, which examine and certify applicants' compliance with the rules relating to admission. The boards do not make a comprehensive investigation of the past conduct and character of applicants and in no jurisdiction are applicants routinely interviewed. For the most part the boards act only upon disclosures by applicants and, very occasionally, objections by people who claim to know something discreditable about the applicant. To this end, some Australian States require applicants to declare that they have not done anything which is likely to affect adversely their good fame and character or, if they have, to disclose the conduct in detail. Similarly, character references may be required from responsible persons. In general, character will be scrutinised only if the applicants themselves disclose conduct which raises doubt as to their moral fitness.[1]

A weakness in these random procedures is the risk that students may complete their legal studies only to learn that misconduct before or during those studies constitutes a bar to admission. This danger was exposed in South Australia when the Board of Examiners refused to advise a student, twice convicted for driving a motor vehicle while under the influence of alcohol, whether or not the convictions would prejudice his admission.[2] The danger is compounded by the severe view taken by the courts of failure to make a candid disclosure of past misconduct. In several years of teaching a course on the legal profession, we have frequently been consulted by students who have been unsure what conduct they should disclose to an admission board. They are often apprehensive of the consequences of minor incidents, sometimes committed during childhood and not resulting in a conviction, such as motor traffic offences, marijuana use and undetected minor criminality. While we know that many students do not disclose such common matters, the uneasiness which persists is highlighted by the example of a student who felt obliged to notify an admission board of his divorce.[3]

In two Australian States a preliminary screening mechanism exists which enables students to determine in advance of their law studies whether past misconduct will deny them admission to the profession. Admission rules for barristers and solicitors in New South Wales and

---

[1] J. Disney, J. Basten, P. Redmond and S. Ross, *Lawyers* (1977) 147-148.

[2] *Id.*, 146. The New South Wales Admission Boards, in correspondence with the authors in 1979, refused to state whether or not they would advise a student-at-law, who disclosed misconduct prior to seeking admission as a practitioner, of the effect of the disclosed misconduct on his or her future application.

[3] *Id.*, 161.

for barristers in Queensland require students to be enrolled as students-at-law before or shortly after commencing their law courses, or for a prescribed period before applying for admission to practice.[4] An applicant for studentship makes the same declaration as to fame and character and files the same certificates of character as are required for admission to practise. The admission boards are empowered to investigate the fame and character of applicants. By enrolling or refusing to enrol an applicant as a student-at-law they rule upon the significance of any disclosed misconduct. We know of no-one admitted as a student-at-law but subsequently denied admission to practise upon the grounds of some conduct which was disclosed upon admission as a student-at-law. However, one student-at-law has recently been asked to provide details of a number of convictions which she had previously disclosed and which did not hinder her admission as a student. Her case had not been resolved at the time of writing.

This article is concerned with four issues. First, we examine the nature and origins of the supervisory jurisdiction exercised over students-at-law and point to problems of policy and operation. Secondly, we attempt to identify standards of moral fitness applied in the exercise of the supervisory jurisdiction. We suggest that the courts have failed to articulate clear standards, a serious omission in view of the strict duty of disclosure and candour imposed upon applicants for admission, whether as a student-at-law or a legal practitioner. Thirdly, we discuss the procedures adopted in relation to applications for admission as a student-at-law and point to departures from the adversary model of judicial process. Finally, in the light of this examination we question the utility of the studentship system. The dangers of injustice inherent in it appear to us to outweigh any positive function it may perform. These questions have been prompted by a series of cases culminating in a recent unreported decision of the New South Wales Court of Appeal in which the Court cancelled the enrolment of a student-at-law.

II THE PROTHONOTARY v. LARKIN[5]

1. *The Facts*

The conduct prompting the Prothonotary to apply to the Court to cancel Larkin's studentship arose out of the breakdown of the marriage

[4] Barristers' Admission Rules (N.S.W.) r. 14; Solicitors' Admission Rules (N.S.W.) r. 4; Rules Relating to the Admission of Barristers of the Supreme Court of Queensland r. 34. The N.S.W. Solicitors' Admission Rules give intending solicitors the option of enrolling as either students-at-law or student-clerks. However, since enrolment as a student-at-law also satisfies the like requirement for admission as a barrister, the great majority of students enrol in this category. While the supervisory jurisdiction under discussion so far has been exercised only with respect to those admitted as students-at-law, there appears no reason in principle why it does not extend equally to student-clerks. However, for ease of reference we shall use the term "student-at-law".

[5] Unreported, N.S.W. Court of Appeal, 24 October 1977.

between Larkin's parents and its aftermath of bitterness and litigation. Relations between the parents had been very strained for some years up until 1970, when the father left the matrimonial home. The defendant (then aged 16), his mother and his two brothers, one two years older and the other six years younger than himself, remained together. As a result of maintenance proceedings commenced by the mother, the father agreed in late 1972 to meet certain domestic expenses, including the youngest son's educational costs. Some time after that, the mother commenced proceedings in the Supreme Court for a judicial separation, whereupon the father cross-petitioned for divorce. At the hearing of those proceedings, the defendant gave evidence on behalf of his mother. He was cross-examined by his father's counsel about a loan application, made by him and purporting to bear his father's signature as guarantor. From evidence given in these proceedings and in the later cancellation proceedings, it became clear that by early 1973 the father had failed to pay substantial amounts for the youngest son's educational expenses. In February 1973 the defendant applied to a credit union for a loan of $400 for the stated purpose of "a court case + dental bills".[6] While it is not clear from the judgment exactly how the loan moneys were spent, it seems that they were applied towards the youngest brother's educational expenses.

However, the loan application was clearly irregular in a number of respects. The defendant had deliberately overstated his age by one year, although his purpose in doing so was not established. More importantly, as a guarantor was required, he had subscribed what purported to be his father's signature to the application as guarantor without any reference to his father. He gave, as his father's address, his own address but correctly stated his father's place of employment, occupation and employer's telephone number. The loan was repaid without the father being called upon under the guarantee and it is not clear how the father came to know of its existence.

The defendant, who was enrolled in an Arts/Law course at the University of Sydney, applied for admission as a student-at-law in October 1974. He was admitted in the following month. On 19 October 1976 the secretary of the Barristers' Admission Board wrote to the defendant enclosing a copy of the transcript of the divorce proceedings which he said had been before the Board earlier in the year. The letter sought an explanation "concerning the matters that were raised in transcript",[7] to be available to the Board at its meeting on 26 October. On or about 26 October the Board received two letters in response, from the defendant's mother—one on her own behalf, the other on behalf of her son. In July 1977 the Prothonotary commenced the cancellation proceedings.

---

[6] *Id.*, 6.
[7] *Id.*, 5.

The Prothonotary relied heavily on the defendant's testimony in the divorce proceedings and, in particular, on the subscription of the father's signature to the guarantee and the defendant's responses to questions put to him in cross-examination by his father's counsel. This second aspect will be considered shortly. As to the first aspect, the defendant said in the cancellation proceedings that he had his father's oral authority to use his name. The defendant alleged that in 1970, several weeks before his father left home, his father had called him aside to say that if he, the son, felt that the family needed anything at any time he could sign his (that is, the father's) name to any documents. Thus, it was alleged that although the signature was physically applied to the guarantee by the defendant, it was in truth his father's signature since the son was exercising the authority conferred some three years earlier. However, the Prothonotary noted that under strenuous cross-examination in the divorce proceedings (in the course of which ultimately he invoked the privilege against self-incrimination and refused to answer further questions on the document) the defendant had made no reference to any such authority. The matter of the oral authority was first raised in an affidavit filed by the defendant a few days before the cancellation hearing.

