



3.14. Ethics and the Advocate

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On reading the notes I prepared for this talk, I had the impression that I shall be reading a lecture telling the Bar and barristers what they should or should not be doing. That is not what I wish to do. Of course, ethics are normative of conduct at the Bar, but more importantly, the free acceptance of the bar's code of ethics is the cement that binds the Bar together, and unites it with the Bench in the common objective of securing justice according to law for the community we serve. So I do not want to read a lecture on conduct so much as to discuss the role which the Bar must play in attaining that objective.

The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. Ethics are not what the barrister knows he or she should do: ethics are what the barrister does¹. They are not so much learnt as lived. Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion. There is no really effective forum for their enforcement save individual acceptance and peer expectation. However, among those who see themselves as members of a profession, peer expectation is sufficient to maintain the profession's ethical code. Ethics give practical expression to the purpose for which a profession exists, so a member who repudiates the ethical code in effect repudiates members of the profession. It follows that if we are to gain an understanding of the ethics of the Bar, we must first ask ourselves whether the Bar is truly a profession and ascertain the purpose for which it exists. Only then can we see whether and how the ethics of the Bar express that purpose.

If the media can be taken to express at least a substantial segment of public opinion, not all Australians regard the Bar as a profession. So perhaps we need to go back to fundamentals to identify what is meant by a profession and thereby to ascertain the true status of the Bar. I imagine that most of you are familiar with the definition of a profession offered by Sir Owen Dixon²:

“It is the essence of a profession that its members master and practise an art. The art must depend on a special branch of organised knowledge and be indispensable to the progress or maintenance of society, and the skill and knowledge of the profession must be available to the service of the State or the community.”

Sir Owen went on to say why it is essential that a profession should maintain high ethical standards:

¹ *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186, at p.200.

² “The Profession of Accountancy”, Melbourne, 4 April 1960, reproduced in *Jesting Pilate*, p.192.



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“Experience has shown in every age that a profession cannot proceed without high professional standards. Special knowledge is always suspected by those who do not share it. Unless high standards of conduct are maintained by those who pursue a profession requiring great skill begotten of special knowledge, the trust and confidence of the very community that is to be served is lost and thus the function itself of the profession is frustrated.”

Note the elements of the definition: mastery of an art, based on special knowledge indispensable to progress of maintenance of society. Those elements describe professional expertise. They are applicable to a barrister, a solicitor, a doctor; but they are equally applicable to a foreign exchange dealer, a computer programmer or a manufacturer of footwear. In a technological society, expertise is not restricted to members of a profession.

The expertise of the Bar covers several fields but, at its core, is the expertise of the advocate before courts and tribunals: an expertise in the marshalling and presentation of facts, in the ascertainment, analysis and application of rules of law and in delimiting and identifying the factors relevant to the exercise of a discretion. It is no part of the Bar’s function to judge but it assuredly is part of the Bar’s function to present the material on which judgment is based. The function of the bar is thus essential to the efficient performance of the judicial function of doing justice according to law. Without the services of the Bar, the members of society would be without effective access to justice and courts and tribunals would be unable efficiently to administer justice according to law. The Bar’s function is truly indispensable to the progress and maintenance of society.

Where the progress of maintenance of society would be prejudiced by sub-standard service in a given field, a licensing regime must be created to exclude those who do not possess the required knowledge and skill. But the monopoly thus created is conferred on terms: the monopolists must provide the service required. Hence the remaining element in the Dixon definition: “the skill and knowledge of the profession must be available to the services of the State or the community”. Sir Owen does not say that the service must be available without fee; no substantial service can be continually provided without remuneration to the provider. But fees have a different significance for professions from the significance they have in trade and commerce, as Lord Macmillan pointed out³:

“The difference between a trade and a profession is that the trader frankly carries on his business primarily for the sake of pecuniary profit while the members of a profession profess an art, their skill in which they no doubt place at the public service for remuneration, adequate or inadequate, but which is truly an end in itself. The professional man finds his highest rewards in his sense of his mastery of his subject, in the absorbing interest of the pursuit of knowledge for its own sake, and in the contribution which, by reason of his attainments, he can make to the promotion of the general welfare.”

It is all very well to quote distinguished jurists of a bygone age but, you may ask, do their lofty sentiments have any relevance in the practical life of the Bar today? Isn’t it time to face the realities of modern practice with high overheads, expensive technology, escalating cost of books and of access to data bases, and the need to cope with a large volume of work in order to defray the expenses incurred before the barrister begins to earn his or her take home pay? Of

³ “Law and History” Edinburgh, October 1934, reproduced in *Law & Other Things*, (1937), 118, at p. 127.



