THE RELATIONS BETWEEN THE PARTIES, JUDGES, AND LAWYERS IN THE AUSTRALIAN CIVIL JUSTICE SYSTEM

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SUMMARY: I. *Introduction*. II. *Attitudes and Functions of the Procedural Actors*. III. *The Regime Controlling Irregularities or Collusions in the Actions of Parties, Judges, and Lawyers*. IV. *Ethical Rules Applying to Procedural Actors*. V. *The Level of the Relationships of the Parties, the Lawyers, the Judge and their Objectives*. VI. *Crises in the Administration of Justice, Brought about by Parties, Lawyers, Judges*. VII. *Contextual Factors Affecting the Development of Relationships among the Parties, the Judges, the Lawyers (Material Resources, Infrastructure, Location of the Dispute Resolution Organ)*. VIII. *Formalities of the Judicial Process and their Impact on the Relationships between the Procedural Actors*.

I. INTRODUCTION

As a consequence of England's colonisation in 1788, the Australian civil justice system essentially follows the English tradition. As a consequence of the distribution of legislative powers in the Constitution in a federal system, however, Australia does not have uniform laws governing procedure. In Australia's dual court structure of federal and state courts, there is frequently some divergence between statutes and court rules governing court proceedings among and within different state and federal courts.[1]

[1] New South Wales, for instance, has separate legislation regarding civil litigation for all state courts in the *Supreme Court Act* 1970 (NSW), the *District Court Act* 1973 (NSW) and the *Local Courts (Civil Claims) Act* 1970 (NSW) and separate court rules and practice notes governing the procedure in each court, whereas Queensland in 1999 introduced *Uniform Civil Procedure Rules* "designed to end unnecessary distinctions in procedure

The state court hierarchy has three first instance levels in most jurisdictions, a Local or Magistrates Court, a District or County Court, and a Supreme Court. In civil matters their jurisdiction depends broadly on the value of the claim in dispute, being highest at the Supreme Court. Appeals lie to either a separate Court of Appeal or the Full Court of the Supreme Court. The federal court hierarchy consists of the Federal Magistrates Court, the Federal and the Family Court and the Full Federal and Family Court. For both court hierarchies, the High Court of Australia is the final court of appeal. For space reasons, this report will focus on civil litigation, most of which is conducted before the state courts.

II. Attitudes and Functions of the Procedural Actors

Until recently, a strong version of the adversarial system governed in Australia. Under this version, the philosophy is that the "correct" result is most likely to be achieved, if the litigating parties are given the opportunity to fight zealously for what they perceive as their rights and interests.[2] Battle and sport metaphors are frequently used to describe the idea of what civil litigation is about.[3] This jurisprudential regime still informs the functions and attitudes of the procedural actors in civil litigation, with some exception regarding the judges, as will be discussed below.

During civil proceedings, the *litigant party's* only direct function, other than in continuing communication with his or her legal adviser, is as a witness. Contrary to a system such as the German, where under a legislative regime the party is almost invariably heard informally as party by the

and practice between the Supreme, District and Magistrates Courts": Justice Moynihan, "Uniform Civil Procedure Rules", speech, http://www.courts.qld.gov.au/publications/articles/speeches/moyAdd2.htm (accessed 17 January 2003). Justice de Jersey, Chief Justice of Queensland, has referred to them as "the most progressive, readily comprehensible, and comprehensive, sets of procedural rules, applicable to any courts across the entire common law world": "Role of Supreme Court of Queensland in the Convergence of Legal Systems" (2002), 76 ALJ 749, at 757. Justice Davies argues that in substance the rules regarding civil procedure are similar throughout Australia: "Civil Justice Reform in Australia" in A. A. S. Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, Oxford, Oxford University Press, 1999, 166, at 166.

[2] Davies, *ibid.*, at 175; Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system, Report No. 89*, AGPS, Canberra, 2000, para. 6.94.

[3] Davies, *ibidem*, Australian Law Reform Commission, *ibidem*, para. 1.119.

court,[4] this does not happen in Australia. With regard to the attitude of a party, Chief Justice Gleeson of the High Court of Australia has commented that "[s]ome of the most adversarial and non-cooperative litigants I have encountered have not been represented by any lawyers at all".[5] On the other hand, individual litigants complained in submissions made to the Australian Law Reform Commission that especially in family law disputes lawyers exacerbate or encourage conflict, want to "score points", and enjoy winning as a "personal contest against other lawyers".[6]

While jurisdictions other than New South Wales, Queensland and Victoria do not distinguish between barristers and solicitors by statute,[7] and the three named states now allow a client direct access to a barrister,[8] in practice, the division mostly lives on in the context of civil litigation.[9] Simplistically speaking, solicitors deal with the client, barristers with the court.[10] The function of *the legal representative* in civil litigation, in line with the philosophy of a strong adversarial system, is primarily that of a zealous advocate in representing the client's interests,[11] that is, as agent in the interests of the litigant party, although tempered by the paramount duty to the court,[12] which will be further discussed below. In terms of their attitude to civil litigation, many lawyers cite commercial imperatives as

[4] The practice is confirmed in interviews with judges and lawyers in the Stuttgart region, which I recently conducted as part of an ongoing research project on "Australian and German civil litigation, a comparative and empirical analysis".

[5] Chief Justice Gleeson, "Commentary on paper by Lord Browne-Wilkinson", Conference paper, Supreme Court of NSW Judges' Conference, 11 September 1998, 3 http://www.hcourt.gov.au (accessed 27 January 2003).

[6] Reported in Australian Law Reform Commission, note 2, *supra*, para 3.31.

[7] Y. Ross and P. MacFarlane, *Lawyers' Responsibility and Accountability: Cases, Problems and Commentary*, 2a. ed., Sydney, LexisNexis Butterworths, 2002, para 4.6.

[8] *Ibidem*, para. 4.2.

[9] *Ibidem*, paras. 4.2 and 4.7; G. E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, 2a. ed., LBC Information Services, 2001, p. 25. 6% of Victoria's solicitors and 9% of New South Wales' solicitors claimed in 1998 to undertake advocacy work in civil litigation: reported in Australian Law Reform Commission, note 2 *supra*, para 3.14, footnotes 37 and 38.

[10] Unless otherwise specified, both will be referred to as "legal representatives", "legal practitioners" or "lawyers".

[11] See text at note 2 *supra* and Justice Ipp, "Lawyers' Duties to the Court" (1998), 114 *Law Quarterly Review* 63, at 63-64; Ross and MacFarlane, note 7 *supra*, para. 12.1.

[12] *Giannarelli v Wraith* (1988), 165 CLR 543, at 556-557 (per Mason CJ).

being at the heart of how they conduct themselves,[13] often leading to excessive adversarial behaviour and at times even misconduct.[14] Justice Ipp has commented that factors including huge increases in the litigation rate and the number of lawyers as well as increased competition among lawyers "increase the susceptibility of lawyers to over-zealous conduct and the incurring of unnecessary costs, obstructionism, and other abuses".[15]

While settlement may often be in the best interests of the client, the attitude of the lawyer in working towards settlement often remains adversarial rather than conciliatory, as is demonstrated in a submission to the Australian Law Reform Commission by the NRMA, a major insurance company and thus frequent litigator.

