PROFESSION OR SERVICE INDUSTRY: THE CHOICE

OPENING ADDRESS

AUSTRALIAN BAR ASSOCIATION CONFERENCE

SAN FRANCISCO 18-21 AUGUST 1996

The Hon Sir Gerard Brennan AC KBE
Chief Justice of Australia
18 August 1996

PROFESSION OR SERVICE INDUSTRY: THE CHOICE

It is a great satisfaction for me to open this Conference of the Australian Bar Association, particularly as the conference has the support of another Bar which shares many of the ideals and aspirations of the A.B.A. My satisfaction stems largely from recollections of and gratitude for a life at the Bar, replete with its triumphs and its tragedies, its wins and its losses, the friendships forged and the battles fought, the long nights of reading and the flashes of inspiration that sometimes fail in their application. The Bar captures the mind and governs the life of those who join it. Its rewards are sometimes financially generous, sometimes financially parsimonious. It is a profession to be entered only by those who have a passionate desire to be a barrister. But that is the best of all reasons. For those, the experience of practice does not disappoint.

I hope that that sense of satisfaction remains in the Australian Bar today, though there are signs of strain and sometimes of

disaffection. Chief Justice Rehnquist has noted something of a change in sentiment in the United States. He said[1]:

> " I think successful lawyers today, on average, earn more than did successful lawyers in my day, even after adjustments for inflation. I think successful lawyers today put a good deal more time into the practice of their profession than did successful lawyers in my day. And I think, though this is the riskiest generalization, that the lawyers among whom I practiced enjoyed the practice of law more than do lawyers today."

He attributed much of the disenchantment to the pressures of a successful practice. He said this:

> " The fact that the work is enjoyable makes it easier than it otherwise would be to succumb to the subtle pressures to put more and more time in on the job.
>
> These subtle pressures are often the result of successful performance, which means an increasing demand for your services that is both flattering and financially rewarding. Without realizing it, you can slide imperceptibly into a mode where demands the job makes are automatically accorded priority over other demands."

His Honour is surely right and I hope that, in this Conference, you may all have an opportunity to enjoy some of the friendships and

---

1 *ABA Journal*, February 1996, p 100.

stimuli that are offered by others who share the same professional interests.

In reading what Chief Justice Rehnquist had to say, I thought back to the time when I came to the Bar and mused about the changes that have occurred. Some of those changes have had an effect on public appreciation of the Bar. Even if financial prospects of practice may have increased, I doubt whether public confidence in and respect for the profession has been maintained. And I wondered why.

Nearly 45 years ago, eleven or twelve of us (I don't now remember), recent graduates of the Law School, were admitted to practice by the Supreme Court of Queensland "as barristers of this Honourable Court." I practised as such for 25 years - 14 as a junior; 11 as a silk. The numerical strength of the practising Queensland Bar when I joined it was slightly more than 80; it was, I think, about 130 when I left for the bench. The new barristers found a corner in the chambers of more senior members. That wasn't particularly difficult, because the rooms were large and sparsely furnished, the rents were low, the secretaries were shared and financial expectations were not exalted. For those of us who were awaiting briefs, and for those fortunate enough to have a chamber application with or against a senior counsel near the top of the list at 10 a.m.,

there was a general exodus for coffee and conversation at 11. The state of the nation, the idiosyncrasies of judges, judicial aspirations and the prospects for next Saturday were discussed with great authority. When the briefs came, they were diverse. Committal proceedings, minor collision cases, landlord and tenant, assaults, maintenance cases, undefended divorces, motions for probate and an occasional reduction of capital provided a varied diet. There was no legal aid work unless you were already briefed to go on circuit and the Public Defender had a matter in the list for which he offered a small fee sufficient to pay for an extra day at the country hotel. "Smithy", the bibulous and beloved salesman for the Law Book Company, determined when we should buy books and how we should pay for them. The fledgling barrister, with few overheads, was anxious to do any brief for the sake of experience. If there were a fee as well, so much the better. There was no talk of anti-competitive rules in that environment. My first lesson in competition policy came when I asked Bob Andrews (as he then was) how much I should charge for a paying brief I had just done. "How much were you thinking of?" he asked. "Eight guineas," said I. "Well," said Bob, "I would charge 10. And if I were a solicitor and I could have you for 8 or me for 10, I'd take me every time!" It was good advice. Now I understand that the experience of coming to the Bar has changed.