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course these realities must be faced, but that is merely to say that the Bar is under considerable financial pressure in struggling to keep itself in the professional category. The struggle is not solely of the Bar's making. Consensus morality has lost much of its normative influence over social conduct and relationships, and the law and legal process have been invoked to make up the shortfall. The community, and particularly the political branches of government, rely increasingly on legal controls though they have not come to terms with the reality that legal controls, however efficient, are labour intensive and therefore costly. Though tempting in the short term, it would be fatal for the Bar's professional status to capitalise on the demand for legal services, and to weaken its endeavours to provide its services to those who need them but who cannot afford to pay the fees offered by the affluent.

A powerful contemporary reminder of the importance of ensuring the general availability of the Bar's services comes from the Supreme Court of the United States which is concerned with a society more complex than our own and arguably more motivated by the acquisition of wealth. In *Shapero v Kentucky Bar Association*⁴ O'Connor J., with the concurrence of Rehnquist CJ and Scalia J, said:

"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. That goal is public service".

The public service which is the goal of the Bar as a profession is no less than the obtaining of justice under the law. As Kitto J said in *Ziems v The Prothonotary of the Supreme Court of NSW*⁵:

"...the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community."

To make that service successful, the Bar's ethical code must aim at making justice according to law as accessible as the Bar can reasonably make it and at ensuring that the judge or other decision-maker has the material at hand to do justice according to the law. These are the broad objectives which, being shared by all members of the profession, guarantee its status and theirs and, more importantly, its and their satisfaction with the work they do.

⁴ (1988) 486 US 466, at p. 488-489 [100 L.Ed.2d.475 at p. 494].

⁵ (1957) 97 CLR 279, at p. 298.



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Accepting briefs

The “cab rank” rule is uncompromising: special circumstances apart, the barrister is bound to accept any brief in the courts or tribunals in which he or she professes to practise at a reasonable professional fee. The “cab rank” rule is, of course, easy to circumvent. Even if “special circumstances” be narrowly confined, the barrister may find ostensible justification for refusing a brief which is distasteful or relatively poorly paid or for passing on such a brief when a better brief can be got.

The Bar, as every experienced member of it knows, is a chancy business. There is no goodwill saleable on retirement, no sick leave, no long service leave, no superannuation or financial security except such as the barrister pays for himself or herself. Briefing patterns are sometimes fickle. Case lists wax and wane. It is not surprising that the financial insecurity of the Bar leads some barristers to regard briefs primarily as a kind of bankcard docket against which a solicitor will pay. The high-sounding rhetoric of professional duty may find little resonance in concerns about family responsibilities, chamber expenses and the provision of some financial security against death, age or disability.

Yet the cab rank rule is fundamental to the professional status of the Bar. Without it, access to justice would be at the discretion of individual counsel; legal rights would be liable to defeat for reasons of distaste or avarice; the minorities; the poor, the powerless, the unpopular – those who most need the protection of the law – would have to go without representation or to find their advocates among those who would build their own reputations on others’ misfortune. In such a situation, the law would become an instrument of oppression and the courts would lose the confidence of the community. You may think that, to some extent, that has already happened.

There is no reason to think that the cab rank rule will not be fully honoured by providing representation for unpopular clients or causes. The concern about the cab rank rule arises because of the setting of fees at levels which are often thought to be unreasonable. In the boom years of the economy, the Bar did well and it may be that the cab rank rule did not receive too much attention when the demand was for stretch limousines. The pattern of litigation changed during those years and a greater proportion of commercial litigation and litigation involving governments and corporations was found in the lists. The courts suffered some erosion of their popular base among the litigants with less financial strength and in litigation about issues of smaller financial value.

These circumstances make it more imperative that the Bar be consciously oriented to providing service to those who need it. In recent times, the steps which have been taken in some Bars to organise pro bono work so that the burden is fairly distributed and so that professional skills can be matched to the client’s needs have been steps in the right direction. Most leaders of the Bar, especially those who are entitled to command the largest fees, have been accustomed to provide their services at no fee or a reduced fee when there is a justifiable call on their services by litigants who cannot afford to pay their usual fees. If there were any diminution in the readiness of the leaders to give this leadership and, indeed, to insist on the general observance of the cab rank rule, I should fear for the future of the Bar.

