

BAR PRACTICE COURSE
Banco Court, Supreme Court of Queensland
Friday, 20 February 2009, 6.00 pm

**THE PROFESSION OF BARRISTER –
SERVICE, DUTY AND INDEPENDENCE**

**The Hon Justice Kiefel
High Court of Australia**

The preamble to the 2007 Barristers Rule of the Bar Association of Queensland contains statements of the beliefs that the administration of justice is best served by reserving the practice of law to those who owe a paramount duty to the administration of justice and that barristers must maintain high standards of professional conduct. These beliefs are not new. They were the foundation-stones of the profession of barrister when it was established in England long ago. Geographical distance and the passage of time have not detracted from their importance to the profession in Australia.

It took some little time for a profession of lawyers and advocates to establish in the colonies. In the early days justice, such as it was, was dispensed by military tribunals composed of officers, who had no legal training¹. It was not until 1809 that a lawyer, Ellis Bent, was appointed Judge Advocate. Despite his recommendation that two barristers and two solicitors be encouraged to immigrate, no action was taken². When the Supreme Court of New South Wales was created in 1814 the only legal professionals available in that colony were three emancipated convicts who had practised as solicitors prior to their transportation for fraud-related offences³. This was not a very auspicious start for the legal profession in Australia. The Brisbane Circuit Court opened in May 1850 and in the absence of any local counsel, two local attorneys were granted a right of appearance⁴. A Roll of Barristers in Queensland was established in 1859.

It was some time after the establishment of Queensland that its barristers formed a Bar Association. Sir Harry Gibbs thought it unlikely to have been "mere coincidence" that the Bar Association of Queensland was formed in 1903, following upon the revival of the New South Wales Bar Association in the preceding year⁵. One of Queensland's leading

¹ Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 306.

² Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 307.

³ Castles, *An Australian Legal History*, (1982) at 106-107.

⁴ Queensland Bar Association, *Early History of the Bar* [online]. Available at: http://www.qldbarr.asn.au/index2.php?option=com_content&do_pdf=1&id=14 (accessed 13 January 2009).

⁵ Gibbs, "Some Aspects of the History of the Queensland Bar", (1979) 53 *Australian Law Journal* 63 at 67.

barristers, who was involved in the formation of the Association, was Arthur Feez. Amongst his other achievements, he acted as best man at Nellie Melba's wedding. His diary entry of 12 June 1903 speaks of another age and pace of life for barristers. He recorded:

"Court at 10 in *Kingston v Ross Reid & Co* when the second action was finally disposed of leave being given to compound it. Meeting of Bar Committee at 11 and at 12 I had a conference with Chambers and Smith, Manager of Burns Philp and Co. Game of snooker after lunch and I played better. Bar meeting at 2.30 the AG's Chambers. Then we planned a Bar Association and passed certain resolutions. It was a very fair meeting. ... Wiley to dinner and stayed yarning til past 10.30. Very pleasant and happy day."⁶

The standards of conduct which are now stated as Rules in Queensland are of long-standing and are drawn from those which shaped the early profession in England. They then reflected the role of a barrister within society, a role which is largely maintained today. It is that role which explains the special duties owed by those practising as barristers, especially that to the court.

A barrister's duty to the court takes precedence over all others, including the duty owed to his or her client. It is a distinctive feature of the profession of barrister that it is one of service to the administration of justice. In that way the role of a barrister involves a public service. The duties of a barrister to this end can only be fulfilled by a barrister thinking and acting in a way unaffected by pressures to act in a way inconsistent with those duties. What is involved in being a barrister therefore requires some reflection. It is not just about acting for clients and earning fees and achieving success for them in litigation, or other methods of dispute resolution. It requires a mindset which facilitates the correct decision about what to do and what not to do in advising clients about litigation and in the conduct of it.

Sir Victor Windeyer, in his *Lectures on Legal History*⁷, observed that some knowledge of the traditions, the professional organisation and training of those who in earlier times "hammered" into shape the daily practice of law in the courts, is essential to an appreciation of the history of English law. It may also illuminate the abiding requirements of duty to the public and to the courts – their source and their continuing purpose.

The word "profession" was first used to signify the taking of vows upon entering a religious order. It took its modern meaning, as an "occupation professed", in the mid 16th century⁸. The opening for a class of laymen to practise as advocates was created by

⁶ Supreme Court of Queensland Library, "Notable Figures", *The Centenary of the Bar Association of Queensland: 1903-2003* [online]. Available at: <http://www.sclqld.org.au/schp/exhibitions/qldbar/notable/default.htm> (accessed 13 January 2009). Reproduced courtesy of the Supreme Court of Queensland Library.