Lawyers are trained to protect their clients' own interests and generally take a defensive rather than a cooperative attitude towards another party.

[13] Reported by the 2002 President of the New South Wales Law Society President K. Cull, "Ethics and Law as an Influence on Business" (October 2002), LSJ 50. Observed and critiqued extrajudicially by Sir Daryl Dawson, "The Legal Services Market" (1996), 5 JJA 147, at 148, 151 and by Justice Ipp, "Reforms to the Adversarial Process in Civil Litigation, Part I" (1995), 69 ALJ 705, at 727.

[14] In *McCabe v British American Tobacco Australia Services Limited* (2002), VSC 73 Eames J found on the balance of probabilities that one of the defendant's legal advisers in anticipation of litigation brought against the defendant by people suffering from smoking related illnesses "devised a strategy in 1990 in which the defendant was advised that provided it asserted —that its intention was not the destruction of material for the purpose of suppressing evidence which would be relevant in anticipated litigation— the defendant should destroy documents and the only likely consequence would be the drawing of adverse inferences in later proceedings". Later "thousands of documents … were destroyed by the defendant". (para 289). He struck out the defence except as to the amount of damages: http://www.austlii.edu.au/au/cases/civ/VSC/2002/73.html (accessed 24 January 2003). It should be noted, however, that the defendant's appeal was successful, the Victorian Court of Appeal holding that in relation to documents rightfully before the court there was no evidence of lawyer misconduct (para 98) and in relation to other documents possibly implying such misconduct the trial judge had wrongfully held that legal professional privilege had been waived (para 131): *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197: http://www.austlii.edu.au/au/cases/vic/VSCA/2002/197.html (accessed 24 January 2003). See also *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56, where a legal practitioner's appeal against the decision by the Legal Practitioners Disciplinary Tribunal, which found him guilty of unprofessional conduct, was dismissed. The barrister had knowingly made a false representation in written defence pleadings and in his oral opening of the case for the defence to the court in order to enhance the credibility of his client.

[15] Ipp, note 11 *supra*, at 84.

Our impression is that the culture of the legal profession and particularly, of litigators, is to distrust the opposing party and not to divulge information or openly discuss matters for fear that it may prejudice their clients' interests in a later hearing. The behaviour of the profession is often directed towards ensuring their clients' position is not prejudiced in the event of a hearing, rather than working cooperatively towards settlement of a matter.[16]

The traditional image of the *judicial function* under the strong version of the adversarial system is that of an umpire who passively watches events as they unfold in court at the hearing, except to control the admissibility of evidence according to law, and then makes his or her decision.[17] Partly motivated by concerns such as those expressed by Justice Ipp,[18] many judges have become uneasy about remaining passive and leaving the conduct of the litigation entirely in the hands of the legal representatives for the parties and have written extrajudicially about the need for judges to become more active in the litigation process.[19] It is now accepted that judges need to take a greater role in the management of civil cases to enhance efficiency in judicial administration.[20] Mostly the focus has been on greater judicial control regarding pre-trial case management, involving a series of

[16] Quoted in Australian Law Reform Comission, note 2 *supra*, para 3.33. See also Davies, note 1 *supra*, at 178, who argues that cases often settle too late in the process to reduce time or cost.

[17] Ross and MacFarlane, note 7 *supra*, para 12.1; Australian Law Reform Commission, note 2 *supra*, para 6.3.

[18] See text at note 15 *supra*.

[19] Justice Rogers, "Judges in Search for Justice" (1987) 10 UNSWLJ 93; Ipp, note 13 *supra*; Justice Davies and S. A. Sheldon, "Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale" (1993) 3 JJA 111; Justice Marks, "The Interventionist Court and Procedure" (1992), 18 *Mon LR* 1; Justice Beaumont, "Legal Change and the Courts" (1994), 12 *Aust Bar Rev* 29; Justice Pincus, "Court Involvement in Pre-trial Procedures" (1987), 61 ALJ 471; Justice Olsson, "Civil Caseflow Management in the Supreme Court of South Australia. Some Winds of Change" (1993), 3 JJA 3.

[20] Australian Law Reform Commission, note 2 *supra*, para 6.3; Ipp, note 13 *supra*, at 723; Justice Beaumont, "Managing Litigation in the Federal Court", in B. Opeskin and F. Wheeler (eds.), *The Australian Federal Judicial System*, Melbourne University Press, 2000, 160, at 163; Justice Spigelman, "Judicial Accountability and Performance Indicators" (2002), 21 CJQ 18, at 18-19. On the other hand, Justice Callinan of the High Court expresses concern that a case managing judge may risk losing the appearance of impartiality: "Courts: First and Final", Speakers' Forum, University of New South Wales, 17 August 1999, p. 4, http://www.hcourt.gov.au (accessed 3 February 2003).

pre-trial conferences before a court registrar or judge according to a pre-ordained timetable with the intention of requiring parties to comply with it.[21] In 2000, amendments to the *Supreme Court Rules* 1970 (NSW) introduced cost sanctions on legal practitioners in the event of non-compliance with directions and the rules of the court, and gave the court the power to impose limits on the number of witnesses to be heard and time limits on such evidence, which takes judicial case management powers into the realm of the trial itself.[22] The Chief Justice of NSW, the Honourable J. J. Spigelman, has commented that the amendments reflect the recognition that parties or practitioners have no right to waste the limited resources available to the Court and that the Court has an obligation to use the resources entrusted to it as effectively and efficiently as possible.[23]

As a result of these developments, under a regulatory regime, judges now have the function of case manager in addition to their function as decision maker. As the High Court held in *Queensland v J L Holdings Pty*

[21] See for example *Practice Note* 33 of the District Court of New South Wales dated 6/12/95, issued under s 68A of the *District Court Act* 1973 (NSW) with the objective "to provide a more orderly, cost-effective and expeditious system for the final disposal of civil actions" (2.1). It requires that "actions are expeditiously prepared by the parties" (2.2) and imposes a standard timetable (13.1).

[22] Sections 52A43 and 43A, 34.6AA *Supreme Court Rules* 1970 (NSW) as amended and *Practice Note* 108. Following the Supreme Court example, on 14/12/2000, *Practice Note* 33 of the District Court of New South Wales was supplemented by *Practice Note* 57, which states that "[t]he purpose of this practice note is to ensure compliance with directions and the rules of the Court. The requirement that parties and practitioners comply with directions and rules will be confirmed by the use of costs sanctions in appropriate cases, including costs orders against practitioners personally…" (1.): http://www.lawlink.nsw. gov.au (accessed 18 June 2001). See also *Uniform Civil Procedure Rules* 1999 (Qld) as amended: "section 5 (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules. (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way. (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court. *Example*: The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court". See also Section 367 (allowing the court for instance to impose limits on the number of witnesses to be heard and time limits on such evidence).

[23] Justice Spigelman, "Just, quick and cheap: a new standard for civil procedure", (February 2000) LSJ 24, at 24.