Perhaps the attitude that needs most careful fostering affects the approach of individual barristers to the fixing of fees. At the Bar, it is not easy to keep fees in proper perspective. In part, a barrister measures his or her progress and standing in the profession by reference to the



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fees which he or she can command and it takes a degree of confidence to formulate and adhere to a fee policy which ensures that his or her services will be available at reasonable rates or to a reasonable extent to those who need them. Yet that availability of professional services cannot be unduly restricted by insistence on fees which the State and the community cannot reasonably afford. I suggest that it is not acceptable to approach the fixing of a fee by asking: what will the traffic stand? Or what do I need to charge to maintain an income of \$X? Rather, the question must be: having regard to the expected length and difficulty of the case and forming as best I can an estimate of the knowledge and skill I can offer, what is a reasonable fee for my services? And, if only a lesser fee can be afforded, should I accept the brief lest the legitimate interests of the client be unrepresented? I venture to suggest that no counsel who adopts that approach need have the slightest ground for misgiving as to his or her progress or standing in the profession.

The cab rank rule is, paradoxically, the chief security of the Bar for its professional future. If the public perceive that the Bar's services are truly available to anybody who is in genuine need of those services on payment of a reasonable fee, the Bar may expect to gain the respect, if not the affection, of the public. And reasonable remuneration for the rendering of the service will not be begrudged. Of course, the public will find the fees of eminent leaders to be high. But an assurance that fees do not necessarily stand in the way of representation in cases where the Bar can reasonably provide the service needed will commend a fee system which allows for graduations according to knowledge, skill and experience. Such a system demands, of course, that there be no rigid fee classifications either by scale or by tacit understanding. It is obvious, however, that if the professional aspiration of providing services to those who need them is subordinated to the maximising of income, public opinion will be contemptuous of the legal monopoly, the courts will be hobbled in their appointed task of doing justice equally, the relationship of Bench and Bar will be sundered, and the function of advocacy will come to be entrusted, by default, to modestly paid employees of the State. In such a situation, the third branch of government would lose its robust independence which relies, in the ultimate analysis, on the availability to the public of access to justice.

Preparing and Presenting Cases

The efficiency of the courts depends largely upon the skill and industry of counsel in identifying and submitting issues for decision, whether in original or in appellate jurisdiction, and presenting the case on the relevant issues economically and accurately. This requires not only a careful consideration of the facts and the relevant law, but a resolute exclusion of issues which are immaterial, unsupported or of marginal relevance.

A barrister is expected to have the knowledge and the skill required by a brief. If the barrister does not have the knowledge and skill and cannot by diligent research make up the deficit, the brief should not be accepted. It is a fraud upon the client and, in the case of a brief on trial, an imposition upon the court, to accept a brief beyond counsel's capacities to work up, or to accept a brief which counsel is unwilling or unable to prepare adequately. Of course, there are times when another night's research would be welcome or when the case before lasts longer than expected, but it is not acceptable for a counsel to go into court without knowing the essential facts relevant to the issues and the legal frames of reference upon which the decision in the case will turn.

Once accepted, a brief imposes an obligation to work it up as well as to appear subject, of course, to supervening circumstances which make it necessary to return the brief – and in good



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time. A brief is not a piece of property to be flicked to a friend when the barrister has double-booked or has been offered a better brief or is too tired to do the work.

When the case is in court, counsel must remember through the dust of conflict that his or her primary duty is to the court. In *Giannarelli v Wraith*⁶, in a passage which summarises the duty of the advocate in court, Mason CJ said:

“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 of appeal.

It is not that a barrister’s duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister’s duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client’s success, but also the speedy and efficient administration of justice.”

Within the limits imposed by the duty to the court, the barrister’s efforts must be devoted to the success of the client’s cause. The basic limitation is not to mislead the court. Misleading covers not only the tendering of evidence that is known to be false or the making of submissions that are known to be wrong (in the sense of not reasonably arguable) in fact or in law; misleading includes the advancing of propositions which are true in literal terms but which imply what is known to be false or wrong. But nothing false or wrong is implied by failing to prove facts relevant to issues which the client does not have to prove. Under the adversary system, the function of putting the court into possession of material for decision-making rests primarily with counsel and, in relation to all matters of fact, rests entirely with counsel. But, where counsel appears for a party on whom no onus of proof rests, there is no misleading of the court in putting the other party to proof. Hence, in criminal cases, even a confession made by a prisoner to counsel during the trial does not prevent counsel from putting the Crown to proof provided cross-examination and submissions are not inconsistent with the facts confessed.

