

Essays in Advocacy

Essays in Advocacy

Edited by the Hon. Justice Tom Gray,
Martin Hinton QC and David Caruso

Introduction by the
Chief Justice of the High Court of Australia
the Hon. Justice Robert French AC



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Foreword

TOM GRAY

Every advocate is different. It ought not be any other way. Attempts to achieve uniformity are the antithesis of good advocacy.

Advocacy is the art of persuasion and that is the goal of every advocate. This book, in appropriately different ways, attempts to facilitate the achievement of that goal.

The teaching of advocacy as part of the law degree has become commonplace in contemporary times, whether as a stand alone subject, or incorporated into core subjects. One of the primary purposes of this publication is to provide a text to aid that teaching. The editors, a university academic, a Solicitor-General and a judge, decided to embark on this publication. They called in aid almost 50 authors to contribute on an aspect of advocacy within their experience and expertise. As a result, the publication is truly ‘essays on advocacy’.

Any observer of advocacy in court will be struck by the dissimilarity of advocates’ styles, mannerisms, eloquence and the manner or mode of persuasion. The power of persuasion is innate, idiosyncratic and unpredictable. There is a danger in attempting to teach a particular style of manner of delivery. This publication approaches advocacy in an entirely different way. The reader of the publication is at times entertained, and other times subjected to concentrated study. Some authors write an elegant manner, others in a scholarly fashion. Pragmatic advice is the approach of yet others. Each author through their essay displays their own unique style of persuasion. The editors have eschewed any thought of attempting any degree of homogeneity. The authors have wanted the student, the reader and the critic to identify and respect these differences. They are the very essence of advocacy.

The book is not intended to be other than the author’s contributions at the time of contribution. Case law, statute law and other references may have been superseded or may well be in the future. Each essay addresses the experience of the author and is designed to demonstrate advocacy. As a result they remain durable, despite changes that may have or may well occur.

A review of the contents page discloses the breadth of the topics covered. The editors have sought to cover the field. However, that has not been possible. A second edition will need to address as best it can the never-ending field of advocacy.

Each of the authors has an outstanding reputation. They are of very high calibre. Their collective experience totals more than a thousand years. This collective experience, together with the reputation of each of the authors, leads to a work that will be not only a reliable

source of reference, but also a work that is both motivational and inspirational to the young advocate. It is a publication that can be 'dipped in to' to find an answer, to discover a precedent, or to simply obtain general guidance.

It is not possible or appropriate in this preface to address particular essays, however this much can be said. Many of the essays draw on the author's particular experience and provide anecdotal accounts that make a point, identify a principle or simply provide an explanation as to what is good advocacy in a particular circumstance.

The essays should appeal to a wide-ranging audience. One of the purposes of this publication is to provide a text for the undergraduate, for the student undertaking professional legal training and for the young practitioner in early years of their work as advocates. The editors have the expectation that the work will have wider uses. It is expected that school students in their final years, engaging in legal studies, in mock trial and in mooting competitions will find the essays both inspirational and motivational.

The editors are indebted to the authors. Their support and efforts have made this publication possible. They are all busy legal specialists who have found time to assist the publication. The editors express their thanks Dr John Emerson for his advice and professional assistance in the publication and to Kate Guy and Fiona Cameron for their hours of review.



Photograph courtesy of the author

The Honourable Justice Tom Gray was admitted to the Supreme Court and the High Court in 1969. He worked in general legal practice for more than ten years before joining Bar Chambers in 1981 where he practised in the areas of common law, commercial law and equity. He was appointed Queen's Counsel in 1984. In 2000, he was appointed to the South Australian Supreme Court. Justice Gray has published in legal books and journals, and maintains a keen interest in legal and social issues. He is a Past President of the John Bray Law Chapter of the Adelaide University Alumni and currently the Chair of the Law Society Advocacy Committee, the Chair of the Advisory Board - Adelaide University Law School, the inaugural patron of the Young Lawyers Committee, Board member of the South Australian Law Reform Institute and a Committee member of the South Australian Chapter of the International Law Association (Australian Branch). Justice Gray is an accredited CJEI judicial educator.