Ltd,[24] however, case management does not give the judge unfettered discretion regarding case management. In that dispute the first instance judge had refused the defendant leave to amend its defence, since that might raise new issues of fact and thereby jeopardise the scheduled hearing date. Regarding the principles of case management as discussed in the earlier case *Sali v SPC Ltd* [25] it was held that nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.[26]

Legal representation is not compulsory in Australian courts and there are significant numbers of unrepresented litigants.[27] This is bound to lead to difficulties for them, as reflected in comments made by unrepresented litigants in a survey conducted by the Australian Law Reform Commission.[28] After all, it is recognised that in the adversarial system, "the role of the lawyer has always been essential to the achievement of justice".[29] The question thus arises whether at least in relation to unrepresented litigants, the judge should have a role as helper, consultant or instructor. Judges, of course, as an incidence of fairness in the proceedings, must be and be seen as impartial.[30] Accordingly, a judge who helps one party and not the other could be seen to threaten the required fairness. But Justice Ipp has argued that [r]ules can be manipulated to benefit the powerful and prejudice the weak and an imbalance in legal representation can work grave injustice. If this is tolerated by judges, who insist on absolute passivity, the courts will lose the confidence of society. [J]udicial intervention that is not unfair does not offend against the need to maintain neutrality.[31]

[24] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146.
[25] (1993) 116 ALR 625.
[26] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146, at 154 (per Dawson, Gaudron and Mc Hugh JJ).
[27] Australian Law Reform Commission, note 2 *supra*, para. 5.147.
[28] *Ibidem*, para. 5.148.
[29] Ipp, note 13 *supra*, at 725-726.
[30] *Ibidem*, at 717.
[31] *Ibidem*, at 716-717.

Justice Sackville of the Federal Court has opined that the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent. An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions.[32]

Do judges fulfil a legislative function? The traditional view has been that they do not; their role is to declare the law; it is up to parliaments to change it. But Lord Reid's famous quip that it is a "fairy tale" to believe that judges only declare the law[33] has been mirrored in a less poetic manner in Australia: Nowadays nobody accepts that judges simply declare the law; everybody knows that, within their area of competence and subject to the legislature, judges make law. Within the proper limits, judges seek to make the law an effective instrument of doing justice according to contemporary standards in contemporary conditions. And so the law is changed by judicial decision, especially by decision of the higher appellate courts.[34]

Perhaps the most famous example of judicial law making in Australia has been the *Mabo* case,[35] in which the High Court rejected the longstanding view that Australia had been *terra nullius* at the time of British colonisation and recognised native title of indigenous people to their traditional lands, albeit under narrow circumstances. Another important instance is *Australian Capital Television Pty Ltd v Commonwealth,*[36] in which the High Court recognised the right of the electorate to be fully informed during elections

[32] *Morton; Ex parte Mitchell Products Pty Ltd* [1996] 828 FCA 1 (18 September 1996), at 23, Federal Court of Australia, Sackville J, citing and endorsing Samuels JA in *Rajski v Scitec Corporation*, Court of Appeal of New South Wales, unreported, 16 June 1986, http://www.austlii.edu.au/au/cases/cth/federal_ct/1996/828.html (accessed 24 January 2003).

[33] Lord Reid, "The Judge as Lawmaker", (1972) 12 JSPTL 22.

[34] *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, at 267 (per Brennan J).

[35] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

[36] Austrian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.

as one implied in the Constitution. There has, however, been much criticism to these cases, especially with regard to judicial law making, and it is in practice mostly confined to the courts at the highest appellate levels, where it depends on the individual judicial attitude. Some former and present High Court judges continue to insist, in the words of one former High Court judge: [I]f the law is settled, it is our duty to apply it… It is for the Parliament, whose members are the elected representatives of the people, to change an established rule if they consider it to be undesirable, and not for judges, unelected and unrepresentative, to determine not what is, but what ought to be, the law.[37]

III. The Regime Controlling Irregularities or Collusions in the Actions of Parties, Judges, and Lawyers

There are two such regimes in relation to *lawyer misconduct*. One arises from the disciplinary provisions of state and territory legislation governing the legal profession, the other from the inherent power of the courts.

The Australian state and territory laws do not apply a uniform system, but they share the following common features: complaints can be made to a commissioner, ombudsman or other body, which will investigate the complaint; complaints can either be dismissed, minor sanctions can be imposed, or in serious cases the matter can be referred to a disciplinary tribunal; and an appeal can be made from the decision of the tribunal to the Supreme

[37] *Australian Conservation Foundation Inc. v Commonwealth* (1980) 146 CLR 493, at 529 (per Gibbs J). See also Justice Callinan, "Law, Society and Culture at the Turn of the Century", The Archbishop Sir James Duhig Memorial Lecture, University of Queensland, 9 September 1998, p. 2 and more recently, Justice Heydon [then Justice of the Court of Appeal of New South Wales], "Judicial Activism and the Death of the Rule of Law", address to a *Quadrant* dinner, 30 October 2002, to be published in (January-February 2003) *Quadrant*, available at http://www.ntu.edu.au/faculties/lba/schools/Law/apl/blog/ (accessed 3 February 2003), where he condemned activist judges, especially those on the High Court, and the decisions in *Mabo* and *Australian Capital Television Pty Ltd*. The speech was widely seen as a job application for a position on the High Court, especially after his appointment to the High Court was announced in December 2002, see Australian Broadcasting Corporation, AM radio broadcast, 19 December 2002, http://www.abc.net.au/am/s750484.htm (accessed 3 February 2003) and "Woman should have got High Court job, say critics", *Sydney Morning Herald*, 19 December 2002, http://www.smh.com.au/articles/2002/12/18/1040174297078.html (accessed 3 February 2003).

Court.[38] All jurisdictions define lawyer conduct justifying disciplinary action.[39] Section 127 of the *Legal Profession Act* 1987 (NSW) may serve as an example:

> (1) For the purposes of this Part, "professional misconduct" includes:
> (a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence, or
> (b) [concerns conduct not in connection with legal practice]
> (c) conduct that is declared to be professional misconduct by any provision of this Act, or
> (d) a contravention of a provision of this Act or the regulations, being a contravention that is declared by the regulations to be professional misconduct.
> (2) For the purposes of this Part: "unsatisfactory professional conduct" includes conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

If a lawyer is found guilty of misconduct, disciplinary sanctions include striking the practitioner off, suspension from practice for a period of time, a fine, a reprimand; in some jurisdictions also cancellation of or restrictions to the practicing certificate, imposition of practice conditions, further education, compensation of the complainant, waiver or repayment of fees or costs paid by or charged to a particular person, and/or periodic examination of the practitioner's files or records or other supervision.[40]

The Supreme Courts' inherent power to discipline legal practitioners is grounded in their power to admit them to practice.[41] It exists "as a matter

[38] Ross and MacFarlane, note 7 *supra*, para 6.1. For more detail see Dal Pont, note 9 *supra*, chapter 26.