A smaller proportion of barristers come to the Bar direct from Law School; many already have family responsibilities; they must take Chambers in expensive buildings in the central business district; they have heavy overheads to meet and, if they buy their chambers, many have substantial interest bills; they specialize from an early stage in order to establish a niche in the work area of their choice; they do not have the freedom to be without paying work for long. For some, legal aid is a financial lifeline. For others, survival at the Bar depends upon briefs to appear for corporate, industrial or government bodies that have the funds to pay counsel's fee. The proportion of briefs to appear on behalf of individuals in big cases has diminished. When a *pro bono* brief is accepted, the motivation is likely to be solely altruistic rather than the acquiring of experience. Fees are necessarily higher than they used to be and litigants who can afford to pay them now probably represent a smaller segment of society than in earlier days. The pattern of litigation has changed; the volume of litigation has increased; the jurisdictions of the lower courts have been extended. Alternative dispute resolution and mediation have become a familiar feature of the litigation landscape. Lay clients are now more knowledgeable about the services rendered by the Bar. Solicitors are under great pressure to conduct their practices as commercial enterprises, even to the extent of joining in multi-disciplinary partnerships. Some firms provide and others

would wish to provide advocacy services by in-house counsel, albeit few of those counsel venture into the higher courts.

Now, all of these factors have produced a profession that is necessarily different from the profession which I first entered. In some respects, we may be justifiably nostalgic about "the good old days" - the days of the long lunch when the case was settled, of the idle chatter in one another's chambers and the innumerable stories that were built around the Bar's characters. The Bar's ethics were enforced almost always without a complaint procedure - usually by peer group pressure or, in graver cases, by a caution administered by a Senior whose authority was undoubted. But nostalgia does not solve the problems of today's profession. Some of the changes are worth a comment not only to identify them but also to note their effect on the profession.

First, specialisation is more commonplace than it used to be. In an age of ever-increasing legal complexity, a barrister who purports to offer a high level of service in advice and advocacy encounters real difficulty in acquiring the necessary fund of knowledge in diverse areas of practice, especially in those years when the briefs relate to problems arising from the minutiae of the law rather than from broad principle. So specialisation, at least to some degree, is inevitable. But specialization comes at a price.

Lawyers are the engineers who operate the legal machinery that maintains social relationships and orders social activity. The lawyer who confines his or her attention to a particular piece of machinery fails to appreciate the social significance of the law he or she practises. Such a lawyer is more like a trained repairer of domestic appliances than a professional engineer. But a lawyer who sees his or her piece of legal machinery as part of an institutional force that both expresses the values of, and governs, society has a more profound understanding of the contribution which his or her piece of legal machinery makes to the welfare of society.

From the viewpoint of the Bar as a whole, narrow specialisation brings the risk of transformation from a profession to a business. If specialist barristers were to lose the consciousness of the law as an entirety, the Bar would be a loose federation of specialist interest groups. Institutional cohesion would be weakened. Then the barrister practising in a speciality would find it increasingly difficult to resist being subsumed into a multi-disciplinary service organization. Professional status would be exchanged for a place on the business letterhead. There are some indicia of strain between sections of the Bar, especially between those who practise in the criminal jurisdictions and those who practise the civil law. In Sydney the divergence seems to be accentuated by the distance

between the chambers of these two categories of counsel. I venture to suggest that the practitioner in the Family Court needs to see the working of the equity jurisdiction; the practitioner in trade practices would do well to appreciate the dynamics of a jury trial.

Another trend in practice, associated with specialisation, is the narrowing of the client base. The litigation in which barristers are briefed today seems to be more confined than in earlier times. Perhaps I am too far removed from the coalface of practice to know the true extent of the areas of work now performed by the Bar, but I suspect that cost and specialisation have combined to restrict briefing to the more remunerative areas of litigation. If this be right, the public goodwill of the Bar has been diminished. Is the barrister seen more as a gun for hire by the powerful than a cab for hire by anybody?