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Part I

Introduction and Etiquette



Photograph courtesy of the author

The Hon. Justice Robert French AC

Robert French was a Judge of the Federal Court of Australia for twenty two years when he was appointed Chief Justice of the High Court of Australia on 1 September 2008. He is a graduate of the University of Western Australia in science and law. He was admitted in 1972 as a barrister and solicitor in Western Australia and joined the Independent Bar in 1983. From 1994 to 1998 he was President of the National Native Title Tribunal, while also serving as an additional member of the Supreme Court of the Australian Capital Territory and a member of the Supreme Court of Fiji. He was also a Deputy President of the Australian Competition Tribunal and a part time member of the Australian Law Reform Commission. From 2001 to January 2005 he was President of the Australian Association of Constitutional Law. In 2010, he was made a Companion in the Order of Australia and made a Fellow of the Academy of Social Sciences in Australia.

1

Introduction

ROBERT FRENCH

Thomas Carlyle once described advocacy as a 'strange trade'. As practised by the legal profession it is indeed strange as trades go. It is a trade with an internal tension. It serves the private ends of those who seek legal services and at the same time the public end of maintaining the rule of law.

Advocacy in the law may take place in a variety of forums. It is not confined to the oral argument of counsel before a court or tribunal. It may involve the communication of a client's interests in negotiations with a representative of a party with whom the client is in dispute, or with whom the client wishes to make an agreement, or from whom the client seeks a right or permission. That may be a private party or a public authority, government department, or statutory regulator.

Legal advocacy may also take a variety of forms. It universally requires an understanding of the representational task. That begins with good listening — listening to the client and/or instructing solicitor to understand the client's objectives which may include, but not be limited to, the resolution of a particular dispute. It requires the identification of legal issues and their communication back to the client in a comprehensible way in oral conference and in written advice. It is not surprising therefore that in this wide-ranging collection of essays on advocacy there is one on the threshold skill of taking instructions and advising the client. It is in that process also that the legal practitioner has the opportunity to explain the extent and limits of the advocate's representative function. Anthony Kerin, the author of that essay, quotes the former United States Supreme Court Justice Sandra Day O'Connor:

As a lawyer you are not just an advocate for your client. You are a representative of the law. It is your duty not only to act according to the highest ethical standards but to make sure that you speak up when others intend to do otherwise. Your highest fidelity is to the law; you serve your clients best by making sure they understand the duties imposed on them both under the letter and under the spirit of the law.

The advocate must serve the client's interests subject to the requirements of the law and professional ethics.

The separation of advocacy from a lawyer's personal views is something which many find difficult to understand. It is highlighted by the quotation in Elisa Holmes' essay on 'Etiquette' of the exchange between Thomas Erskine and the court when Erskine was defending Thomas Paine on charges of sedition. Erskine said to the judge:

I will now lay aside the role of an advocate and address you as a man.

The judge replied:

You will do nothing of the sort. The only right and Licence you have to appear in this court is as an advocate.

There is also in that observation a useful reminder of the professional distance that should exist between lawyer and client.

A number of the essays remind us that advocacy is not confined to the lawyer's work in courts. The advocate's skills, adapted to the occasion, may be called upon in negotiation between parties, in mediation and arbitration, and in the various species of alternative dispute resolution. The advocate may be called upon to represent a client's interests in a non-judicial tribunal, or a public inquiry, or in a coercive interrogation by a statutory regulator. Mediation and alternative dispute resolution are each the subject of essays by the Hon Bruce DeBelle and Stephan Walsh QC respectively. Industrial commissions and tribunals, disciplinary tribunals, coronial inquiries, and inquiries and royal commissions generally are also dealt with.

An advocate may seek, by written submissions, to persuade a Director of Public Prosecutions to file a *nolle prosequi* or an Attorney-General to advise a Governor to exercise the prerogative of mercy. The duties of the prosecutor and prosecutorial discretions are discussed by Justices and Howie and Refshauge in their contributions. The 'Institution of Mercy' is discussed by Martin Hinton QC and David Caruso.