[39] S 37 *Legal Practitioners Act* 1970 (ACT); s 127 *Legal Profession Act* 1987 (NSW); s 45(2) *Legal Practitioners Act* 1974 (NT); s 3B *Queensland Law Society Act* 1952 (Qld); s 5(1) *Legal Practitioners Act* 1981 (SA); s 56 *Legal Profession Act* 1993 (Tas); s 137 *Legal Practice Act* 1996 (Vic); s 25(1)(b) *Legal Practitioners Act* 1893 (WA).

[40] For detail on each jurisdiction see statutes listed in note 39 *supra* and Dal Pont, note 9 *supra*, chapter 26.

[41] Ross and MacFarlane, note 7 *supra*, para 6.2. It is to be distinguished from the role a court plays in an appeal from a decision of a disciplinary tribunal, where it has to con-

of necessity in the interests of justice and its administration … [a]nd … it is a power which carries with it, unless contrary provision is made, the power to adopt whatever procedures are considered appropriate".[42] Thus, it encompasses all the orders listed above as statutory disciplinary measures. Relevant factors in governing the choice among them are evidence of the practitioner's high professional and personal reputation, good faith, acknowledgment of the misconduct and remorse, and the effects of the misconduct.[43] In addition, the inherent jurisdiction provides "superior courts with such power as is necessary to ensure that their procedures are capable of producing just outcomes".[44] It may be invoked in relation to the litigant parties themselves and includes the power to punish for contempt or to impose sanctions for an attempt to pervert the course of justice, to strike out pleadings in total or in part, to draw adverse inferences, to exclude particular evidence, to impose penalties by way of costs, and the court is entitled to intervene regarding conduct prior to commencement of proceedings at least if such conduct is illegal.[45]

fine itself to a review of that decision: *Walsh v Law Society of New South Wales* (1999) 164 ALR 405, at 423-424 (per McHugh, Kirby, Callinan, J. J.).

[42] *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, at 252 (per Deane, Dawson, Toohey and Gaudron, J. J.).

[43] Dal Pont, note 9 *supra*, pp. 592-595 and the case law cited there.

[44] S. Colbran *et al., Civil Procedure: Commentary and Materials*, Butterworths, Sydney, 1998, para. 1.4.4.

[45] *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197, note 14 *supra*, paras. 165, 173. See note 14 for the facts involved in the case and the decisions of both the first instance judge and the Victorian Court of Appeal. As is clear from the judgment of the first instance judge, he made his decision to strike out the defence in the exercise of the inherent jurisdiction of the court, commenting that "the inherent powers of the Court … apply with the overriding objective of ensuring that parties to litigation receive a fair trial. Central to the conduct of a fair trial in civil litigation is the process of discovery of documents. That process is particularly important where documentary evidence is likely to be both voluminous and critical to the outcome of the case, and where access to documents is very much dependent on the approach adopted by one party and its advisers.": *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73, note 14 *supra*, para. 384. In my opinion, the Court of Appeal was in error when it held that regarding the alleged destruction of documents prior to commencement of the proceedings the plaintiff had not put her case on the basis of that constituting either an attempt to pervert the course of justice or contempt of court and therefore the trial judge "was not entitled to impose any sanction on that ground": *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197, note 14 *supra*, para. 175. This stance reflects the strong version of the adversarial system,

For an example of complaints against legal practitioners under the statutory regime in practice, space only allows a brief look at New South Wales. The Annual Report 2001-2002 of the Legal Services Commissioner[46] shows that in the reporting year there were 2928 written complaints made, the majority about solicitors rather than barristers, as well as 9999 telephone calls to the inquiry line.[47] 12.7% of the written complaints concerned general civil litigation.[48] 45.2% of written complaints were with regard to poor communication, overcharging, and negligence.[49] On the phone inquiry line, poor communication-related complaints were the most frequent.[50] The Commissioner can either investigate complaints himself (s 147A) or refer a complaint to the Law Society (regarding solicitors) or the Bar Council (regarding barristers) (ss 141, 126). In the reporting year, 27.5% of written complaints were so referred.[51] In accordance with section 155 of the *Legal Profession Act* 1987 (NSW)[52] two matters were referred to the NSW Administrative Decisions Tribunal (Legal Services Division) in the reporting year and five reprimands were issued, one including a compensation payment to the complainant.[53] In one of the matters referred to the tribunal, the legal practitioner was struck off for professional misconduct, because he had failed to return 57 phone calls to a cli-

but surely the inherent jurisdiction of the court is independent from precise party allegations. Its essence, after all, is to prevent abuses of process. How can a court do so, if it has to wait for corresponding submissions by one of the parties?

[46] His office is the institution set up under section 135 *Legal Profession Act* 1987 (NSW) to receive and investigate complaints about legal practitioners.

[47] Office of Legal Services Commissioner, Annual Report 2001-2002, pp. 1, 2, http://www.lawlink.nsw.gov.au/olsc1.nsf/pages/ar2001_2002_developing (accessed 24 January 2003).

[48] *Ibidem*, p. 1.

[49] *Ibidem*, p. 2.

[50] *Ibidem*, p. 3.

[51] Office of Legal Services Commissioner, Annual Report 2001-2002, p. 2, http://www.lawling.nsw.gov.au/olsc1.nsf/pages/ar2001_2002_report (accessed 24 January 2003).

[52] It provides that the Commissioner must institute proceedings in the NSW Administrative Decisions Tribunal (Legal Services Division) if satisfied that there is a reasonable likelihood that the tribunal will find the legal practitioner guilty of unsatisfactory professional conduct or professional misconduct, and if the former, the Commissioner may instead reprimand the legal practitioner, if he or she consents to that, or dismiss the complaint.

[53] Office of Legal Services Commissioner, Annual Report 2001-2002, pp. 1, 2, http://www.lawlink.nsw.gov.au/olsc/1.nsf/pages/ar2001_2002_promoting (accessed 24 January 2003).

ent, failed to follow instructions to commence proceedings, cancelled 11 out of 20 appointments, and had already been before the tribunal on two prior occasions, where he had received a reprimand.[54] At the time of writing, the second matter has not been decided by the tribunal as yet. The Professional Standards Annual Report 2001-2002 by the Law Society of NSW shows that they made 102 complaints about legal practitioners themselves and were referred 640 complaints by the Legal Services Commissioner.[55] 62 matters were opened as disciplinary files.[56] 29% of complaints opened concerned unethical conduct.[57] 49% of complaints were dismissed because there was no finding of misconduct, 28% of complaints were withdrawn, resolved or mediated, in 4.2% of complaints the solicitor was reprimanded, and 5.6% were sent to the tribunal.[58] The results of disciplinary proceedings referred to the Administrative Decisions Tribunal by the Law Society Council were: 10 solicitors struck off, 4 reprimands, 3 restrictions to practicing certificates, 2 orders to do further legal education, 2 fines, 1 suspension, 1 practice inspection, 3 dismissals (one for lack of jurisdiction).[59] Most of the solicitors struck off had failed to keep accounts or to account, or misappropriated trust moneys, two had misled the court, tribunal or investigator.[60] Given that a total of 16,670 solicitors are active in New South Wales,[61] it appears there is only little evidence of conduct by legal practitioners undermining the ultimate end of the litigation process.