The defendant maintained that the vigorous manner in which he was cross-examined by his father's counsel had inhibited him from putting forward the authority in explanation of his action, but the Court of Appeal rejected this explanation. Even granting that the defendant was the "target of a vigorous forensic attack"[8] the Court held that nonetheless he had had ample opportunity to put the authority forward during cross-examination. The Court pointed to other facts said to militate against its acceptance. The loan application had stated that the moneys were to be applied towards court expenses and dental bills. The court expenses could only be those incurred by the mother in litigation with her husband. Such expenses, it was said, could hardly fall within the contended scope of the authority. However, as noted earlier, it is not clear that the loan moneys were applied for these purposes rather than his brother's educational expenses which undoubtedly did fall within the scope of the alleged authority.[9] Furthermore, the Court said, if the defendant really had been acting in the honest belief that he was exercising such an authority he would not have mis-stated his father's address and would have made the procuratory nature of his execution explicit. (The former defect, at least, was ameliorated by the correct statement of other particulars sufficient to enable the credit union to

[8] *Id.*, 12.

[9] *Id.*, 13, where *semble* the Court suggests that the loan moneys were applied towards payment of the mother's court costs. However, on at least two other occasions in the judgment (pages 7 and 16) statements by the defendant that the moneys were used to meet his brother's educational expenses (in one instance upon oath) were quoted without adverse comment.

contact the father.) Finally, the Court noted that neither of the letters to the Board made reference to the authority.

These considerations induced the Court not merely to reject the defendant's explanation, but to doubt the existence of the alleged authority and the genuineness of the defendant's belief in its existence when signing the guarantee. However, in assessing the significance of the act the Court accepted that the defendant might fairly be seen as the victim of an internecine family dispute. It also accepted that the act was not intended to cast any financial burden upon the father, but was indeed a morally defensible response (in the defendant's eyes) to the father's default in payment of educational expenses.

The rejection of the explanation of the authority cast the defendant's testimony in both the divorce and the cancellation proceedings in a new light. In the divorce proceedings the following exchange had taken place between the defendant and his father's counsel before the trial judge intervened to inform him of his right not to answer questions tending to incriminate him:

Q. That purports to be your father's signature?
A. Yes.
Q. And it isn't, is it?
A. I do not think it is, I am not sure.
Q. You know very well that is not your father's signature.
A. I have a fair idea it is not.
Q. There is no doubt in your mind, is there?
A. Very little doubt.[10]

In the cancellation proceedings the defendant denied that these earlier answers were untrue. Initially he attributed them to his inability to see clearly the document counsel was referring to and to the stress of the moment. Ultimately he shifted position somewhat by drawing a distinction between his father's signature and his father's name written by his father in his own hand. Thus, he asserted, his refusal to agree that the signature was not that of his father was perfectly correct. As for the initial explanation, the Court did not accept that Larkin had been under any doubt as to the document referred to and it attached little weight to the effect of stress upon his replies. Without evaluating the latter explanation, they characterised his testimony in the divorce proceedings as lacking in candour and, consistently with their rejection of the alleged authority, described his evidence in the cancellation proceedings as being "in part false".[11] The defendant's admission as a student-at-law was cancelled forthwith.

---

[10] *Id.*, 4.
[11] *Id.*, 20.

2. *Basis for the Decision*

Why was the order for cancellation made? Beyond stating that the defendant was unfit to remain as a student-at-law, no legal standard of minimum acceptable character or of tolerable conduct is articulated in the judgment. Which of his actions compelled the decision—the subscription of his father's signature to the guarantee, lack of candour in the divorce proceedings or the false testimony before the present court? Or were these acts viewed in their totality? Some indications appear towards the end of the judgment:

> Had he admitted the impropriety of doing what he did, we could have found much in the circumstances to palliate his conduct. But he has not sought to meet the complaint in this way. He has attempted to justify his conduct, and has failed to do so. We consider therefore that the defendant stands to be dealt with on the ground which he has taken . . . . [The defendant's reputation for honesty] is insufficient to overcome the means which he has adopted in an endeavour to justify his action. This conduct, viewed in the most favourable light, manifests a sad lack of judgment and discrimination quite unacceptable in one who seeks admission to the legal profession. The defendant, in our opinion, is unable to appreciate the nature of his behaviour—in which we include his purported explanation before this Court—and is unfit to remain as a student-at-law.[12]

The reference of the Court to "means which he has adopted in an endeavour to justify his action" suggests that it was not the initial "forgery" which was relied on, but rather Larkin's defence of his action in the course of the two court proceedings. The election to make that defence rendered him unfit because it disclosed "lack of judgment and discrimination" and an inability to appreciate the nature both of the initial subscription and its later defence. These defects, rather than the mere act of subscription itself, resulted in the cancellation of his studentship.

Our impression is confirmed by references throughout the judgment to the defendant's refusal to repent of his original action and his testimony in the divorce proceedings. In the passage quoted, it was stated that had the defendant confessed to impropriety the Court "could have found much in the circumstances to palliate his conduct". Similarly, the success of any future application for re-admission was stated to depend upon his demonstration that "he has undergone a wholehearted change of attitude towards the principles which should govern the conduct of one who seeks to be admitted to the legal profession".[13]

Thus, the result stems from the defendant's election to stand by his earlier conduct. That conduct being impugned, and his justification

---

[12] *Ibid.*
[13] *Id.*, 20-21.

rejected, he had compounded earlier errors by putting forward a false defence. His unrelenting refusal to apologise or otherwise recant was exacerbated by the language of his reponse to the Board's letter of 19 October 1976 with its references to "judicial malaise" and "contempt of the law [he has] had to suffer under". His parents' divorce proceedings he characterised as a "miscarriage of justice and due process of law".[14]

III ORIGINS OF THE SUPERVISORY JURISDICTION OVER STUDENTS-AT-LAW

Only two earlier instances of proceedings for cancellation of admission as a student-at-law appear to have been reported. In 1889, in *Re Costello*[15] the Queensland Full Court assumed without discussion or citation of authority that it possessed the same measure of inherent control over the admission and discipline of students as it possessed over its admitted practitioners. The admission rules then made no reference to cancellation of the enrolment of students, but the Full Court held that the student's name might nonetheless he removed if he fell short of the common standard of good fame and character.[16] (The current Queensland rules expressly permit the Barristers Board to remove the name of any student for misconduct.)[17]

In New South Wales, neither the Solicitors' nor Barristers' Admission Rules make any provision for such removal and it was only recently that the power of the Court to do so was considered. In *The Prothonotary* v. *Ord*,[18] the Prothonotary sought to have the defendant's admission as a student cancelled for failure to disclose several convictions for driving offences, malicious damage and carrying a cutting instrument, and for failure to disclose that at the time of his application he had been committed for trial upon a charge of culpable driving (a crime of which he was convicted and sentenced to two years imprisonment). It was only an enquiry by the defendant concerning the possibility of continuing his studies by correspondence which alerted the Board to the non-disclosures. When applying for admission as a student the defendant had made an unqualified declaration as to his good fame and character.