The function of the Attorney-General as advocate is discussed by the current Attorney-General of South Australia, John Rau MP, writing with Chad Jacobi. Appropriately they write:

An Attorney-General should relate to the judiciary and profession with openness and respect. The test of the relationship is in the maturity and civility with which we conduct ourselves in the unavoidable event of disagreement, not in the hopefully frequent times of enthusiastic unanimity.

Advocacy by legal practitioners is often a cooperative exercise and so it is appropriate that the book includes essays on the solicitor/barrister relationship and on the obligations and duties of senior counsel and their juniors. John Goldberg, a commercial solicitor, writes on the first topic and Michael Grant QC, Solicitor-General of the Northern Territory, on the second.

Despite the strong tradition of oral advocacy in Australian courts and tribunals, the role of the written word in argument has assumed increasing importance over the last 30 years or so. It is particularly appropriate therefore that the book contains useful chapters on the drafting of pleadings, written submissions and the use of language. Justice Pagone in his essay on 'Written Advocacy' makes the point that:

A well prepared written submission can be effective and persuasive as a useful resource or tool for a decision maker. It can be a single reference point in which the issues, the law and the evidence are all identified for the decision maker's task of making and producing a decision.

Julian Burnside QC in his chapter on the 'Advocate and Language' in both written and oral advocacy offers important perspectives on good writing and speech and offers the useful advice from HW Fowler and others:

prefer plain words over fancy ones
 prefer short words over long ones
 prefer familiar words over exotic ones.

Legal advocacy is probably put to its most acute test in, and in connection with, the trial process. A significant number of the essays in this book are centred around that process. They cover preparation for criminal and civil trials, and various aspects of the trial process. These include the conduct of a voir dire, opening addresses, examination-in-chief, cross-examination, dealing with expert witnesses, and closing addresses. David Edwardson QC discusses the all important advocacy of the plea in mitigation. The challenges raised by trials in which child witnesses are called are discussed, and the particular issues involved in the representation of Indigenous Australians and members of ethnic minorities in courts are also canvassed.

The appeal process is well covered with a contribution by Chief Justice John Doyle on appeals before the Full Court and the Court of Criminal Appeal and by Justice Besanko on seeking permission or leave to appeal. Justice White writes on appeals before single judges, and Judge Cuthbertson on appeals against sentence. Justice Kourakis discusses advocacy on applications for special leave to appeal to the High Court with the provocative question in his title ‘Does Advocacy Matter?’

Remedies are considered in a contribution by Malcolm Blue QC. This is an important aspect of trial advocacy as the question of the precise remedy to be sought is not always sufficiently addressed in pleadings or argument. The Hon Justice Mansfield discusses the particular issues surrounding applications for injunctions.

Justice Bleby deals with the preparation for and administration of serious and complex commercial actions and the need for a cooperative approach between counsel and the court in order to identify the real issues in the case.

This is a book which contains something for everyone. The essays I have mentioned are not exhaustive of its topics. It has much practical wisdom and learning in it. It is, I suspect, a resource to be used rather than a text to be read from cover to cover. Its compilation required a significant effort on the part of the editors, the Hon Justice Tom Gray, and the publishers. The range, diversity and depth of experience of the contributors whom they have brought together is truly remarkable. The editors, the contributors and the publishers are to be congratulated. I commend the book to its readers.



Photograph courtesy of the author

Elisa Holmes

Elisa obtained a first class Honours degree in law at the University of Adelaide in 1997, and was a University Medalist in the same year. She began practice as a barrister in South Australia in 1998. After three years at the Bar in Adelaide, Elisa took up a scholarship to read for the BCL and MPhil at the University of Oxford (for each of which she was awarded a First Class), following which she was called to the Bar in England. She has also been a Visiting Research Fellow at Columbia University in New York City. Elisa is currently practicing at Monckton Chambers in London where she specialises in commercial law, competition law, public law and sports law. She is also an associate member of Howard Zelling Chambers in Adelaide.

