

**THE PROFESSIONAL REGULATORY AND DISCIPLINARY BAR ASSOCIATION
(PRDBA)**

**PRESENTING AND DEFENDING CASES WHEN A PRACTITIONER'S FITNESS
TO PRACTICE IS AT ISSUE ON MEDICAL GROUNDS**

**DELIVERED BY EUGENE GLEESON SC ON 7 JULY 2016 IN THE SHEDS AT
8.30AM**

- Practitioner – this noun is used to include Doctors; Vets; Dentists; Nurses; Pharmacists, Barristers and Solicitors.
- Allegation of unfitness to practice is the most serious; in effect your own profession is alleging that you are unfit to practice. It is worse than an allegation of Professional Misconduct/Proof Professional Performance. Examples of unfitness on the part of a practitioner include inter alia:-
 - i. A Surgeon who is unable to perform surgery, competently, any more.
 - ii. A Barrister is an alcoholic and labours under the influence of an intoxicant whilst in Court.
 - iii. A Nurse is so addicted to Pethidine (an opiate) that the Nurse is no longer able to discharge his/her duties.
- The Fitness to Practice Committee investigating the Practitioner's fitness will know that, what is of paramount importance, is whether the practitioner is a danger to the public. If the allegation is proved beyond reasonable doubt it may result in erasure; publication and a reputation left in ruins.
- By the time a Barrister is involved the case has usually gone beyond the point of referral to a Health Committee.
- If the Medical Council receive a general complaint to the effect that a Doctor is ill, the Council will tend to push that case away from the Professional Practices Committee and on towards the Health Committee. This is likely to occur if for example the Doctor says yes I am an alcoholic I have a problem. However, if the Doctor is in denial the Medical Council will invoke Section 57 thereby becoming the Complainant and refer the matter to the PPC.
- The Disciplinary Process:
 - (i) On receipt of a complaint the Regulator is required to seek the observations and comments from the Practitioner. The response is critical.
 - (ii) The Barrister's input should commence here. This is the only opportunity to prevent the case from moving to the FPP. If the Barrister is contacted by a

Solicitor at this stage, it is incumbent upon the Barrister to stress the importance of this opportunity to the solicitor.

- (iii) When drafting the reply you must ensure the response is accurate; it is appropriate to take legal points such as delay; it is essential to avoid hostility towards the Complainant; it is essential that the practitioner demonstrates insight when sending the response. The Barrister must realise that this response, if the matter proceeds onwards, will form the basis for cross examining the practitioner at the FPP.
- (iv) When the matter goes before the FPC it is likely to be held in public with attendant publicity. In this regard, the Barrister should bear in mind Kearns P.'s observations in *Corbally .v. The Medical Council* on proportionality, the late and greatly missed Mr. Justice Hardiman's observation in the Supreme Court *Corbally* to the effect that this may be a grounds for applying to have the Inquiry in private.
- (v) When presenting or defending a case before FPC you will obviously know:-
 - (a) The burden is on the Prosecutor and the standard is the criminal standard vis beyond reasonable doubt.
 - (b) The issue of unfitness will be determined at the date of the inquiry and not at the date of the complaint – this gives a window of opportunity to rectify matters.
- (vi) If it is a substance abuse case try and get Dr. John O'Connor Consultant Psychiatrist/Specialist in Substance Misuse – Rutland Centre, on board before
 - (a) he retires and (b) the other side do

Notice Inquiry

- A Barrister, when asked to draft the Notice of Inquiry should avoid duplicity or worse, and the Notice should contain allegations that are capable of being proved based on the available expert evidence.
- A Barrister must at all times when presenting or defending a case before the FPP (and everywhere else) demonstrate pluck courage and independence – qualities that are greatly admired by Judges and members of statutory committees

The Inquiry

- A Barrister should make sure that no member of the PPC sending complaint to FIC is sitting on the F.P.C.
- A Barrister should consider admitting witness statements as, frequently, oral evidence is more damaging to the practitioner than the contents of the written statement.
- Have at least one expert who is in a position to establish fitness to practice at the date of inquiry
- If practitioner does have medical issues use time between notification of referral to FPC and date of inquiry to address those issues e.g.
 - (i) if it is case of drug addiction – have supervised urinalysis showing negative
 - (ii) consider the option of giving undertakings so as to persuade the FPC that the practitioner is not a danger to the public
 - (iii) adduce evidence that the practitioner has “insight”. In my experience as a Legal Assessor if the FPC are not satisfied that the practitioner has insight, the practitioner is usually doomed.
 - (iv) have plan of action in place so that at worst, the FPC will recommend conditions attaching to practice/registration
 - (v) try not to antagonise the Committee or the Legal Assessor by making over technical legal points either presenting or defending
 - (vi) the Legal Assessor, whilst not a member of the Committee, advises the Committee. This gives the prosecuting or defending Barrister an opportunity to get the Legal Assessor “onside”.
 - (vii) the hardest decision which the Barrister has to take is whether to call the practitioner or not; this decision requires pluck courage and independence. In my experience the FPC usually want to hear the practitioner. They usually do so to work out if the practitioner has “insight” and whether the practitioner is safe to be “let loose on the public”. In *McManus .v. The Medical Council Kearns P* held that the FPC may refuse a direction on the basis of a desire to hear the practitioner. In that case the Legal Assessor advised the Committee to grant the Direction. It is well established that the FPC are not obliged to follow the advice of the Legal Assessor. However, in the *McManus* case the decision of the FPC was quashed, on other grounds.

- (viii) do not be afraid to adduce character evidence before the FPC. Usually this will be met by objection from Counsel for the Prosecutor to the effect that this is really a matter for mitigation usually followed by a “nod” from the Legal Assessor and Members of the Committee but here some pluck is required and you should press ahead with the character evidence and hopefully by the time the character evidence has been adduced the initial dismay of the FPC will have evaporated.
- (ix) as you are aware the FPC does not impose sanction, it merely recommends sanction if it feels it appropriate. The doctrine of proportionality applies.
- (x) publication – each profession has different rules on publication, in my experience, if the practitioner is well regarded in the community the “locals” are not adversely influenced by the publicity.

Restoration to the Register

1. In the unhappy event of an erasure, applications to be restored may be made provided what triggered the erasure has, in effect, been dealt with by the practitioners. This will require planning for at least six months, unless the erasing authority suggests otherwise.
2. If it is a Doctor, the Medical Council has adopted rules SI594/229 specifying the criteria to be considered for application for restoration to the Register.

Dated this 7th day of July 2016

Eugene Gleeson SC
Law Library
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