Ord was out of Australia for the hearing but had instructed counsel to consent to cancellation by the Court. Therefore, the only question that arose was whether the Court possessed jurisdiction to cancel at this early stage or whether, once he was enrolled as a student, the Court was confined to its undoubted power ultimately to refuse to admit him to practise. Moffitt P. (with whom Samuels and Mahoney JJ.A. agreed) was prepared to find jurisdiction to cancel enrolment as a student upon

---

[14] *Id.*, 16-17.
[15] (1889) 3 Q.L.J. 129.
[16] *Id.*, 136.
[17] Note 4 *supra*, r. 36.
[18] [1976] 1 N.S.W.L.R. 421.

either of two bases. First, he inferred from the terms of the admission rules that

> a, if not the significant purpose of studentship-at-law is to introduce the embryo barrister into a group which requires as a condition of membership like standards, i.e. of good fame and character, as are required of a barrister. In return he receives the imprimatur, which the appointment carries, of fitness to become a member of an honourable profession and as such subject to some control by the Court.[19]

The Court in admitting applicants to the profession relies as a matter of practice upon the Board's certificate that the applicant is properly qualified. Furthermore, admission as a student is a formal prerequisite for admission as a barrister. Therefore, it is of concern to the Court that a student is, in fact, properly qualified for admission as such and incidental to this jurisdiction to admit as a practitioner, the Court has jurisdiction to set aside admission as a student which has been fraudulently or otherwise improperly obtained. But Moffitt P. went further, to place the jurisdiction upon what he saw as a wider basis:

> Upon admission as a student-at-law the student acquires a sufficient relationship with the Court and a sufficient status which flows from that relationship, to regard his appointment as under the control of the Court in that he holds an appointment which requires of him, in relation to and under the supervision of the Court, proper standards of conduct. In this way he is amenable to the jurisdiction of the Court in relation to his conduct which is relevant to his continuing studentship-at-law as a step to being a member of the Bar. This jurisdiction of the Court concerning students-at-law extends to removal from studentship-at-law where the Court considers this course is warranted by reason of the studentship-at-law being improperly obtained.[20]

The precise distinction between these alternative bases for jurisdiction is not immediately apparent. It may be that, on the first basis, jurisdiction is merely ancillary to the jurisdiction to admit legal practitioners and extends no further than ensuring that all formal requirements for full admission, including admission as a student have been validly fulfilled. On this view jurisdiction would extend, as in *Ord*, to misconduct not disclosed when applying for admission as a student. On the second basis, jurisdiction is not tied narrowly to the power of admission to practise but is a general supervisory jurisdiction analogous to that which the Court exercises over legal practitioners. On this basis, jurisdiction covers undisclosed misconduct prior to admission to the studentship but also subsequent misconduct. In effect, it brings forward to the date of admission to the studentship the disciplinary jurisdiction which the Court has, since the Charter, exercised over practitioners.

---

[19] *Id.*, 424.
[20] *Id.*, 424-425.

Moffitt P. sought support for the wider basis of jurisdiction in the judgment of the Queensland Full Court in *Costello* which, he said, described a student as an officer of the court so as to subject him to the common law discipline of the court over its officers.[21] He did not himself describe students under the New South Wales admission rules as officers of the court. It is submitted, however, that the judgment in *Costello* contains no such description either. Perhaps the passage which Moffitt P. had in mind is the following: "But independently of the examiners, the Court has a general control over its students and officers, and over admissions to practise in the Court".[22] This statement falls short of assimilating students to the position of officers for the purposes of amenability to judicial supervision.[23]

IV NATURE OF THE SUPERVISORY JURISDICTION OVER STUDENTS-AT-LAW

The Court of Appeal in Larkin's case placed emphasis upon repentance by the student but failed to articulate a minimum standard of tolerable conduct. These two factors prompt enquiry as to, first, the *objectives* of the supervisory jurisdiction exercised over students and secondly, the risk of prejudice to which students are exposed by reason of indeterminacy in the formulation of these objectives and of the applicable standards. Under the present heading we consider objectives. At a later stage, the duty of candour, imposed by courts upon applicants for admission and upon practitioners and students against whom proceedings have been commenced in the disciplinary or supervisory jurisdiction, is examined. The article also reviews the utility of the studentship system in the light of the earlier examination.

In *Costello* and *Ord* the courts did not refer explicitly to the nature of the jurisdiction being exercised although in each case reference was made, at least by way of analogy, to the inherent disciplinary jurisdiction over legal practitioners. In proceedings against practitioners, at least where disbarment or suspension is sought, the courts have stated that the proceedings are protective and not punitive.[24] In Larkin's case

---

[21] *Id.*, 424.

[22] Note 15 *supra*, 136.

[23] *Re Costello* was decided under the Legal Practitioners Act 1881-1977 (Qld), the cross-practice provisions of which were repealed in 1938. Under these provisions members of either branch of the profession were permitted to practise as members of the other. Thus, the Court, citing an English decision on the discipline of a solicitor, relied upon the cross-practice provisions of the Act to extend that power to cover barristers. It is by no means clear that, had the cross-practice provisions of the Act not been in force, the same jurisdiction would have been assumed over a student for the Bar.

[24] *Clyne* v. *New South Wales Bar Association* (1960) 104 C.L.R. 186. In *Clyne supra*, 202, the High Court recognised that disciplinary proceedings served the further purpose, from the perspective of the profession, of ensuring that "abuse of privilege may not lead to loss of privilege". See also *Kariapper* v. *Wijesinka* [1968] A.C. 714, 737.

the Court expressly declared that the order was not intended to be punitive but was "to protect the public from the admission to the profession of one who is not fit to join its ranks".[25] This proposition was not supported by reference to considerations or authority peculiar to students, but by citation of a decision involving disciplinary proceedings against a barrister.[26]

In developing a supervisory jurisdiction over students, the courts have drawn, again by way of analogy, upon the principles relevant in disciplining practitioners. Therefore, it is necessary to examine the objectives and incidents of the disciplinary jurisdiction to understand the nature of the jurisdiction exercised over students.

There are dicta in recent New South Wales disciplinary decisions suggesting that legal practitioners owe a duty of co-operation and candour to the court which is quite foreign to the normal workings of the adversary process. So far, this duty of candour has been sketched in outline only. Thus, Moffitt P. in *Law Society of New South Wales* v. *Weaver*[27] described the inherent supervisory jurisdiction as not adversary in nature but "substantially of a protective nature, in which the public interest is of major importance".[28] The non-adversarial aspect reflects the fact that such proceedings are commonly, though not inevitably, commenced by the Prothonotary (a court official) at the direction of the Court. It is the Prothonotary who places relevant material before the Court so as to ensure that the practitioner has adequate opportunity to respond. But explicit statements on the nature of the disciplinary process are rare and, for the most part, the practitioner's role must be gleaned from procedural rules which are peculiar to the jurisdiction and derive from its protective function.

To characterise disciplinary proceedings as being intended for the protection of the public distracts attention from the consequences for individual practitioners who are disciplined. It can hardly be doubted that, whatever the *purpose* of disciplinary proceedings may be, the sanctions imposed are punitive in their *effect* upon the individual. In particular, the sanctions of disbarment and suspension have been aptly described by a Canadian Royal Commission as "economic death".[29] Furthermore, the characterisation of the proceedings as punitive or protective is not a matter of mere semantics, but has substantive effect. For example, if the punitive impact of the disciplinary sanction is accorded more recognition, the practitioner will be able to make a strong claim to the benefit of safeguards built into our criminal trial procedure. One consequence of that would be to enable the practitioner

---

[25] Note 5 *supra*, 20.
[26] *Clyne* v. *New South Wales Bar Association*, note 24 *supra*.
[27] [1977] 1 N.S.W.L.R. 67.
[28] *Id.*, 76.
[29] Royal Commission: *Inquiry Into Civil Rights*: Ontario 1968: Report No. 1 Vol. 3 p. 1181 (The McRuer Report).

to sit back and demand that the "prosecutor" establish a case to the satisfaction of the court. Precisely such a claim was raised in disciplinary proceedings against a solicitor and was rejected by the New South Wales Court of Appeal:

> From the earliest times, and as far back as the recollection of the individual members of this Court goes, disciplinary proceedings in this jurisdiction in this state have always been conducted upon affidavit evidence and not otherwise. They are not conducted as if the Law Society . . . was a prosecutor in a criminal cause or as if we are engaged upon a trial of civil issues at nisi prius. The jurisdiction is a special one and it is not open to the respondent when called upon to show cause, as an officer of the Court, to lie by and engage in a battle of tactics, as was the case here, and to endeavour to meet the charges by mere argument.[30]