Whatever the truth may be, media references seldom acknowledge the Bar to be the protectors of the oppressed or the champions of the righteous. Rather the emphasis seems to be that the Bar is the institution that frustrates the doing of justice and the visiting of the powerful unrighteous with their just deserts. Such a portrayal can be reversed only if the Bar is and is seen to be available to serve the interests of clients across the range of areas in which advice and advocacy are required. I imagine that might require a

significant increase in work accepted on an unremunerative or pro bono basis in areas in which the Bar's services have not been often sought.

The cab-rank rule, so often and so rightly advanced as a cornerstone of the profession's ethical standards, can be easily negatived in practice. The rule, as you know, has two limbs: the obligation to accept a brief exists only in respect of briefs in an area in which counsel ordinarily practises and for which a reasonable fee is offered. If counsel confines the area of practice too narrowly, or if the notion of reasonableness in relation to fees is not properly applied, the cab-rank rule becomes a cloak for a failure in professional standards. Then the Bar is seen to be oriented more towards commerce than it is to the service of the public. Yet it is the hallmark of a profession that its services answer a social need.

Sir Anthony Mason has written[2]:

> "The professional ideal is not the pursuit of wealth but public service. That is the vital difference between professionalism and commercialism. It is timely to repeat what O'Connor J.

---

2 *The Independence of the Bench* (1993) 10 Aust.Bar Review 1 at p.9.

(with whome Rehnquist CJ and Scalia J agreed) said in *Shapero v. Kentucky Bar Association*[3]:

> 'One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth.'"

Sir Anthony adds the comment:

> "Unless the Bar dedicates itself to the ideal of public service, it forfeits its claim to treatment as a profession in the true sense of the term. Dedication to public service demands not only attainment of a high standard of professional skill but also faithful performance of duty to client and court and a willingness to make the professional service available to the public."

Of course, the Bar cannot be expected to provide an across-the-board social service to represent litigants in every class of litigation. The Bar's function is to provide that service so far as it is reasonable for the collective strength of the Bar to do so. By performing this function, the Bar earns the respect and goodwill of the community.

---

[3] (1988) 486 US 466 at 488-489.

Practices must be carried on so as to return a reasonable income and in that respect the barrister is in business as well as in a profession. But, with due respect, those who would seek to regulate the Bar as though it were a service industry profoundly misunderstand the purpose of the Bar's existence. Perhaps barristers themselves sometimes fail to appreciate the social importance of what they do, especially in the conduct of litigation. Barristers are not mere agents of the client seeking to employ their skill and knowledge to gain whatever benefit the client desires: they are involved in the administration of justice according to law, a function on which a free and democratic society depends. In *Giannarelli v Wraith*, Mason CJ said[4](and I omit a part of the quotation):

> " 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 his 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. So, in *Swinfen v Lord Chelmsford*[5] Pollock CB, after speaking of the discharge of counsel's duty as one in which the court and the public, as well as the client, had an interest said:
>
> > 'The conduct and control of the cause are necessarily left to counsel...."
>
> ...

---

4 ((1988) 165 CLR 543 at 555-556.

5 (1860) 5 H & N 890 at 921 [157 ER 1436 at 1449].

> 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. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal."

In the same case, I quoted[6] Lord Eldon:

> "'He 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.'"

And I added:

> "By a paradox which is obvious to any who have experience in our courts, the client is best served by a counsel who is manifestly independent."

Absent an independent Bar, how would the voice of the oppressed be heard? Where would one find an effective champion of an unpopular cause? How would the courts be able to function without the distillation of issues by skilled and independent minds? And how

---

[6] (1988) 165 CLR 543 at 579.

would any tendency to judicial tyranny be restrained? The point was well made by Chief Justice McEachern of British Columbia[7]:

> "I believe an independent bar and an independent judiciary are sentries posted by the constitution to guard our people of their danger. A re-born Erskine would remind us that our greatest threat is not from insurrection, but rather from earnest, misguided, well-intentioned philosophies that suggest some combination of Jeffersonian democracy and Harvard Business School efficiency could organize the legal system better, if troublesome judges and lawyers would just get out of the way."