⁷ 2nd ed (1957) at 137.

⁸ Onions et al (eds), *Oxford Dictionary of English Etymology*, (1976) at 713.

the prohibition, placed by the Church in England, upon clerks in holy orders appearing as advocates in secular courts⁹. These advocates were known as pleaders, along with some other titles, and were trained in law by their Inns. The organisation of lawyers at this point bore the hallmarks of a medieval guild.

The profession is considered to have first become organised with the establishment of the order of Serjeants in or around the time of Edward I¹⁰. They were a small, elite society of trained lawyers whose specialty was advocacy. They were appointed by royal warrant¹¹ and appeared principally in the main common law court of that time, the Court of Common Pleas, where they had an exclusive right of appearance. The word "Serjeant" was derived from the Old French for "servant"; the full title coming from a phrase¹² which roughly means "one who serves in matters of law"¹³. The office of Serjeant was a public one and they took an oath accordingly.

Although they left their Inns, often joining a Serjeant's Inn when they joined the order, Serjeants maintained close ties with their old Inns, as did judges of the time. At this time the Inns were like medieval universities. The universities at Oxford and at Cambridge then offered degrees in law which, by their subject matter, were useful only if one intended to practise in the ecclesiastical courts. It was the Inns which provided the teaching of law. There moots were conducted and they served as the meeting place for the apprentices, Serjeants and judges. It could take eight years to complete these studies¹⁴. To put their length in perspective, the average life expectancy in Tudor times was not much more than 40 years. But then again students at the Inns were probably rather better fed than most. The life of a student involved much feasting and entertainments. The first performance of Shakespeare's *Twelfth Night* is said to have taken place at the appropriate time after Christmas in the hall of the Middle Temple¹⁵.

There is evidence of the standards of professional conduct required of Serjeants from records of the exhortations of Chief Justices to the order in the reign of Henry VIII¹⁶. The standard of conduct expected of them was high and reflected their public office. They were to assist the poor and oppressed and to give counsel to anyone who sought it. It was considered a form of corruption to pretend that they were unable to assist in a worthy cause.

⁹ Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 139.

¹⁰ Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 139.

¹¹ Baker, *The Oxford History of the Laws of England: Volume VI 1483-1558*, (2003) at 421.

¹² Serviens ad legem.

¹³ Onions et al (eds), *Oxford Dictionary of English Etymology*, (1976) at 811.

¹⁴ Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 138.

¹⁵ Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 139.

¹⁶ Baker, *The Oxford History of the Laws of England: Volume VI 1483-1558*, (2003) at 430, referring to his book *Serjeants at Law*.

They were to be truthful at all times and do nothing to the wrong of good conscience. It was their duty to "deal with business expeditiously and not prolong it for gain". They were to dissuade clients from pursuing unjust causes and advise them to abandon causes if it appeared that they were in the wrong¹⁷.

These standards are as relevant today as they were then. Some of them are enshrined as rules of conduct, such as the cab-rank rule. The stated duty of the Serjeants, not to prolong litigation and to give clients advice which they might not wish to hear, but which they need, has a particular relevance now. It is a very important aspect of the independence which a person practising as a barrister must exercise.

The work of the other courts, such as the King's Bench and the Court of Exchequer, allowed for senior apprentices from the Inns to practise as advocates. The term "barrister" later replaced the reference to an "apprentice". It was derived originally from the term "barrae", which were the benches upon which members of the Inns sat during moots¹⁸. In the courtroom, part of the floor was "railed off by a bar"¹⁹. Members of the court sat within it on their bench; those persons having business before the court (words which are still heard today when courts commence their daily work) and their advocates stood at the bar and were heard from there²⁰. The arrangement of the courts now is indicative of the position of the bar. By custom, the Inns came to have the right to call members to the bar and thereby give them the right to practise in the courts²¹.