2

Etiquette

ELISA HOLMES

Introduction

In 1792, Thomas Erskine was defending the radical Tom Paine from charges of sedition for publishing his book *The Rights of Man*. Carried away in his defence, he said:

Erskine: I will now lay aside the role of the advocate and address you as a man.

Only to be told:

Judge: You will do nothing of the sort. The only right and Licence you have to appear in this court is as an advocate.

According to the judge, there was an important and distinct line to be drawn between a barrister's role as a human being and his or her role as a barrister. It could not be said that this proposition does not remain true today. Otherwise, there would be little point in reading a chapter on barristers' etiquette. This does not mean that barristers are expected to behave in a completely counter-intuitive way, but it does mean that instinct is sometimes, particularly early in an advocate's career, a false friend. It is hoped that this chapter will help you to work out when. Here you can find a simple guide to the kind of conduct expected of you inside and outside of court. You should not forget, however, to familiarise yourself with the professional conduct rules, which, in South Australia of course apply to solicitors and barristers alike. But not all of the rules of etiquette are there enshrined, and indeed many of the most significant rules of etiquette remain creatures of custom rather than written obligation. First though, a few words on what we mean by etiquette.

Court etiquette can be divided between three kinds of consideration. First, much of what is generally referred to as court etiquette in fact comes down to simple courtesy; the sort of thing one observes in any profession which is intended to enable it to function well and maintain its status and credibility. Barristers certainly have their own ways of showing courtesy, and their own procedures for making things run smoothly. By and large though, this is a matter of common sense, and it is not simply coincidence that these kind of behavioural considerations are also those which, when complied with, are likely to make you and therefore your client's case more appealing to a court. Be on time. Treat the judge with respect. This is not of course to say that judges and juries don't apply their minds impartially to the matters they deal with, and are not committed to determining the questions before them on the merits. But judges are human too, and you do no favours to your client by failing to observe general and customary manners.

Nonetheless, barristers are deceiving themselves if they do not recognise that there is also a large element of ritual in what they do. Wearing wigs and asking for permission to leave your seat is not the kind of thing that courtesy and common sense requires in most other professions. These are rules that just have to be learnt and followed if you do not want to stand out and appear foolish. There are not many situations when you can look foolish by not wearing a wig, ideally made out the hair from the mane of a single horse, but this is one of them. Perhaps some people become barristers in part out of affection for dressing up and abiding by ancient customs. Since you are reading this chapter, perhaps this is you. On the other hand, some people think of it as an annoying impediment or source of stress. Like all rituals, court rituals perform a certain kind of function, and say something about the profession. The wigs and the ‘may it please the courts’ turn the courtroom into a certain kind of performance, which you might find helpful or annoying. On a cynical interpretation, the rituals serve to exclude non-initiated members of the public. But taken charitably, you might say that the rituals remove legal proceedings from the level of ordinary life, and enable the court to consider the case with the appropriate degree of detachment. Either way, you have to live with it — many of the customs have survived more than 400 years, so it is unlikely they are going anywhere soon.

This brings us to the final element of court etiquette, which you might call ethics. Lawyers’ duties to their clients are often reasonably clear, but often less clear are the other duties a barrister owes. Lord Macmillan counted five beneficiaries of the duties owed by barristers: clients, opponents, the court, yourself and the state; others might wish to add more. From an ethical perspective, lawyers are in an unusual position, in which the ethics of day-to-day life are often a misleading guide. This is exactly the mistake that Erskine made in the opening quote. The most important parts of court etiquette are those concerned with the peculiar ‘role-morality’ of the different actors in the courtroom. These are the rules, for example, that prohibit a barrister from expressing a personal opinion, withholding an authority, or touting for trade. They are designed to preserve the ethical ecosystem of the courtroom, and impose limits on how far it is acceptable to go in order to win. Some of these rules are serious matters of law; some of them will just get you a bad reputation. The ethics included in this chapter are only an introductory guide; serious and complicated situations may involve complex questions of law.

Of course, in real life these elements of courtesy, ritual and ethics are combined and confused. Together, they form the expected etiquette of a barrister. This is the kind of thing that experienced barristers do effortlessly, without even thinking about it. What follows should help you to manage until then.