A second consequence which might flow from overt acceptance of the punitive element in the proceedings would be the claim that the "prosecutor" should satisfy the criminal burden of proof. There is no logical need to accede to such a claim: rather it would require an appeal to custom and practice in like jurisdictions, but it would have a strong attraction to lawyers. There is Privy Council authority suggesting that proceedings before the statutory disciplinary tribunal are quasi-criminal in nature and require a standard of proof higher than the civil standard of balance of probabilities, at least where the alleged professional misconduct involves an element of deceit or moral turpitude.[31] In Australia, however, the civil standard of proof has been accepted as the proper standard, although it has also been acknowledged that the degree of satisfaction for which the civil standard calls may vary with the gravity of the alleged misconduct.[32]

A third consequence apparently flowing from characterisation of the jurisdiction as protective is illustrated by *Weaver*.[33] In that case the New South Wales Court of Appeal held that the doctrine of issue estoppel had no application in disciplinary proceedings commenced against a solicitor in its inherent jurisdiction. Therefore, where the statutory disciplinary tribunal had previously dismissed charges of professional misconduct laid against the solicitor by the Law Society, the Court held that the tribunal's findings did not prevent the same charges being considered by the Court. In so holding the Court relied upon section 79 of the Legal Practitioners Act 1898 (N.S.W.) which expressly preserved the Court's inherent disciplinary powers. Street C.J. and Moffitt P. went further to declare that, even in the absence of

---

[30] *Re Vernon; ex parte Law Society of New South Wales* (1966) 84 W.N. (N.S.W.) (Pt 1) 136, 141-142.

[31] *Bhandari* v. *Advocates Committee* [1956] 3 All E.R. 742, 744.

[32] *Re Evatt; ex parte New South Wales Bar Association* (1967) 67 S.R. (N.S.W.) 236, 238; *cf. Re Anderson and the Medical Practitioners Act 1938-1964* (1967) 85 W.N. (N.S.W.) (Pt 1) 558, 577-578.

[33] Note 27 *supra*.

section 79, the Court had a responsibility to the public, independent of the interests of the parties before it, to take cognisance of matters affecting the fitness and propriety of solicitors to remain upon the roll.[34] The weight of that responsibility precluded any operation of the doctrine of issue estoppel.

A fourth consequence arising from the characterisation of the disciplinary jurisdiction as protective concerns the substantive criteria upon which the courts and statutory disciplinary tribunals act. Apart from statutory grounds, the principal basis upon which English and Australian tribunals act to disbar or suspend practitioners is "professional misconduct", a phrase judicially defined as "[conduct] which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency".[35] Although the phrase also embodies the primary basis for exercise of the inherent judicial power to disbar or suspend, the criteria for exercise of this power are even more imprecise because courts are ultimately concerned with whether the practitioner is a fit and proper person to practise law, a question held to be incapable of more precise definition.[36] The New South Wales Court of Appeal recently emphasised the basic distinction between the issue of fitness and the enquiry as to whether the ingredients of the charge of professional misconduct had been made out when it reversed a finding of the statutory tribunal that a solicitor's conduct constituted professional misconduct but then refused to restore his name to the roll until it had heard evidence as to his mental condition.[37]

The difficulties inherent in the adoption of such a standard of "professional misconduct" as a non-exhaustive guide to the ultimate fitness issue are two-fold. The first is the sheer imprecision in the legal concept of professional misconduct; the other is the risk that since the outcome of the professional misconduct enquiry is not conclusive of the ultimate fitness issue the elements of the professional misconduct charge may not be strictly proved in the same manner as would, for example, the elements of a criminal charge. In criminal proceedings the courts are careful to apply stringent procedural safeguards in determining whether or not all the elements of the offence have been made out and only then to expand the scope of the enquiry into the personal propensities of the defendant and the appropriate punishment. The dangers inherent in the bifurcation of the disciplinary enquiry appear from Larkin's case itself. While none of the three cases involving

---

[34] *Id.*, 73.

[35] *In re a Solicitor; ex parte The Law Society* [1912] 1 K.B. 302, 312 *per* Darling J. quoting from *Allinson* v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750, 763; *cf. Re Vernon; ex parte Law Society of New South Wales*, note 30 *supra*, 143.

[36] *Ziems* v. *The Prothonotary of the Supreme Court of New South Wales* (1957) 97 C.L.R. 279, 298 *per* Kitto J.

[37] *Robinson* v. *Law Society of New South Wales* [1977] A.C.L.D. 451.

the supervisory jurisdiction over students makes any attempt at definition of the substantive grounds for the exercise of that jurisdiction, Larkin's case compounds this deficiency by the confusion noted earlier as to the precise conduct of the student which was held to be objectionable and to betoken unfitness. The judgments in *Costello, Ord* and Larkin's case do not discuss these four consequences of defining the disciplinary jurisdiction as protective, although the references in each decision to the inherent disciplinary jurisdiction over practitioners suggest that corresponding rules and standards are applicable to students.

V DUTY OF CANDOUR IN ADMISSION APPLICATIONS

1. *The Case Law*

As noted earlier, a positive duty of candour is imposed upon practitioners in respect of whom disciplinary proceedings have been commenced. The duty has not been clearly articulated in Anglo-Australian case law,[38] although the Council of the English Law Society has suggested tentatively the existence of an ethical duty of candour to the statutory disciplinary tribunal.[39] However, examples given by the Council of a breach of duty to the tribunal involve perjury and contempt, conduct which would be equally punishable under the normal adversary process. We return to this duty subsequently.

If the nature and scope of the lawyer's duty of candour in disciplinary proceedings remains to be stated authoritatively, the position of the student under the supervisory jurisdiction hardly has been broached. The supervisory jurisdiction was first affirmed in New South Wales only in May 1976 when judgment was delivered in *Ord.* Questions of candour and co-operation did not arise in *Ord*, since it was assumed that the full measure of disclosure had not been made before the hearing and the defendant had consented to the order being made against him. The only issue in *Ord* was the extent of the Court's jurisdiction. However, in The Prothonotary v. Larkin, where jurisdiction was assumed without explicit reference to *Ord*, the Court of Appeal, through its emphasis upon repentance and openness, also assumed the existence of a duty of candour, although it gave no clear indication as to its scope and content.

In the identification and evaluation of potential prejudice to students in the supervisory jurisdiction (arising through uncertainty as to its objectives and as to the proper obligation of candour and co-operation) some guidance may be derived from examination of the duty of frank

---

[38] The duty has not been recognised by statute although an analogous duty has been expressed in special circumstances outside of disciplinary proceedings. See for example, Solicitors' Practice Rules (N.S.W.) r. 14.

[39] The Council of the Law Society, *A Guide to the Professional Conduct of Solicitors* (1974) 65-66.

disclosure imposed by courts upon applicants for admission to the profession. This duty is itself usually referred to by courts as a duty of candour and, at the risk of confusion with the duty arising in the litigious context of supervisory proceedings, we shall adopt this usage.