The second limitation on the duty to the client - not to cast unjustifiable aspersions on a party or witness – flows from the function of counsel as an independent contributor to the administration of justice. This limitation does not impose a duty to be diffident or timorous in advocating a client’s cause. Counsel is entitled, sometimes bound, to advance an argument relevant to an issue in the strongest terms consistent with the evidence, whether or not the argument prejudices the reputation of others. But no allegation of moral or legal turpitude against an opposite party should be made in pleadings without a prima facie case being disclosed by the facts and no such allegation should be made in the hearing against any person without evidence to support it. Counsel is not an amanuensis or spokesperson for a client who wishes to place irrelevant or unsupported and scandalous material on public record under cover of privilege. For this reason, no issue should be submitted merely because of a client’s desire to

⁶ (1988) 165 CLR 543, at p. 556.



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raise it. On the other hand, there can be no refusal to submit an issue, however unpalatable or unpopular, which will, if the issue is resolved in the client's favour, advance the client's cause. There may be a relevant issue the raising of which would reflect adversely upon the client's reputation, in which case counsel may decline to plead the issue without specific instructions to do so⁷.

The third limitation is not to withhold documents and authorities which detract from the client's case. The injunction against withholding documents relates, of course, to documents which must be produced either to comply with an order for discovery or to prevent any misleading of the court by the tendering of evidence which the document qualifies. There is, I think, another situation in which a document needs to be produced. Even if there has been no order for discovery, counsel who is aware of a document which relates to an issue the onus of proving which rests on the opponent, but which establishes that issue in favour of the opponent and destroys the client's case, cannot proceed on the footing that the client is entitled to succeed.

The duty of counsel not to withhold authorities which detract from the client's case flows from counsel's duty to assist the court to apply the relevant law. To allow the court to decide a case in favour of a client without knowledge of a contrary authority is tantamount to misleading the court. Of course, it is not misleading to advance a legal argument contrary to authority provided the argument is reasonably open and provided the court is put into possession of the authorities relevant to the problem including authorities contrary to counsel's submission.

Counsel who, through industry and candour, earns the respect of the courts before which he or she appears is a powerful advocate of a client's legitimate interests. Sir Owen Dixon, whose lecture on "Professional Conduct"⁸ should be compulsory reading for every barrister, said that "it is a paradoxical if cynical truth which needs no elaboration that in advocacy candour is a weapon." When a counsel who has earned a judge's respect is known to be appearing, it is a fact – perhaps a judicial weakness, but nonetheless a fact – that the judge approaches the case with a sense of tranquility, knowing that the issues for determination will be clearly and accurately defined with the material for determination at hand.

Conclusion

The ethics of the advocate serve a number of purposes. Chief among them is directing the contribution which the Bar makes to the administration of justice, both in respect of its availability and its quality. Next, because of a barristers' ethical responsibilities in court, an immunity from suit is conferred on him or her. Perhaps I should recall a few sentences of what I wrote in *Giannarelli v Wraith*⁹:

"If the immunity of counsel were abrogated, the assistance which the courts obtain from the advocacy of an independent profession would be imperiled. But there is a corollary. If counsel generally were to fail to adhere to the standards of advocacy which the courts expect and on

⁷ See, as to pleading the Statute of Frauds, *Charlick v Foley Bros.* (1916) 21 CLR 249, at pp. 251-252.

⁸ *Jesting Pilate*, op. cit., at p. 134.

⁹ (1988) 165 CLR, at pp. 579-580.



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which they rely, there would be no justification for the immunity. That has not happened. Hopefully it never will.

Immunity is not the only advantage gained by adherence to the Bar's ethics. The status of the Bar as a profession, the monopoly rights which the Bar enjoys and the remuneration it derives all depend in the long run on the maintenance of high ethical standards. And perhaps the most immediate advantage which those standards confer is the sense of collegiality in the day to day work of the Bar. A barrister in good standing, without consciously advertent to rules, lives his or her professional life in the camaraderie of a group devoted to justice and to law, jealous of its standards and of the great privileges which it exercises in service of the public. It is not surprising that those of us who have left active practice at the Bar have a nostalgia for the years in which that camaraderie was enjoyed and a certain pride in our continued relationship with an institution held in both affection and respect.