Inside the courtroom

General etiquette

Dress

You should always appear neat and tidy when appearing in court. Elderly and distinguished barristers can get away with slightly more outlandish costume, but everyone else should dress conservatively. While directions hearings are less formal occasions, you should still look neat and tidy, and always wear a jacket. Occasionally a judge will combine in court matters with directions hearings and it may not be obvious whether you are required to robe. If you are in doubt, contact the judge’s associate or personal assistant to clarify.

The black barristers’ gown currently worn in court has its origin in the period after the death of Charles II in 1685, during which time the Bar wore the mourning gown. The

popular theory for the piece of triangular cloth attached to the left shoulder of the robes with the long strip down the front of the gown is that it was once a money pouch for brief fees. It was apparently considered inappropriate for barristers openly to ask for or receive payment, so clients were to put the money in money pouch without the barrister seeing it. An alternative theory is that it is derivative of a mourning hood which was cast over the left shoulder and held in place by a lengthy tassel.

Jabots have been worn by barristers since 1640 when plain linen ‘falling bands’ were worn to conceal the collar of the shirt. Jabots in one of the forms popular today — two rectangles — were worn from about the 1680s. In South Australia it is also popular to wear a jabot in the form of a single piece of cloth boarded by lace, and fastened with Velcro behind the neck. In South Australia, it is relatively uncommon for barristers to wear a stiff wing collar (or a collarette for women) and bands (over a collarless shirt), although that is the traditional style of jabot. Whichever style is adopted, your jabot should be clean. It seems perhaps to be something of a trend for barristers to appear wearing jabots that don’t appear to have been washed for years. Jabots should be clean, and worn the correct way round — there should be two pleats at the front and three at the back.

The wearing of wigs by barristers was adopted when they became popular in English society in the 1660s. There is a tradition for Senior Counsel to wear a full bottom wig on ceremonial occasions, such as special sittings, although this practice is by no means universal.

The justification for the requirement to wear robes (the collective noun for wigs and gowns) in modern times is generally thought to be twofold: to encourage anonymity and to promote uniformity of counsel. These considerations are thought to be more important in the context of criminal hearings than in civil cases, hence the growing trend in many jurisdictions for full robes to be worn only in criminal cases. Many barristers who defend the practice of wearing robes in the face of growing pressure for their abolition, contend that putting on robes before going to court helps to put them in an appropriate frame of mind, and in particular, to emphasise the importance and significance of their role in the administration of justice and the formality which such a role requires.

Respecting the judge

It is sometimes observed by new practitioners that being a barrister is a bit like being back in school. You cannot just talk whenever you like or get up and walk around; everything needs permission from the teacher (judge). Historically, the judge was the direct representative of the king, which might help to explain why they are still treated with the kind of respect normally reserved for aged and short-tempered maestros. It is, however, in modern times, a way in which order and formality is retained in what can otherwise be an emotional, combative and/or heated environment. It can in fact be rather shocking the first time you see court proceedings, particularly in one of the higher courts. Indeed, just as the junior barristers become accustomed to the level of formality and deference required, often barristers find themselves facing a new kind of awkward formality when they find themselves appearing before newly elevated members of their own Chambers, friends, and other kinds of personal relations, and still having to show the same level of formal respect. It is, however, perhaps particularly in these circumstances that the customary formality of behaviour in court is most important.

Everything in the court waits for the judge, no matter how slow they may be. Since they are the people who control your fate, and more particularly, that of your client, it pays to

pander to them. The Hon. Justice Young AO has recently written of the pompous 'superior silk', in a passage worth repeating:

If a judge has the gall to ask a superior silk a question, the judge sees a reaction that tells him or her that the superior silk is saying, 'Look, I am an experienced commercial silk. You are an ancient personage who is really not up to my intellectual standard. I will tell you what the law is and how it applies to this case. I will have to do it slowly and carefully so that you can take it in. It will not assist if you interrupt my brilliance with your infantile questions.'