The principal Australian discussion of the duty of candour in admission applications may be found in the 1947 decision of *In Re Davis.*[40] In that case, an applicant for admission as a barrister failed to disclose to the New South Wales Barristers' Admission Board that he had been convicted eleven years earlier for housebreaking and theft. The omission was not discovered until a year after his admission whereupon his name was removed from the Roll of the Supreme Court of New South Wales. Jordan C.J., delivering the judgment of that Court, referred to section 9 of the Legal Practitioners Act which provides that no candidate shall be admitted unless the Barristers' Admission Board is satisfied that he is a person of good fame and character. He continued,

> [i]t is quite clear, from s. 9 of the Act, that it is the duty of a candidate for admission to the Bar to satisfy the Board that he is a person of good fame and character . . . . [I]t was the plain duty of Mr. Davis to do everything in his power to assist the Board to perform the duty laid on them by s. 9. He failed in his duty. Not only did he not disclose to them the fact of his crime; but he actively misled them. He concealed the fact of his criminal record from two solicitors of the Court, and then placed before the Board certificates from them that he was of good fame and character—a very gross *suppressio veri.* The explanations which he gives for concealing the fact of his conviction are entirely unsatisfactory. One is that he regarded himself as having led an exemplary life since, and decided for himself that this was all that mattered. The other is that "my motive was a desire to avoid publicity which I feared would follow on disclosure".[41]

However, the Full Court did not rest its order for disbarment solely upon Davis' non-disclosure to the Board and his referees, but upon the cumulative weight of the conviction and its non-disclosure.

Upon appeal the High Court held that the New South Wales Supreme Court had power to disbar where admission had been procured through incomplete disclosure and that the power had been correctly exercised in these circumstances. However, only Starke J. stated unequivocally that Davis' failure to make proper disclosure was in itself sufficient ground for disbarment. The other justices did not make it clear whether he should not have been admitted because of his conviction, because he failed to disclose it or because of the cumulative effect of these two factors. The judgments also fall short of a definitive

---

[40] (1947) 75 C.L.R. 409.
[41] *In re Davis* (1947) 48 S.R. (N.S.W.) 33, 36-37.

statement of the scope of required disclosure. Thus, Dixon J. (with whom Williams J. agreed) thought that however sanguine a view might be taken of the conviction "a complete realization [by Davis] . . . of his obligation of candour to the court in which he desired to serve as an agent of justice"[42] was a prerequisite to demonstration of fitness to practise. Latham C.J. agreed that the conviction ought to have been disclosed. While Davis was not obliged to disclose every past wrongdoing, he said the conviction was undoubtedly relevant to the Board's function of certifying him as a fit and proper person.[43] It is significant for the origin of this duty of candour that no reference appears in the judgments either in the New South Wales Court of Appeal or in the High Court to the particular declaration made by Davis as to his character and past conduct.

A recent New South Wales case, New South Wales Bar Association v. Rose,[44] bears a striking factual similarity to Davis, although it differs in outcome. The plaintiff association commenced disciplinary proceedings against a barrister in respect of his prior misconduct as a solicitor and his failure to disclose it upon application for admission to the Bar. Although the statement of facts in Rose's case is incomplete in a number of respects,[45] it appears that two years before his admission to the Bar, Rose had been instructed to form a company for a client of the firm by which he was employed. He prepared the documents for incorporation, drew a cheque for registration fees and requested a registration clerk to lodge them at the Corporate Affairs Commission. Months later, when the client was pressing for the certificate of incorporation, Rose said he discovered that the documents had not been lodged with the Commission. In order to avoid embarrassment with the client and his own employers (who had promised an early partnership) Rose concealed this fact by preparing a fictitious certificate of incorporation by superimposing the name of the proposed company over that of another company in its certificate and making a photocopy of such quality as to conceal the superimposition. The fictitious photocopied certificate was given to the client. He subsequently took no steps to rectify the situation and the "company" traded for three and a half years before police enquiries, initiated by the Commission, resulted in a frank explanation by Rose as to what he had done.

This incident was repeated a year and a half later. Rose's firm acted for a purchaser in a conveyancing transaction. He was instructed to form a company which was, as part of the transaction, to receive a

---

[42] Note 40 *supra*, 426.

[43] *Id.*, 416.

[44] Unreported, Supreme Court of N.S.W., 27 November 1974.

[45] *E.g.*, nothing is said as to whether the clients for whom the companies were formed were told that incorporation was complete and, if so, when; nothing appears as to whether the clients were billed for the considerable fees payable upon incorporation of companies.

bank loan secured by the personal guarantee of the purchaser. After delays by the vendor, Rose issued a notice to complete and a day or so prior to the date for completion discovered that the documents for the incorporation of the company had not been lodged. Rose was anxious to complete on the day specified in the notice and thereby avoid a possible rescission by the vendor. He therefore prepared a fictitious photocopied certificate of incorporation in the same manner as before and forwarded it to the bank for sighting, a precondition of the loan. It seems that the loan was made on the faith of the copy certificate, for completion took place as planned. However, as before, Rose took no steps to complete the incorporation or to inform the purchaser and the bank of the real state of affairs. The company traded for two years before the police interviewed Rose.

Seven months after this transaction, Rose, on his own request, had his name removed from the Roll of Solicitors and was admitted to the Bar. He had practised as a barrister for a year and a half when approached by the police and made a full confession in relation to each incident. The police said that as neither client sought any further action by them, they did not prosecute but referred the matter to the Prothonotary who in turn referred it to the Bar Association. The Association commenced disciplinary proceedings in the Supreme Court in relation to the two acts and their non-disclosure. In seeking admission to the Bar, Rose had sworn an affidavit stating that he had not done anything to affect adversely his good fame and character and was not aware of any circumstances which might affect his fitness to practise at the Bar. He also swore that he did not "expect or apprehend"[46] that any proceedings would be taken against him in respect of his practice as a solicitor.

McClemens C.J. at Common Law found that Rose had "perpetrated two acts of inexcusable misconduct" which were "at some time certain to be revealed".[47] This inevitability, picturesquely compared by counsel for the Bar Association to "a time bomb blowing up in his [Rose's] face",[48] derived primarily from the companies' statutory obligation to file an annual return within 19 months of incorporation.[49] Receipt by the Commission of a return from a "company" not on its register inevitably produced an immediate investigation. The failure of counsel for the Bar Association to cross-examine Rose allowed the judge to accept his explanation that he did not consciously advert to the two incidents when swearing the affidavit and he dismissed the non-disclosure from further consideration. In relation to the incidents themselves, the judge was assured that no financial loss had been

[46] Note 44 *supra*, 2.
[47] *Id.*, 6.
[48] *Ibid.*
[49] Companies Act 1961 (N.S.W.) (as amended) ss. 136(1), 158(4).

suffered by the clients and no gain made by Rose. The defendant was severely reprimanded and suspended from practice for three months, over a period including the whole of the summer vacation.[50] The judgment contains no reference to *Davis*, neither to any other decision bearing upon the duty of pre-admission disclosure nor does it contain any discussion of relevant legal principles.

Three other Australian cases have involved applicants for admission, each of whom failed to disclose that he had been disciplined in another jurisdiction. In *In Re Watson*[51] the applicant, who was seeking admission to the Queensland Bar, had previously been admitted in Victoria and South Africa. In fact, he had been disbarred for misconduct in the latter jurisdiction but he failed to refer to his South African admission or disbarment in applying for admission in Queensland. After being admitted in Queensland, his admission came to the knowledge of the Admission Board which moved for his disbarment. The Court made the order without delivering reasons.

In the Application of Pratt[52] concerned a New Zealand practitioner who was seeking admission as a solicitor in New South Wales. New South Wales Admission Rules required the filing of an affidavit containing the following paragraph:

> I have not done or committed any act or thing which would cause my name to be struck off the Roll of Solicitors of the said Court [the Supreme Court of New Zealand], and to the best of my knowledge and belief my name still remains on the said roll.[53]

The applicant filed an affidavit in precisely these terms, referring to his New Zealand admission, but making no reference to the fact that he had been found guilty on two charges of professional misconduct for gross over-charging less than two years earlier. The charges had been heard together and on each, the applicant had been fined and ordered to refund the overpayments. While the affidavit was literally accurate, the Admission Board did not believe that proper disclosure had been made and refused the application. Before the Court, the applicant stated that he had honestly believed that he owed no obligation of disclosure beyond faithful completion of the affidavit, and that he also believed that the usual investigations consequent upon his application would reveal the disciplinary findings. The Court held that neither the fact of the misconduct findings nor the failure to disclose them disqualified him from admission in New South Wales. Upon the scope of pre-admission disclosure Street C.J. (with whom Hope and Mahoney JJ.A. agreed) said,

---

[50] The Council of the Bar Association had resolved, by a majority, that Rose ought to be disbarred. Beyond informing the Court of this fact, counsel for the Association made no submission as to penalty.