Much has been written and said about the independence of the Bar. In this regard attention is more often focussed upon a barrister being available to act and appear for any person with a worthy cause against any other party, including the government of the day. Such an obligation, a truly public one which harks back to the Bar's beginnings, is not to be underestimated in its importance. But it is only one aspect of the independence which a person practising as a barrister must exercise. When we speak of the independence of the Bar, or those who comprise it, we are really speaking of the means by which all the duties and obligations of a barrister are able to be fulfilled. The independence spoken of is the central characteristic of a barrister who is aware of what is involved in their role of the profession – the service to the public, the duty to the courts and the duty to the client. Independence is not a benefit bestowed upon a barrister. It does not imply freedom of action but rather the need to be free from pressures and temptations antithetical to the duties. It is independence from pressures not to act for a particular person or in a particular cause; pressures about whether, and in what way, litigation should be conducted; and of course it involves independence from one's own interests.

¹⁷ Baker, *The Oxford History of the Laws of England: Volume VI 1483-1558*, (2003) at 430-431.

¹⁸ Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 141.

¹⁹ Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 141.

²⁰ Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 141.

²¹ Windeyer, *Lectures on Legal History*, 2nd ed (1957) at 143.

Duty to act: service to the public

You will recall the exhortation to the Serjeants – to assist the poor and oppressed. Before pro bono work was necessitated on a larger scale, because of the withdrawal of legal aid funding, barristers were expected to appear from time to time for indigent persons for no fee, or to take a fee only if the action was successful and a fund became available to the client. The decision to do so was considered as one personal to the barrister, as is the undertaking of pro bono work. In this it has always been understood that a barrister's conscience will guide them to provide assistance in a deserving case, to the extent that they can reasonably afford to do so. This continues an aspect of the service to the public which characterised the early Bar.

The acceptance of any brief within one's areas of practice, now commonly referred to as the cab-rank principle, similarly reflects the early standards of the profession. It ensures that every citizen may find a voice in the courts and that those who govern cannot deny a person's redress to the courts. Much is said of the position of the courts – standing between the citizen and the government – but the protection that the courts may offer may not be possible if there is no proper advocate for the person. The right of a person to appear for themselves will not suffice in most cases. Sir Thomas Erskine, speaking in 1792 of the defence of Thomas Paine for sedition said:

"From the moment that any advocate can be permitted to say, that he *will* or will *not* stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end."²²

The cab-rank principle now finds expression in r 89 of the Bar Rules.

Duty to the Court

Lord Eldon, in 1822, described a barrister as someone who:

"... lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression, that truth is best discovered by powerful statements on both sides of the question."²³

The indifference of which Lord Eldon spoke was not a want of care in the presentation of the best possible case and the best possible argument. That is a barrister's personal measure of success. Of course a barrister feels pleasure in the vindication of his or her client's rights; but the barrister does not have a personal interest, aligned with the client, in the outcome of the litigation. This aspect of the independence of a barrister is one standard of professionalism.

²² *Trial of Thomas Paine* (1792) How St Tr 358 at 412.

²³ *Ex parte Lloyd* (5 November 1822), reported as a note in *Ex parte Elsee* (1830) Mont 69 at 72.

This professional detachment, or "disinterestedness" as it is referred to in the Bar Rules, finds expression in the rule which prohibits the making of submissions or the expression of views which "convey or appear to convey the barrister's personal opinion on the merits of that evidence or issue"²⁴. And it permits the discharge of a barrister's duties to the court, also expressed as rules: not to knowingly mislead the court²⁵; to correct any misleading statement made²⁶; and to provide all necessary authorities, including those which may be harmful to the barrister's case²⁷. It is professional detachment from a desire for an outcome which permits these duties to be performed without question. But there can be no lack of interest by a barrister in the full and complete preparation of the case at hand.

The exhortation of the Chief Justices to the Serjeants, earlier mentioned, spoke of a barrister not prolonging hearings. It was obviously a matter of importance then and has remained so. The Bar Rules require a barrister to exercise his or her own forensic judgment on what the barrister believes to be the real issues and to present the client's case as quickly and simply as may be consistent with its robust advancement²⁸. The judgments and speeches of judges from England, the USA and Australia have often spoken of the reliance of the courts upon the profession in the efficient conduct of litigation. In recent years Gleeson CJ observed that the courts can only cope with their workload because of the facility with which experienced lawyers can handle litigation²⁹.

The barrister's duty in this respect, in the conduct and management of a case, again requires the exercise of independent judgment. Mason CJ explained in *Giannarelli v Wraith*³⁰ that the exercise of that independent judgment is with

"... an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case."

²⁴ Barristers Rule 2007, r 22.

²⁵ Barristers Rule 2007, r 23.

²⁶ Barristers Rule 2007, r 24.