Needless to say the reaction is, 'How can I down this bastard?', a reaction which one instantly suppresses in the interests of justice ...¹

Obviously this is the last situation you want to be in. Treat the judge with the utmost respect, and obedience, however ridiculously they behave. If you receive a question from the bench, address it directly. The judge may be wanting to side with you and is seeking a way to do so.

Some basic court protocol

1. When the judge enters the courtroom, everyone must rise. Usually, the judge will bow to you before sitting down, and you should return the bow. Once they have sat, everyone else should do the same.
2. If you need to leave or enter the courtroom, bow to the judge as you do so. Do not expect them to notice this, but do expect them to notice if you do not.
3. Do not speak or move while a witness or jury member is being sworn in.
4. When you are addressing the court, or being addressed, you should stand.
5. There should normally be only one barrister standing at any one time, unless you are both being directly addressed by the judge. If your opponent rises to their feet while you are speaking, you should sit down and wait for them to make their objection.
6. Unless you are on your feet addressing the court, you should not speak unless you are quietly talking to your leader, junior or instructing solicitor about an aspect of the case which cannot wait for a suitable adjournment.
7. Sotto voce comments, facial expressions, sniggering and sighing whilst your opponent is addressing do nothing to impress the court. If your opponent says something objectionable whilst addressing, you will have an opportunity to respond to it after they finish. If you have no right of reply, you may always seek leave of the court on the basis that there is a matter that was raised by your learned friend that you would like briefly to clarify. It is fair to say that this is a rule with which few, if any, barristers comply 100 per cent of the time. But not only does such behaviour often reflect a lack of respect for your opponent or even the judge, but it can also exhibit weakness and uncertainty in one's own position.
8. Do not enter or leave the court while the verdict is being taken, or during sentencing.
9. A judge should never be left 'undressed'. This means you should never leave a judge alone in court without a barrister present, unless they have given you permission to leave.
10. Indeed, if for any reason you wish to leave the court while the judge is sitting, either because a number of matters are listed in a row without the judge leaving the bench, or because you have to attend to some other urgent matter in the course of a hearing (such as looking for a witness or to speak to your client, usually if there are more than one counsel appearing), you should seek the judge's permission first.

¹ Justice Young, 'Current issues' (2010) 84 *Australian Law Journal* 143, 144.

11. Robed barristers should avoid being seen with the trappings of everyday life. Avoid leaving miscellaneous personal items like newspapers on show.
12. Any of these rules should be ignored if the judge tells you to do so.
13. Mobile phones, pagers, or any other device liable to make an uninvited noise should be turned off immediately upon entering the courtroom.
14. Be polite to court staff at all times. Although not widely considered to be a rule of etiquette, this should be obvious. Remember also that the court staff can be invaluable sources of assistance at all kinds of stages in proceedings.

Honesty

This is the key element of barristers' ethics. It is your duty not to keep back from the court any information which ought to be before it, and you must in no way mislead the court by stating facts which are untrue, or mislead the judge as to the true facts, or knowingly permit a client to attempt to deceive the court. If your client secretly confesses their guilt to you, you must not propound his innocence before the court, although you may test the evidence put against them. Of course, there will be grey areas, when such seemingly simple rules as 'do not lie to the court' still are not quite specific enough to tell you what to do. In such cases you should generally err on the side of honesty, but a really complicated problem may just need some research into the specific law concerning the situation.²

A useful summary of the duty of candour can be found in Canon 22 of the Canons of Ethics of the American Bar Association:

Candor and Fairness: The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of the opposing counsel, or the language of a decision of a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding position in his opening argument upon which his side then intends to rely.

It may seem from a brief reading of this statement that it is no more than a statement of the obvious. But it would be a rare advocate indeed who had not at least one moment or other in his or her career, been tempted to cite evidence out of context, not to disclose every argument in advance in an opening statement or to unfairly represent arguments put by opposing counsel.

One of the most important lessons of advocacy which many if not most barristers never really learn, is that your role as an advocate is to present the true case for your client in as persuasive a manner as possible. It is not to achieve a personal victory by defeating your opponent. The fact of the matter is that most barristers end their careers with something like a 50:50 win:loss record. There is no shame in that. An advocate is a facilitator of justice. As Samuel Johnson stated, 'if lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim'. The most important cases you take on as an advocate will often be the least attractive or appealing on their face. Remember, the justice system works, and maintains legitimacy, only through the availability of capable representation for all.