[51] [1914] St.R.Qd. 231.

[52] Unreported, N.S.W. Court of Appeal, 9 August 1977.

[53] Note 4 *supra*, rr. 4(b), 55 and First Schedule, Form No. 8.

> [t]here is in my view an obligation upon an applicant for admission to either branch of the profession in this State to volunteer a full and frank disclosure at the appropriate time of all matters which could fairly touch upon the decision of whether he should be admitted to the profession. The prescribed form of affidavit does not make provision for such a disclosure, but, where there are matters which could fairly touch upon this decision, the form in the rules goes only part of the way. There was an overriding obligation on this applicant, and on any other applicant with prejudicial matters in his personal background, voluntarily to disclose such matters, touching as they do so closely upon the question of whether he is a fit and proper person for admission as a solicitor.[54]

Hope J.A. added that he would "strongly advise any applicant if he has a doubt about a matter to resolve that doubt in favour of disclosure".[55]

The third case involved the most recent and successful application by Mr S. S. W. Davis for re-admission to the New South Wales Bar.[56] In the course of the proceedings, the applicant was criticised by the Bar Association for not making full and detailed disclosure of activities while employed by a solicitor, Munro, before the latter was struck off the roll in 1966. Davis suggested that Munro's conduct, and his own involvement in it, had been thoroughly aired in Munro's disbarment proceedings and thus was publically known, particularly within the legal profession. Street C.J., in the Court of Appeal, pointed out that although he "did not wish to negate the existence of a positive obligation upon a person coming forward for admission to make full disclosure", there was "a difference in degree between a non-disclosure in circumstances tantamount to concealment" and the situation described by Davis.[57] This distinction no doubt accounts in part for the fact that both Pratt's failure to disclose and Davis' omission of details were not fatal to their respective applications.

Implicit in statements such as those extracted from Pratt's case is an ill-defined concept of relevance. Thus, Latham C.J. stated in *Davis* that "[i]t would not be reasonable to require a candidate to disclose to the Board . . . every wrongdoing of his life".[58]

2. *A Suggested Formulation*

We suggest that the following formula provides an appropriate test: previous acts need only be disclosed where the nature of the acts is such that they bear a direct relationship to the applicant's fitness to practise law. The relationship between character and fitness to practise was not explored in Larkin's case and did not arise in *Costello* and *Ord*. How-

---

[54] Note 52 *supra*, 5.
[55] *Id.*, 7.
[56] Unreported, N.S.W. Court of Appeal, 27 October 1978.
[57] *Id.*, 24.
[58] Note 40 *supra*, 416.

ever, there is weighty Australian authority in the disciplinary area,[59] and parallel United States authority with respect to character enquiries for admission purposes,[60] requiring that conduct be examined not in the abstract but for its connection with or significance for the subject's capacity for ethical practice. However, this test provides a mere framework which cannot yet be adequately filled in from existing case-law, although a few tentative lines can be drawn. Three categories of prior misconduct appear from the decisions; namely, conduct resulting in formal findings of professional misconduct, conduct resulting in criminal conviction, and dishonest acts which have not been the subject of criminal or professional disciplinary proceedings.

As to the first, *Watson* and Pratt's case suggest that previous findings of professional misconduct in another jurisdiction ought to be disclosed. But even this inference is undermined by the peculiar circumstance in *Watson* where non-disclosure was compounded by false swearing in the affidavit supporting the application. In any event, Pratt's failure to make proper disclosure was not held to bar his admission. Secondly, as it is not clear from *Davis* that the applicant's conviction alone would have disqualified him from admission, that decision suggests that a conviction for a crime of dishonesty at least must be disclosed. However, a substantial penumbra of uncertainty surrounds these two relatively settled areas.

The third area has yet to be faced squarely by the courts. The general statements in *Davis* and Pratt's case on the obligation of candour, not being restricted to disclosure of prior convictions or disciplinary offences, indicate that the obligation extends to acts in this category, at least of a serious nature. Specifically, non-disclosure of misconduct in this category arose in Rose's case, Larkin's case and the recent decision of the New South Wales Court of Appeal in The Prothonotary v. Lollback.[61] The decisions in Larkin's case and Rose's case cast some doubt upon the scope of required disclosure. In Larkin's case it is clear that the apparent forgery was made prior to application for admission as a student. Equally clearly, it was not disclosed. It is not so clear that the testimony in the divorce proceedings took place before application for admission; indeed, the better view appears to be that it did not. In any event, there is a total absence in the judgment of any discussion upon the duty of disclosure and consequently an inference may be drawn that the "forged" signature on the guarantee need not have been disclosed.

This inference finds some, albeit limited support from Rose's case which must, however, be compared with *Davis*. A superficial comparison

---

[59] *Ziems* v. *The Prothonotary of the Supreme Court of New South Wales*, note 36 *supra*, 299 *per* Kitto J.

[60] *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239, 248 (1957).

[61] Unreported, N.S.W. Court of Appeal, 10 May 1978.

between the misconduct by Rose and Davis reveals several factors in the latter's favour. Davis' conduct consisted of a single incident twelve years earlier; Rose repeated his deception only seven months prior to completing his affidavit. Davis' act was unconnected with professional practice; Rose's deceptions arose out of his work as a solicitor. Emphasis was placed upon Davis' failure to inform his referees of his conviction; no adverse inference was drawn from Rose's failure to do so. These factors notwithstanding, Rose's explanation that he did not advert to the incidents when swearing the affidavit was accepted. What apparently distinguishes Rose's case and *Davis* is the fact that Davis' conduct resulted in a criminal conviction, to which he consciously adverted when making his application, even though he dismissed it as irrelevant to his present fame and character. Lollback's case contains nothing to displace this inference. There the defendant came forward voluntarily to disclose misconduct, the full significance of which he had appreciated only after admission as a barrister. This misconduct, which the Court held ought clearly to have been disclosed, consisted of apparent offences under the Legal Practitioners Act relating to the unqualified practice of law.

3. *Privilege Against Self-Incrimination*

In truth, little guidance can be obtained from any of the cases in relation to disclosure of conduct which has not been the subject of criminal proceedings or disciplinary action. If in fact the duty of candour does extend to previously undisclosed offences, serious problems arise with respect to the common law privilege against self-incrimination. Under the privilege no-one can be required to answer questions, either in or out of court, if the answers could render that person liable to criminal prosecution. This protection can only be overridden by statute.[62]

In all Australian States there are legislative provisions enabling inspectors or investigators to examine solicitors' trust records and other aspects of their practices and these would by necessary implication override the privilege. In other situations the position is less clear. Most of the reported cases concerned with the good fame and character of applicants for admission come from New South Wales, where rules of court require applicants for admission to studentship or practice to disclose past misconduct. The statutory authority for these rules would no doubt allow them to override the privilege against self-incrimination, if that were their clear intention, but that issue has not been dealt with in any reported decision. The question could well have arisen in Larkin's case, as the defendant had actually claimed the privilege while testifying in his parents' divorce proceedings, but the Court of Appeal did not

[62] *Ex parte Grinham Re Sneddon* [1961] S.R. (N.S.W.) 862.

expressly decide whether or not a forgery had been committed and made no reference to possible non-disclosure.