²⁷ Barristers Rule 2007, rr 25(c), 27, 29.

²⁸ Barristers Rule 2007, r 21.

²⁹ "Bench and Bar" in Lindsay and Webster (eds), *No Mere Mouthpiece: Servants of All, Yet of None*, (2002) at 39.

³⁰ (1988) 165 CLR 543 at 556.

Regrettably, it is not uncommon these days to see litigation run on issues which are of tenuous relevance and which are not remotely likely to be determinative of an outcome, despite the presence of a Bar Rule to the contrary, about confinement to the real issues. The practice of encouraging unnecessarily complex litigation, expressly or tacitly, is not new. Despite repeated statements from judges, particularly trial judges, there is little indication of its abatement. It is to be seen whether the more difficult economic circumstances in which litigants may be placed will exert an influence upon legal advisors to the contrary of this practice. But of course there should be no need for a reminder that members of the profession should be exercising their own forensic judgment and giving clear advice. There is no acceptable answer to litigation of the kind mentioned.

Of course there is some litigation which is complex; but it does not need the further assistance it is often given. There is no benefit to a client in litigation which may obscure the key issue upon which they may have success – leaving it to appellate courts to mine for this gem in the context of hopelessly diffuse litigation. It goes without saying that some cases appear to be muddled for the reason that in truth there is no meritorious action. The result is often a pleading resembling a web, in which it is sought to connect disparate pieces of different causes of action, or a case where a large number of causes are pleaded, but each missing an essential element.

To the disbenefit which results to the client by this practice may be added the impact on the courts of litigation replete with peripheral issues. It is sometimes said that barristers, or their solicitors, may be influenced in determining the shape and extent of litigation, by concerns about their potential liability to their client. It is difficult to understand how the exercise of a barrister's forensic judgment can be considered consistent with such an approach. Such an approach, one would think, puts at risk the immunity thus far provided by the courts. The nature of the judicial process, and the barrister's role in it, as founding the immunity from suit, in the public interest, were emphasised more recently in *D'Orta-Ekenaike v Victoria Legal Aid*³¹ as was the paramount duty owed by a barrister to the court³².

In *Rondel v Worsley*³³ Lord Danckwerts said that counsel is to be the "master of the conduct of the case in court" and to conduct it with complete independence. Salmon LJ said that a barrister "cannot be dictated to as to how the case should be conducted". His Lordship said that "[t]his is a matter about which he must exercise his own independent judgment"³⁴. As examples he cited the refusal to put forward a charge of fraud, on the client's instructions, unless it was well-based and genuine; and the refusal to put irrelevant questions or take false points "for to do so would greatly impede and delay the administration of justice".

³¹ (2005) 223 CLR 1 at 16 [31]-[32].

³² *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 15 [26].

³³ [1967] 1 QB 443 at 512.

³⁴ [1967] 1 QB 443 at 517.

Gleeson CJ, in an essay for the centenary of the New South Wales Bar Association, described a barrister as no mere "mouthpiece" of those for whom he or she acts³⁵. That statement and the requirements that a barrister exercise independent judgment, confine a hearing to the real issues and conduct proceedings efficiently are contained in the Bar Rules³⁶.

The pressure to do as the client or instructing solicitor wishes can be great. It is not always easy to explain to a lay client why an illegitimate tactical advantage may not be taken or litigation run with the purpose of putting the other party under financial duress. Pressures to conform can arise especially in larger-scale litigation, where a barrister may be encouraged to act as if he or she is part of a team. The decisions which a barrister must make, and the advice which must be given, may benefit from the views of others. But the independence of thought required is not a team effort and it is not achieved if the advice given is a sop to the wishes of those who may be the source of further work. An important aspect of the independence of a barrister spoken of is independence from self-interest.

Conclusion

Barristers usually become aware of the pressures of which I have spoken at some point in their practice. Self-interest is more likely to intrude into professional decision-making in times of economic constraint when work may be more limited. As persons coming into practice it may be as well now to reflect upon the role of the barrister and the service, to the administration of justice, which the Serjeants understood to be involved. You should understand the need to bring to bear, in the many decisions which lie ahead, a mind independent of pressures against the maintenance of the standards, recognised so long ago as those of the profession of barrister.

³⁵ "Bench and Bar" in Lindsay and Webster (eds), *No Mere Mouthpiece: Servants of All, Yet of None*, (2002) at 39.

³⁶ Barristers Rule 2007, rr 20, 21.