With regard to *judicial misconduct*, the only real sanction is removal from office upon an address from both Houses of Parliament.[62] For High

[54] *Legal Services Commissioner v Veneris* [2002] NSW ADT135, reported by R. Collins, "'Only the highest of standards are acceptable'. Tribunal removes solicitor from Roll" (October 2002) LSJ 34.

[55] The Law Society of New South Wales, *Professional Standards Annual Report 2001-2002: Complaints and Discipline in the Legal Profession*, October 2002, p. 12, http://www.lawsociety.com.au (accessed 24 January 2003).

[56] *Idem*.

[57] *Ibidem*, p. 15.

[58] *Ibidem*, p. 20.

[59] *Ibidem*, p. 28.

[60] *Ibidem*, p. 29.

[61] *Ibidem*, p. 48.

[62] Queensland is the only exception, since it has a uni-cameral legislature. Here power of removal is upon the address of the Legislative Assembly. See section 1 *Constitution Act* 1867 (Qld). For details on removal of State and Territory Supreme Court, District or County Court judges and Magistrates see Justice Thomas, *Judicial Ethics in Australia*, 2a. ed., Sydney, LBC Information Services, 1997, pp. 202-207.

Court and federal judges, section 72 of the Constitution provides that they "shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity". If such conduct is suspected, a special commission, to date always comprised of retired judges, will be appointed to inquire into the facts and circumstances and report its findings to Parliament.[63] With respect to state judges, except in New South Wales, state Parliaments could theoretically remove a judge at pleasure, though constitutional convention would dictate otherwise.[64] In practice, except in New South Wales, the Attorney General deals with complaints informally.[65] In terms of what conduct is sufficiently serious to warrant a judge's removal from office, the independent judicial commission established to inquire into the conduct of the late Justice Murphy of the High Court in 1986[66] decided that the word "misbehaviour" in section 72 of the Constitution is not confined to misconduct in office: "Proved misbehaviour" means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question.[67] The final report of the Constitutional Commission confirmed this view:

> It is clear to us … that conduct which warrants removal of a judge should include:
> (a) misconduct in carrying out the duties of office; and
> (b) any other conduct that, according to the standards of the time, would tend to impair public confidence in the judge or undermine his or her authority as a judge.[68]

In New South Wales, the system for dealing with judicial misconduct is the most developed, although it has been criticised by judges, especially

[63] *Ibidem*, pp. 13, 202.
[64] *Ibidem*, p. 208.
[65] *Ibidem*, p. 253.
[66] The case of Justice Murphy is discussed at length by Thomas, *ibidem*, pp. 178-188.
[67] Lush, Blackburn and Wells, *Special Report of the Parliamentary Commission of Inquiry*, 19 August 1986, Parliamentary Paper 443/1986, p. 32 (per Sir Blackburn), cited in Thomas, *ibidem*, p. 16.
[68] *Final Report of the Constitutional Commission* (1988), vol. 1, p. 403, cited by Thomas, *ibidem*, p. 17.

on the grounds of risk of harm as a result of adverse publicity, even if the judge is later exonerated.[69] The *Judicial Officers Act* 1986 (NSW) established a Judicial Commission to *inter alia* receive and examine complaints against judicial officers.[70] Under sections 21, 19 *Judicial Officers Act* 1986 (NSW) complaints that are classified as serious must be referred to the Conduct Division, those classified as minor can be. The Conduct Division may hold hearings, at which the judge may be legally represented and where evidence may be taken.[71] If the Division decides that a serious complaint is wholly or partly substantiated and could justify removal of the judicial officer, it must state its findings in a report, which it has to present to the Governor, whereupon the report is laid before both Houses of Parliament for consideration.[72] With regard to minor complaints, the Judicial Commission may refer the matter to the relevant head of jurisdiction or to the Conduct Division.[73] If a minor complaint is referred to the Conduct Division and is found wholly or partly substantiated, the Division can either inform the judicial officer concerned or decide that no action need be taken.[74]

The Annual Report 2001-2002 issued by the Judicial Commission of New South Wales shows that in the reporting year 94 complaints were made about 79 NSW judicial officers.[75] 72% of complaints made concerned allegations of apprehension of bias and failure to provide a fair hearing, many by unrepresented litigants and unsuccessful parties to legal proceedings. According to the report, the allegation was in essence mostly that a wrong decision had been made.[76] Seven complaints alleged collusion between a judicial officer and other persons, all of which were dis-

[69] Thomas, *ibidem*, pp. 257-259; Justice McLelland, "Disciplining Australian Judges" (1990), 64 ALJ 388.

[70] Part 6, sections 15-39 deal with complaints against judicial officers. It should be noted that in New South Wales allegations of judicial corruption would be handled by the Independent Commission Against Corruption, which may investigate a judge after a complaint has been made or on its own initiative: sections 10, 13 *Independent Commission Against Corruption Act* 1988 (NSW).

[71] Section 24.

[72] Section 29.

[73] Section 21.

[74] Section 27.

[75] Judicial Commission of New South Wales, *Annual Report 2001-2002*, http://www.judcom.nsw.gov.au (accessed 24 January 2003), p. 20.

[76] *Ibidem*, p. 23.

missed after an investigation found them to be baseless.[77] In the reporting year, one minor and one serious complaint were referred to the Conduct Division.[78] The Conduct Division dismissed the minor report and had not completed its examination of the serious complaint during the reporting period.[79] This is to be seen in context with a total number of about 280 judicial officers in New South Wales, who in the reporting period handled more than 400,000 matters.[80] The Chief Executive of the Commission in a conference paper in 2000 stated that [at that time] 12 complaints classified as serious (some judicial officers attracting several complaints) had been referred to the Conduct Division since the Commission commenced operating in 1987.[81] In each case bar one, the judicial officer resigned during the complaints procedure process, in one case the NSW Legislative Council by majority voted against this Supreme Court judge's removal from office on the grounds of severe delay in the delivery of judgments.[82] Again it appears there is only little evidence of conduct by judicial officers undermining the ultimate end of the litigation process.