The independence of the Bar is as valuable to the client as it is to the public welfare. To the client, it gives an assurance of such accuracy as knowledge and skill can contribute; to the community, it gives the service of applying the law in the manner in which the law is intended to act. It is independence that makes the barrister essential to the administration of justice according to law. Independence that cannot be bought in a market; independence that will not be bartered for money, or for privilege, status or favour or even for a momentary success. This is the characteristic that, more than any other, stamps the Bar as a profession and not a service industry. Competition policy assumes that profit is the governing motive of commercial conduct; that is an assumption which, if it

---

7 (1995) 29 Law Society Gazette No.1, 1 at p.5.

were ever to be true of the Bar, would transform it from a profession to a service industry. That is the quality which, above all, must be preserved not only in the interests of clients and of the courts but in the interests of the community as a whole.

Independence is preserved by the sole practice rule. It would be sapped by a need to give loyalty to partners, or to lay clients on whose patronage a barrister depended for income, or to sources of power or patronage. Independence is the mother of candour and candour is the ally of advocacy. Thus independence is the quality exhibited by all leaders in the profession. And any compromise with expediency is quickly sensed by the peer group and reflected in a loss of the respect which is essential to professional eminence.

In the years that lie ahead, there will be enormous pressure on the Bar to alter its rules and practices to conform more closely to some commercial template. Of course, there will be changes - and so there should be. Mediation and alternative dispute resolution will evoke skill in the negotiation of settlements rather than in the adversarial battles of the court room. Problem solving will become as important a function as the set joust of litigation. Technology will alter in a variety of unforseen ways the conduct of counsel's practice. We are familiar with the word processor and, to an extent, with the document scanner, with video connections to distant places and with

the keeping of records electronically. The methods and even the nature of legal research is changing with the development of data bases and of CD-Roms that direct the user to relevant research material. Technology will place new demands on the advocate, challenging him or her to produce submissions of such cogency and precision that they might be downloaded with minor editing into a judgment. The pressure of cases will require ever more pithy written submissions and the utilisation of advocacy time to advance arguments that do not ramble aimlessly or tendentiously around the point for decision.

Nation-wide eligibility to practise cannot now be far distant. We shall see the emergence of what can be described with complete accuracy as an Australian Bar. And from that Australian Bar, there will in time grow an Australian Judiciary familiar with the legal systems of all parts of the Commonwealth and preserving the characteristics which develop from a lifetime of independent thought. A competent and independent Bar is the vital training ground for judges in the modern age who must possess experience in litigation and a fair and robust mind to stand against the buffeting that many decisions attract.

An Australian Bar will not be created, I hope, merely as a supplier of services in what some economic regulators choose to call

a national legal services market. The Bar has far more extensive duties to perform than the provision of services to so-called "consumers". If the Bar were to see itself simply as such a supplier, our national court system would have to be reconstructed with features and safeguards that are presently unnecessary. The survival of the Bar as a separate and independent institution may make little sense to an economist who does not appreciate its social utility and does not foresee the consequences of its destruction. But the possibility that the Bar will not survive is minimal provided the Bar has a sufficient conceit of its function in the maintenance of a free democracy and, to that end, retains its competence and its independence. It must reject the notion that it is concerned with the marketing of expertise rather than with the use of skill and knowledge in the service of the client and the community. That was the message which Sir Daryl Dawson delivered in his significant paper "*The Legal Services Market*" which he delivered to the 29th Australian Legal Convention. The Bar must change with the times, but it must cling to its ideals of independence and competence in the service of justice according to law. These are the ideals that, for those who have practised at the Bar, make it a true home for mind and spirit. These are the ideals of which Judge Cardozo spoke when addressing the lawyers of New York County:

> "The tradition, the ennobling tradition, though it be myth as well as verity, that surrounds as with an aura the profession

> of the law, is the bond between its members and one of the great concerns of man - the cause of justice upon earth."

That is the tradition in which we meet, and I am glad to be part of it.