At the other end of the scale, there is no statutory authority for investigating misconduct by practising barristers in New South Wales and Queensland, nor is there any express provision which could be used to compel a student or a practitioner to answer questions in court. In these circumstances it is a moot point whether a court could disbar or refuse admission to someone on the ground solely of refusal to answer questions concerning alleged, undisclosed misconduct, as distinct from answering questions untruthfully or evasively. The issue has recently been resolved in the United States where the Supreme Court held that the constitutional privilege against self-incrimination extended to an attorney who had refused to co-operate in a judicial enquiry into his professional conduct. He had been disbarred for refusing to testify and produce financial records in answer to a subpoena, but the Supreme Court reversed his disbarment.[63]

VI UTILITY OF STUDENTSHIP

Our survey of the duty of candour in admission applications has thrown little light upon the duty arising in the course of proceedings in the supervisory jurisdiction. However, it has raised questions as to the scope of the duty which are of fundamental importance to intending lawyers and those from whom they may seek advice in relation to their obligations of disclosure. The duty to disclose past misconduct applies at two stages; first, when the aspiring lawyer enrols as a student-at-law and secondly, upon application for admission to the profession. In New South Wales the first declaration must be made within six months of *commencing* a law course. On the other hand, it is only at a late stage in their academic training that most law students take the compulsory course in legal ethics. To require virtually untrained law students to know of and appreciate the scope of a rather ill-defined duty of a kind rarely found in our legal system is quite unwarranted. Indeed, one may wonder why students are required to pass a course in legal ethics at all if the obligations are expected to be instinctive.

The principal justification for requiring enrolment as a student-clerk in the early months of a law course must be to allow students with serious records to learn at the outset of their legal studies that they will probably not be able to practise law. If they fail to enrol, whether through indecision or ignorance, they are rarely if ever penalised. However, if they enrol but make incomplete disclosure they jeopardise their future careers. This seems to be both unnecessary and unfair. If

[63] *Spevack* v. *Klein*, 385 U.S. 511 (1967). In *In re March*, 71 Ill. 2d 382, 376 N.E. 2d 213 (1978) the Illinois Supreme Court held that testimony can be compelled if the practitioner is granted immunity from use being made of such testimony in any possible criminal proceedings. Such immunity is not used in this country.

the present system is retained, the courts should at least show some appreciation of the limited training and experience of the student and of the need to clarify with precision the types of misconduct which they consider to be relevant to character and fitness, and which ought to be disclosed.

VII DUTY OF CANDOUR IN COURT PROCEEDINGS

In disciplinary proceedings brought against both practitioners and students, an ill-defined duty of candour and co-operation appears to be imposed upon the defendants. But again there is reason to distinguish the two types of proceeding on the basis discussed above, namely, the training and experience of the person called on to show cause. It is inherently unfair to call on students to defend themselves, perhaps at extraordinarily short notice and at a time when they may well be unaware of the extent of the duty placed on them. The student's own interests would be satisfied if he or she were given notice of facts and inferences which might have to be explained or rebutted prior to admission. The student could then be allowed the option of having the matter cleared up, or of leaving it until the time came to seek admission as a practitioner.

These potential dangers seem to have been realised in Larkin's case. For example, one may ask whether Larkin, when replying to the letter of the Admission Board in October 1976 and during the cancellation proceedings, understood the nature of the jurisdiction which was being exercised and was aware of his duty of candour and co-operation. The letter, it has been noted, sought a reply to be available for the Board's meeting seven days later. The defendant in his reply, which is set out at length in the judgment, claimed that this limited notice had denied him adequate opportunity to consider his position and obtain legal advice. Why such short notice should have been given, especially since the transcript was stated to have been before the Board earlier in the year, is not apparent. Yet the judgment discloses that at least two significant inferences were drawn against the defendant from the terms of his reply. First, the letter is noted for its failure to admit any measure of fault on the part of the defendant. Secondly, the absence of any reference to the oral authority, later alleged to have been given by the father, is cited by the Court in support of its conclusion that there was no such authority.

An impressive body of psychological evidence suggests that, contrary to popular belief, remembering is not a passive process of recollection and retrieval of previous impressions but an active process of imaginative reconstruction. This process, usually unconscious, is affected by temperament, interests, attitude and previous experiences. The more distant the event to be recalled, the more elaborate is the task of

reconstruction.[64] These insights, when applied to the circumstances of Larkin's case prompt caution in founding disciplinary action upon the veracity of the defendant's recollection and explanation of the alleged authority. The oral authority was said to have been given in a conversation between father and son at the height of a bitter family dispute several years before the cancellation proceedings. The defendant was then aged 16 years. The guarantee was executed over four and a half years before evidence was given of it in the cancellation proceedings. While the date of the divorce proceedings is not stated in the judgment, it is reasonable to assume that they took place at least two years after execution of the guarantee and certainly several years after the alleged conversation. The defendant when cross-examined in the divorce proceedings was unexpectedly confronted with the document in proceedings which were not only adversarial but were fiercely contested. The demands of instant justification in such circumstance, are not conducive to dispassionate and impartial reconstruction.

Furthermore, the defendant's testimony in Larkin's case betrayed little appreciation of the importance attached by the Court to a spirit of repentance and to a co-operative search for the nature and cause of the defendant's alleged error. While his testimony may simply reflect an obdurate indifference to the moral quality of his earlier act, it is possible that the student's perception of the nature of the proceedings had some bearing upon his reconstruction and presentation of evidence. Initially the guarantee may have been viewed as an insignificant incident —the amount involved was small; the father was not intended to and did not have to meet any liability; the guarantee, while not communicated to him, was not (since his telephone number and other particulars were correctly included) concealed from him and the proceeds of the loan appear to have been applied towards meeting a financial need arising from a moral and legal default of the father. Further, it appears that the sons, having sided with their mother, were not communicating with their father when the loan application was made. Verbal communications are rarely unambiguous in their terms and free from the risk of misconstruction, even when they are made between adults in unstrained circumstances and involve concepts with which each is familiar. The impulse must have been strong for the defendant when recalling the conversation in February 1973, to place a construction upon it which would support the execution of the guarantee in the father's name. It is interesting to speculate whether the process of "recollection" would have produced the same result if it had been made clear to the defendant that in cancellation proceedings the ordinary assumptions

[64] See generally F. Bartlett, *Remembering: A Study in Experimental and Social Psychology* (1967) 58, 63 ff., 80, 93; G. Talland, *Disorders of Memory and Learning* (1968) 18-19; M. Freedman, *Lawyers' Ethics in an Adversary System* (1975) 65-69.

of the adversary process are not necessarily applicable and that candour and openness, far from being prejudicial to success, are an obligation which the defendant owes to the Court.

It is becoming apparent that the courts, in exercising control over practitioners and students are moving away from the traditional adversarial model of proceedings. This move is effected through limitations imposed on the tactics open to the parties. Of course, it is a myth to assume that all our court proceedings conform to the traditional adversarial model; criminal trials exemplify one obvious departure in so far as the prosecutor is under a duty to establish the truth, rather than to achieve a conviction at all costs. This ethical limitation on the role of the criminal prosecutor is well established and is probably also applicable to plaintiffs in disciplinary proceedings.[65] The novel departure in these proceedings is rather found in the obligations imposed on the defendant, and in discussions of the nature of the jurisdiction, analysed above. In the recent Davis re-admission case, Street C.J. said that "[a]lthough litigation of disciplinary matters . . . is cast in conformity with the system in the adversarial mould, it is in substance of an inquisitorial character".[66] Such an explicit acknowledgement, though belated, is to be welcomed. Whether or not one believes that this departure is desirable, it is surely incumbent upon courts exercising the supervisory jurisdiction to articulate in advance the precise nature of these proceedings, the extent of their departure from the adversary model and the duties of candour and co-operation expected of participants.