IV. Ethical Rules Applying to Procedural Actors

Legal Practitioners are subject to multiple layers of sources governing their professional behaviour. Legal obligations derive from general law, especially the law on torts, contracts, agency, and fiduciary relationships, and from statute.[83] In addition, professional rules have been enacted in each jurisdiction, which establish basic rules of ethical professional behaviour, combining prescriptive and aspirational provisions, and can be relevant for disciplinary procedures.[84] Most of these are modelled to some

[77] *Idem*.
[78] *Ibidem*, p. 22.
[79] *Ibidem*.
[80] *Ibidem*, p. 23.
[81] E. Schmatt, "The Role and Functions of the Judicial Commission of New South Wales", Conference paper, 6 May 2000, p. 12, http://www.judcom.nsw.goc.au/dublin.htm (accessed 24 January 2003).
[82] *Idem*.
[83] Dal Pont, note 9 *supra*, p. 17. The relevant statutes are listed in note 39 *supra*.
[84] In New South Wales and Tasmania the rules are statutory, in the other jurisdictions they are mere pronouncements from the relevant professional body: Dal Pont, *ibid*., pp. 18-19. The following jurisdictions have separate rules for solicitors and barristers: ACT: *Professional Conduct Rules* (solicitors); *The Australian Capital Territory Barristers' Rules*

extent on the Law Council of Australia's *Model Rules of Professional Conduct and Practice*[85] and/or the *Advocacy Rules* (1995) and/or the *Code of Conduct* (1993) of the Australian Bar Association. Furthermore, New South Wales, for instance, has the *Law Society Statement of Ethics*[86] and a *Client Care Guideline* established by the Law Society.[87] Both of these are aspirational, rather than binding. In terms of the contents of the rules, space only allows a brief look at New South Wales. The most important aspects relevant here of the *Law Society Statement of Ethics* are: The law should protect the rights and freedoms of members of the community. The administration of the law should be just. The lawyer practices as an officer of the Court. The lawyer's role is both to uphold the rule of law and serve the community in the administration of justice. In fulfilling this role, lawyers should:

- Treat people with respect.
- Act fairly, honestly and diligently in all dealings.
- Pursue an ideal of service that transcends self-interest.
- Act frank and fairly in all dealings with the court.

In fulfilling this role, lawyers are not obliged to serve the client's interests alone, if to do so would conflict with the duty which lawyers owe to the Court and to serving the ends of justice.[88]

(barristers); NSW: *Professional Conduct and Practice Rules* (solicitors); *New South Wales Barristers' Rules* (barristers); Queensland: *Solicitors Handbook* (solicitors); *Barristers' Rules* (barristers); Tasmania: *Rules of Practice* (solicitors); *Bar Association Professional Conduct Guidelines* (barristers); Victoria: *Professional Conduct and Practice Rules* (solicitors); *Barristers' Practice Rules* (barristers). The following jurisdictions incorporate rules applying to barristers: Northern Territory: *Professional Conduct Rules*; South Australia: *Professional Conduct Rules*; Western Australia: *Professional Conduct Rules*.

[85] Available at http://www.lawcouncil.asn.au/policies.html (accessed 24 January 2003). The Law Council of Australia is the representative organ of all Australian legal practitioners at the national level.

[86] Proclaimed on 20 November 1994. http://www.lawsociety.com.au (accessed 17 January 2003).

[87] Published in (December 1995) LSJ 18.

[88] See note 86 *supra*. Similar is the preamble to the *New South Wales Barristers' Rules*: "These Rules are made in the belief that: 1. The administration of justice in New South Wales is best served by reserving the practice of law to officers of the Supreme Court who owe their paramount duty to the administration of justice. 2. As legal practitioners, barristers must maintain high standards of professional conduct. 3. The role of bar-

This statement is then given some concrete content in the *Professional Conduct and Practice Rules*. For instance, a legal practitioner must terminate a retainer with a client, if aware that a client intends to mislead the court by withholding information required by a court or informed by the client that the client's affidavit is false in a material particular (r 17.1); s/he has a duty not to influence a witness (r 18 and r 23A.43); s/he must not knowingly make a misleading statement to a court on any matter (r 23A.21); and s/he must make responsible use of court process and privilege, for instance by not alleging any matter of fact unless s/he believes on reasonable grounds that available factual material provides a proper basis to do so (r 23A.36). These rules are also a reflection of the High Court's decision in *Giannarelli v Wraith*,[89] where Chief Justice Mason said: The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to the client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest. The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary.[90]

It is important to note, however, that the duties lawyers owe to the court are legal rather than ethical duties, imposed by the courts as part of their inherent powers.[91] They fall into four categories: duty of disclosure subject to legal professional privilege regarding confidentiality to the client,[92] duty not to abuse the court process, duty not to corrupt the administration of justice, and duty to conduct cases efficiently and expeditiously, the first three being founded on the public interest in not allowing

risters as specialist advocates in the administration of justice requires them to act honestly, fairly, skilfully, diligently and bravely".

[89] (1988) 165 CLR 543.

[90] *Ibidem*, at 555-556.

[91] Ipp, note 11 *supra*, at 63.

[92] *Ibidem*, at 71. See *Grant v Downs* (1976) 135 CLR 674, at 685 (per Stephen, Mason and Murphy JJ).

a subversion or distortion of the administration of justice by dishonest or obstructive practices.[93]

For *judges*, Justice Thomas argues that the philosophical basis of judicial ethics can be found in the judicial oath,[94] which for High Court judges in its most significant words is I do swear that I will do right to all manner of people according to law without fear or favour, affection or ill will.[95]

The Council of Chief Justices of Australia[96] developed a *Guide to Judicial Conduct*,[97] which is not designed to be prescriptive, but to provide practical guidance as to principles or standards appropriate to judicial conduct.[98] It lists three basic principles as benchmarks: impartiality, judicial independence, and integrity and personal behaviour.[99] In separate chapters it discusses conduct in court, activities outside the court, non-judicial activities and conduct, and post judicial activities. With regard to impartiality, it is the "perception of a reasonable well-informed observer" that determines whether there are grounds to disqualify a judge from hearing a case for apparent bias or possible conflict of interest.[100] With regard to judicial conduct in court this means in practical terms that save in the most exceptional circumstances, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of a party) otherwise than in the presence of, or with the previous knowledge and consent of, the other party (or parties) once a case is under way.[101]

[93] *Ibidem*, at 65.

[94] Thomas, note 62 *supra*, p. 10.

[95] Section 11 and schedule *High Court of Australia Act* 1979 (Cth).

[96] Comprising the Chief Justices of the Federal Court, the Family Court, each Supreme Court, each District or County Court, and the Chief Magistrates of each state and territory.

[97] The Council of Chief Justices of Australia, *Guide to Judicial Conduct*, Australian Institute of Judicial Administration Inc., Melbourne, 2002, http://www.aija.org.au/online/GuidetoJudicialConduct.pdf (accessed 24 January 2003).

[98] *Ibidem*, p. 1.

[99] *Ibidem*, p. 3.

[100] *Ibidem*, p. 8. This stems from a long line of High Court cases referred to and endorsed in *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 176 ALR 644, at 647 (per Gleeson CJ, McHugh, Gummow and Hayne JJ), 662-663 (per Gaudron J).

[101] *Guide to Judicial Conduct, ibid.*, p. 15, as established in *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122, at 127 (per McInerney J) and endorsed in *Re JRL; Ex parte CJL* (1986), 161 CLR 342, at 346 (per Gibbs CJ), 350-351 (per Mason J).

V. The Level of the Relationships of the Parties, the Lawyers, the Judge and their Objectives

In my view, the relationships between the procedural actors are clearly hierarchical in Australia, with the judge at the apex and the parties at the bottom. Provided they are legally represented, the subordinate position of the *parties* is a reflection of their role in the litigation process being restricted to that of a witness.[102] Significantly, a study of plaintiffs' satisfaction with dispute resolution processes found that only 32.5% of plaintiffs interviewed, whose claims were resolved at trial, felt they had some or a lot of control over the outcome of their claim, only 39.5% found the procedure comfortable and 52% felt the dispute resolution procedure was confusing.[103]

That *judges* see themselves at the apex is clearly reflected in the following statement from the *Guide to Judicial Conduct*.

It is common and often necessary for a judge to question a witness or engage in debate with counsel, but the key to the proper level of such intervention is moderation. A judge must be careful *not to descend into the arena*…[emphasis added].[104]

My observations of five judges at the District Court of New South Wales in civil disputes confirm this hierarchy between the judge and the legal representatives, though the extent of it depends on the judge's personality. Three out of the five clearly dominated the lawyers, as the following statements made by judges to barristers demonstrate: You stand up when I talk to you. I'm not going to deal with this on the run; I'm sick of this sort of thing; you do it properly.

Where is the plaintiff's solicitor? Presumably he'll charge the plaintiff for his attendance, so he should be here [adjourning the proceedings until the appearance of the solicitor in question].

The objectives of the parties and their lawyers generally coincide, since it is the role of the lawyers to represent the interests of their clients. The

[102] See p. 2 *supra*.

[103] M. Delaney and T. Wright, *Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-trial Conference and Mediation*, Justice Research Centre, 1997, pp. 48, 56, 52.

[104] Note 97 *supra*, p. 15. The same words were used by Justice Callinan in an address in 1999, note 20 *supra*, p. 4.

objectives are a reflection of their attitudes and functions as discussed above.[105] As a natural consequence of any civil dispute, however, the objectives of one party and his or her legal representative are usually diametrically opposed to that of the opponent and his or her lawyer. Chief Justice Gleeson of the High Court made this point clearly:

> To describe the administration of civil justice in this country … as a "system" may create a false impression. It conveys the idea of a group of participants, judges, lawyers, administrators and litigants, working towards a common objective; presumably the fair, efficient, expeditious, and relatively inexpensive, resolution of civil disputes. In truth, what happens in practice is nothing like that. The so-called "stakeholders" in the "system", in many respects have conflicting, rather than common interests. They are not working together. It is not in their interests to do so.[106]

As reflected now in court rules and discussed above,[107] the objective of most judges would include that presumed by Chief Justice Gleeson above. I suspect that some time will pass until that objective is shared by all litigants and their legal advisers. There is some debate in Australia on the first part of Lord Denning's well known statement that the judge's "object, above all, is to find out the truth, and to do justice according to the law".[108] How can the truth be ascertained in a strong version of the adversarial system where it is up to the parties to decide what evidence to place before the court? Some judges have expressed their dismay, if crucial evidence was not called by any of the parties, and some have suggested that in such a case the judge should step in and call such evidence him- or herself: A trial is not a game; it is an attempt, on behalf of the community, to resolve in accordance with the law the questions at issue between the parties. A system which requires the courts to resolve those issues in the circumstances in which the issues in this case have had to be resolved is surely deficient, for instead of assisting the finding of the truth, the system has

[105] See pp. 2-5.

[106] Gleeson, note 5 *supra*, p. 3. He goes on to juxtaposition the interests of the plaintiff, who may generally want the case heard and decided early, with those of the defendant, who may wish to delay the proceedings.

[107] Pp. 5-7 *supra*. See section 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) quoted in note 22 *supra* and section 1.3 *Supreme Court Rules* 1970 (NSW) as examples.

[108] *Jones v National Coal Board* [1957] 2 QB 55, at 63.

prevented the court from having before it the only witnesses who could have spoken directly as to what the truth was. In some other parts of the world where the adversary system prevails, this patent defect has been remedied. … The present case highlights the need for some such remedial measures in this State.[109]

There was, regrettably, no expert evidence before his Honour as to the psychological effect of such disruption upon the life of such a young child, in being removed at the age of two and a half years from the environment of his relationship with his mother, especially given the virtual continuity from his birth. In my view, such evidence should have been given at the trial. I regard it as virtually indispensable for the proper resolution of a case such as the present [involving a dispute over the custody of a child] not to usurp the judicial function but to help it to be properly exercised. If necessary, it should have been required by his Honour. His orders affected the rights of a person who was not a party to the litigation but whose interests were principally at stake. In such circumstances, I consider that a Judge of the Court is entitled to seek expert assistance from a child psychologist or psychiatrist as to the typical impact of the disturbance of established relationships.[110]

In a case I observed at the District Court of New South Wales, the judge also expressed his wish to hear a particular person, who was not put forward as a witness, stating: I want to get to the truth as far as possible; I'd like to have all available evidence on what happened.[111]

Other judges have expressed the same views extrajudicially.[112] To my knowledge only in Queensland so far is there an express rule allowing the court on its own initiative to call a person as a witness.[113] Court rules

[109] *Bassett v Host* [1982] 1 NSWLR 206, at 207 (per Hope JA).

[110] *Marquet v Marquet*, NSW Court of Appeal, unreported, 23 September 1987 (per Kirby P), cited by Rogers, note 19 *supra*, at 96. Justice Samuels has also suggested that a judge should have discretion to call a witness over the opposition of a party: *Superintendent of Licences v Ainsworth Nominees Pty Ltd*, NSW Court of Appeal, unreported, 23 July 1987, cited by Rogers, *ibid*. And see also Chief Justice Street of the NSW Court of Appeal in *R v Damic* [1982] 2 NSWLR 750, at 755-6, where he expresses his view that a judge should be able to call a witness on his or her own initiative.

[111] He adjourned the trial for two months so the plaintiff representative could search for that witness.

[112] Rogers, note 19 *supra*, at 97, 101; Davies and Sheldon, note 19 *supra*, at 114; Ipp, note 13 *supra*, at 714, 716.

[113] Section 391, *Uniform Civil Procedure Rules* (Qld).

throughout Australia now provide that the court may appoint an expert,[114] but, with the exception of the Family Court, judges rarely do so to date.[115]

VI. Crises in the Administration of Justice, Brought about by Parties, Lawyers, Judges

There have been steady increases in the litigation rate in Australia,[116] but this is mainly due to a huge increase in legislation and increased rights consciousness and recognition,[117] rather than *parties* illegitimately engaging the litigation process. If legal action is brought as an abuse of process, the court can use its inherent power to stay it, that is, to stop the action.[118] It is an abuse of process when proceedings are commenced not in order to bring them to their normal procedural conclusion, "but to use them as a means of obtaining some advantage for which they are not designed or for some collateral advantage beyond what the law offers".[119] Legal representatives who are involved in such an abuse of process may be subject to disciplinary action and the court may order costs against them.[120] In addition, either statute or court rules give the courts power to restrain specific persons, who have frequently and without reasonable grounds instituted vexatious legal action, from bringing further proceedings without the leave of the court.[121]

[114] See for instance O 34 *Federal Court Rules*; section 39.1 *Supreme Court Rules* (NSW); section 28A.1, *District Court Rules* (NSW); section 425, *Uniform Civil Procedure Rules* (Qld).