VIII COMPARING DISCIPLINARY AND SUPERVISORY PROCEEDINGS

Whatever the similarities between the exercise of disciplinary powers over practitioners and control of students by courts, two significant differences appear from the cases. First, one cannot help but notice the differences in the penalties imposed on students on the one hand and established practitioners on the other. The severe penalties suffered by Larkin and Davis compare curiously with the leniency accorded to Rose. In disciplinary proceedings, practitioners are rarely disbarred for conduct falling short of wholesale misappropriation of clients' property, and it appears likely that Rose benefited from his professional reputation and connections.

A second though related difference is that applicants for admission appear to suffer from a disadvantage in relation to the consideration of general character evidence. If the courts are really engaged on an investigation of a person's fitness to practise law, the focus should be

[65] J. Disney, J. Basten, P. Redmond and S. Ross, note 1 *supra*, 683-687 for a discussion of prosecutors' duties.

[66] Note 56 *supra*, 15.

placed squarely upon the defendant's character as revealed by the whole of the evidence available and should not concentrate exclusively on the incident which prompted the proceedings. Examples abound of disciplinary action against practitioners being mitigated by the finding that the offence was out of character with previous conduct. In this respect students suffer the disadvantage of having no professional experience and reputation to use in rebutting negative inferences drawn from a particular incident. This disability was compounded in Larkin's case by the manner in which evidence of the defendant's general character and reputation was treated. A written character reference was examined for the explanation it advanced for the defendant's conduct and was used to rebut the existence of the alleged oral authority. At another point, the Court accepted evidence establishing that the defendant had "earned a reputation for complete honesty and integrity", but this evidence was held "insufficient to overcome the means which [the defendant] . . . adopted in an endeavour to justify his action".[67] No attempt was made in the judgment to analyse his behaviour in terms of his earlier reputation for honesty and to explore the apparent contradiction between character and conduct. We suggest it is with precisely such a reconciliation that an investigation of the student's fitness ought to be concerned. Apart from the written character reference, the judgment does not indicate what character evidence was before the Court. However, a court enquiring into a student's character ought to ensure that adequate evidence as to the character, reputation and antecedents of the student is before it, if necessary by calling and examining its own witnesses. In Larkin's case the Court could also have sought further evidence of the father's alleged oral authorisation for his son to use his name.

On the other hand, it is not at all clear on what basis the two letters to the Admission Board were put in evidence. Again there may have been a confusion of the separate functions of establishing past misconduct and viewing such misconduct in the wider context of the applicant's general reputation.

IX CONCLUSIONS

Seven points might be made in conclusion. First, the Supreme Court of New South Wales, following an old Queensland decision, has asserted an inherent jurisdiction to revoke the enrolment of a prospective lawyer as a student-at-law. The status of student-at-law has apparently been equated with that of an officer of the court. The basis for this equation is hard to determine. Studentship is granted by an admission board, not by a court; the student obtains no privileges nor any role in relation to the administration of justice. Yet, unless courts

[67] Note 5 *supra*, 20.

can say that students are a new class of "quasi-officer" they have no power to remove a person from that status.

Should courts have such power? It is not clear to us that there is any public interest requiring protection through the removal of students who misconduct themselves. It is hard to justify the conduct of a court in arrogating to itself a power which is not granted by the legislature, which is fraught with dangers in the way it is exercised and for which there is no demonstrated pressing need. If courts have no such power, can any other body revoke the enrolment of a student? It is arguable that an admission board, which permitted enrolment, could revoke it, at least on the grounds that it was improperly obtained. It is less clear that an admission board could revoke enrolment on the basis of subsequent misconduct in the absence of an express grant of supervisory power. Of course, it could well be argued that if there is a need for a supervisory body, that body should be a court. Where the alleged misconduct is not admitted, natural justice demands that the student have a proper hearing, which may be more easily provided in the regulated proceedings of a court room. At the very least, the jurisdiction should be placed on a statutory basis. Additionally, if this is to be done, a right of appeal to a court should be provided for those applicants for entry to the status of studentship (if it is retained) who are not accepted by an admission board.

However, there is the further question of whether the status of studentship should be abolished altogether. Clearly, it is desirable for law students who intend to seek admission to the profession to be able, if they so desire, to obtain a ruling in relation to past misconduct prior to embarking on a lengthy course of training. On the other hand, we can see no reason to compel students to obtain a character clearance at an early stage of their student lives. Many new law students, especially in these days of dual degrees and uncertain employment opportunities, have little or no idea as to whether they will ever practise law. It would be foolish to penalise them for failure to enrol as students-at-law in these circumstances. In fact there is no penalty for such failure; an apologetic letter to the secretary of the admission board will always obtain a waiver of the rule from the board. However, it seems that penalties are sometimes imposed upon those who do enrol. Students are under a strict, if ill-defined, duty to disclose prior misconduct upon enrolment. Failure to do so, if uncovered, can result in a student with little experience and incomplete training being taken before the Court of Appeal to justify the non-disclosure. We see no reason why such questions cannot be left (at the student's option) to the time when entry is sought to the profession.

Applicants for admission to the legal profession are also under a strict, and again ill-defined, duty to disclose misconduct relevant to their fitness to practise law. This duty, imposed by rule of court, serves

little purpose in most cases and only convictions are in practice disclosed. Our perusal of the decisions of the admission boards in cases where convictions have been disclosed suggests that the boards are only concerned with convictions for indictable offences. If this is the case, then there is no disadvantage and great benefit in stating this as a rule. The only question which then arises is whether it is necessary to require the applicant to disclose such information or whether the admission board could not carry out a routine check of police records. Admittedly where other jurisdictions are concerned this might not be feasible, but the position is hardly helped by requiring the applicant to make the present expansive declaration of prior misconduct. If courts are anxious to exclude dishonest persons from the profession, an objective we wholly applaud, it is naïve to believe that this will be done by requiring declarations of prior dishonesty in circumstances in which present dishonesty is unlikely to be uncovered. In other words, the present procedure is unsatisfactory. Either effective screening procedures should be introduced, or the attempt to vet the character of applicants for the profession should be abandoned.

Even more loosely defined and potentially unjust is the duty of candour imposed on applicants whose conduct is under scrutiny. The number of people attempting to enter the legal profession is very small. The number about whom any doubt is raised concerning their fame and character is minuscule. On the other hand, a large percentage of our community would no doubt welcome moves to maintain or improve the ethical standards of our lawyers. Many lawyers also would welcome moves to improve the honesty and somewhat tarnished public image of the profession. Despite, and indeed because of, the overwhelming support for ensuring that applicants for admission are fit and proper persons, courts must be scrupulously careful to ensure that justice to applicants is both done and seen to be done. We cannot say that this is the case at present.

The failure of courts and admission boards to make any attempt to explain what kinds of misconduct should be disclosed and their apparent refusal to articulate the nature of the proceedings they conduct in the case of suspected misconduct are both sources of grave potential injustice. It is ironic that this apparent blindness on the part of courts to the substantive and procedural demands of natural justice should occur in relation to their own prospective officers.

While most applicants are accepted without a second glance, the characters of a few are subjected to close scrutiny. This scrutiny is concentrated on individual acts with little regard for other evidence of good character. Indeed, the primary requirement for someone whose past indiscretions come before the court in its supervisory jurisdiction is that he or she should adopt a servile stance and beg forgiveness. Subservience to authority is an inappropriate measure of that integrity and honesty which the court should require of its practitioners.