[115] Australian Law Reform Commission, note 2 *supra*, para 6.110. In 75 NSW District Court files I analysed for my ongoing research project on "Australian and German civil litigation, a comparative and empirical analysis" the power was not exercised once.

[116] Ipp, note 13 *supra*, at 706; Davies, note 1 *supra*, at 166. The NSW District Court's *Annual Reviews 2000* and *2001* show that the number of new actions registered in Sydney have increased from 7,995 in 1994 to 12,916 in 2001. Although its jurisdiction was widened to a value of the claim in dispute of $750,000 in 1997, there was no significant increase in filings from that time onwards compared to before.

[117] Ipp, Davies, *ibidem*, Australian Law Reform Commission, note 2 *supra*, para. 4.56.

[118] Colbran *et al*., note 44 *supra*, paras. 9.7.1, 9.7.2; *Clyne v NSW Bar Association* (1960), 104 CLR 186; *Williams v Spautz* (1992), 174 CLR 509.

[119] *Williams v Spautz* (1992), 174 CLR 509, at 526-527 (per Mason CJ, Dawson, Toohey and McHugh JJ).

[120] Dal Pont, note 9 *supra*, pp. 375, 467.

[121] Colbran *et al*., note 44 *supra*, paras. 9.7.8, 9.7.10. Section 84 *Supreme Court Act* 1970 (NSW); section 39 *Vexatious Litigants Act* 1986 (Qld); section 21 *Supreme Court Act* 1935 (SA); section 21 *Supreme Court Act* 1986 (Vic); *High Court Rules* O 63 r 6;

Legal practitioners can themselves engage in abuse of process, which can lead to disciplinary sanctions and costs orders against them personally. Examples include deliberate strategies of obstruction and delay[122] and bringing legal action maliciously and without reasonable and probable cause.[123] On the other hand, if a legal practitioner considers a case as hopeless, advises the client accordingly, and the client insists on bringing or defending legal action, the lawyer is not obliged to refuse the client representation.[124] The Law Council's *Model Rules of Professional Conduct and Practice* advise the legal practitioner to inform the client about reasonably available alternatives to litigation,[125] speak settlement and ADR, but this has not been taken up as yet throughout Australia.[126]

Judges can cause crises in the administration of justice in the form of delays, if they do not ensure in pre-trial case management that the legal practitioners involved in a particular dispute comply with the timetable standards discussed earlier.[127] In addition, of course, a crisis can be attributable to judicial misconduct or severe delay in the delivery of judgments, as discussed above.[128]

VII. Contextual Factors Affecting the Development of Relationships among the Parties, the Judges, the Lawyers (Material Resources, Infrastructure, Location of the Dispute Resolution Organ)

As discussed below, the court infrastructure and design in combination with the formalities of the judicial process enhance the hierarchy in the

Federal Court Rules O 21 r 1; *Supreme Court Rules* (ACT) O 17 r 2; *Rules of the Supreme Court* (WA) O 78.

[122] *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169; *Saragas v Martinis* [1976] 1 NSWLR 172.

[123] *Dunshea v Ryan* (1901) 1 SR (NSW) 163. For more detail see Dal Pont, note 9 *supra*, pp. 466-475.

[124] Dal Pont, *ibidem*, pp. 473-474.

[125] Section 12.3.

[126] In New South Wales, for instance, neither the *Professional Conduct and Practice Rules* nor the *NSW Barristers' Rules* include such a provision. On the other hand, both the *Professional Conduct Rules* (WA), r 5.7, and the *Bar Association Professional Conduct Guidelines* (Tas), para 9, provide that lawyers should try to settle the dispute out of court.

[127] Pp. 5-6 *supra*.

[128] See pp. 14-17 *supra.*

[129] See pp. 20-21 *supra*.

relationship between the procedural actors described earlier.[129] Material resources also have an impact in various ways: as Justice Davies explains, good quality lawyers generally command higher fees, which is advantageous to the wealthier litigant.[130] In addition, the chance of winning is to some extent related to the time and money spent on a case, again favouring the richer litigant.[131] Many of the minor complaints about legal practitioners to the New South Wales Legal Services Commissioner resulted from law firms struggling financially and many complaints were about the costs charged by the legal practitioner.[132] Another factor is government funding for courts. The number of judges in the courts is insufficient when regard is had to the number of cases filed each year.[133] The NSW District Court's Annual Review 2001 shows, for instance, that the court had a judicial capacity of 66 judges in that year, plus the equivalent of 8.4 Acting Judges, for 20,784 civil matters, 2,165 criminal trials, and 5,378 appeals registered in New South Wales. This does not necessarily mean a decline in the quality of the administration of justice, however. The court attempts to deal with the number of civil case filings through pre-trial case management[134] and by referring almost 5,900 cases in 2001 to arbitration. Primarily the shortage of judges increases delays. To what extent, if any, the shortage of judges affects the relationships between the procedural actors, is difficult to say; my observations of pre-trial case management indicate that it may lead to an increased hierarchical relationship between judges and lawyers.[135]

While there are Local Courts situated throughout the Australian states, the District and Supreme Courts are in the capital cities, and their judges go on circuit visiting other state towns for court sittings. Similarly the High Court goes on circuit to state capitals throughout Australia. Anecdotal evidence suggests that the relationships between judges and lawyers are friend-

[130] Note 1 *supra*, at 180.

[131] *Idem*.

[132] Note 47 *supra*, pp. 1-2. The NSW Law Society's Annual Report shows that overcharging was the 9th most frequent complaint: see note 55 *supra*, p. 41, table 1.

[133] Davies, note 1 *supra*, at 171-172.

[134] The three NSW District Court judges I observed at pre-trial Directions Hearings were quite vigorous in pushing lawyers for compliance with particular dates by threatening cost sanctions or ordering a lawyer to show cause why the claim or defence respectively should not be struck out at the next scheduled Directions Hearing.

[135] *Idem*.

[136] See pp. 21-22 *supra*.

lier and more equal when they meet on circuit, than in the normal city location of the court.

VIII. Formalities of the Judicial Process and their Impact on the Relationships between the Procedural Actors

In my opinion, the formalities of the judicial process do have a strong impact on the relationships between the procedural actors as described above.[136] Australian court rooms are designed to underscore the position of the judge at the apex of the hierarchy in that the judicial bench is the most elevated in the court room and is somewhat removed in distance to the bar, where the barristers sit or stand, through the insertion of an additional bench housing the judge's associate and the court recorder. Barristers don't face one another, but stand next to one another facing the judicial bench. Both judges and barristers wear wigs and gowns to underscore their formal position in the process and clearly distinguish them from both solicitors and litigant parties. Before the judge enters, a court official knocks on the door through which he or she will enter and commands "All rise". When the judge has entered, everyone in court bows to the judge and sits down only when the judge has done so. When addressing the court, barristers stand up and use deferential language such as "Your Honour", "if it pleases the court", "in my respectful submission". With the exceptions of gowns, none of these features exist in Germany, for instance, where the court process is very informal in comparison and the relationships between the procedural actors are consequently much more equal, as my observations of German civil proceedings have shown.