² *Re Gruzman, Ex parte The Prothonotary* (1968) 70 SR (NSW) 316.

Proceedings

Authorities

It is often tempting, particularly as a young practitioner, to keep a particularly useful case ‘up one’s sleeve’ and not to disclose it. Always provide complete lists of authorities, and in the event you find an authority late in the day, make sure you provide it to the court and to your opponent at the earliest possible opportunity. If you really do only discover an authority on the morning of a day in court, and you wish to rely upon that authority, make sure you take sufficient copies to court — at least one for each judge and one for each of your opposing counsel, and a spare for their instructing solicitor.

The practice of ambush in relation to authorities, whilst sometimes tempting, really will not assist your client’s cause: the judge, not to mention your opposition, will be singularly unimpressed, and rarely will such a practice in fact deprive your opponent from the opportunity to consider their response to such authorities: a sympathetic judge will grant an adjournment to provide an opportunity if required. And of course there’s the matter of your own professional reputation. Developing a reputation for underhanded or less than straightforward behaviour will mean you will not earn professional respect, which in turn will reflect upon the number and quality of instructions you receive, your professional advancement and even the manner in which your arguments will be received by a court.

Remember also, it is your duty to provide all relevant authorities to the court, even if they do not benefit your case.

Forms of address

The courtroom is a very hierarchical place, and this is most obvious when it comes to the different forms of address expected. In most courts in South Australia the correct mode of addressing the judge is to refer to him or her as ‘Your Honour’. This is so in the Magistrates Court, the District Court, the Supreme Court and at federal level, the Federal Court and the High Court. Examples of using this mode of address are as follows:

I am happy to say this is common ground, **Your Honour**.

If **Your Honour** could refer to bundle ‘A’ ...

Has **Your Honour** seen the third affidavit?

If you need to refer to the judge in the third person, use ‘**Her Honour/His Honour**’ instead of ‘her/him’:

Describe the contents of the bag to **Her Honour**

Tell **His Honour** the purpose of that visit

When appearing before the Full Court, or more than one judge, the bench should collectively be referred to as ‘Your Honours’ or ‘the Court’.

When appearing before a Master who is not a judge, the correct form of address is ‘Master’. It is not always straightforward to determine how this form of address works in different contexts. One example is as follows:

I have considered my learned friend’s submissions overnight, Master

It is acceptable in the case of a Master to say, for example,

Have you had the opportunity to read my outline of argument?

If in doubt, few Masters will complain at being called 'Sir' or 'Madam'.

This sounds complicated, but you will be doing it automatically in no time at all.

When referring to the judgment of another judge, you should use their full title, so, for example, 'Smith J' should be 'Justice Smith', or to be completely correct, 'His Honour Justice Smith'. If a judge whose judgment you are referring to was later elevated to a more senior judicial position, for example, to Chief Justice, but when the judgment you are referring to was written they were still an ordinary judge, the correct reference is to 'His Honour Justice Smith, as he then was'.

Finally, when referring to other members of the profession in court, there are a number of common forms of address. Members of the independent Bar should be referred to as '**my learned friend**' whereas solicitor advocates are referred to as '**my friend**'. It is true that this distinction can often be used in jest or with a certain sense of disparagement. Almost (but not quite) needless to say, adopting the distinction for this purpose or in this manner should be avoided. Indeed it is a tradition which is not universally maintained, perhaps particularly in a jurisdiction such as South Australia in which every lawyer is admitted as both a barrister and a solicitor. When referring to one's own instructing solicitors, the proper manner of address is 'my instructing solicitor' or 'those instructing me'. For example, you might have occasion to say:

Would your Honour excuse me a moment while I consult with my instructing solicitor about that question?

A less formal oft-used approach is to refer to 'those sitting behind me'.

Starting a case

After your matter is called on, you should announce your appearance clearly. Your appearance should take the form of:

May it please the Court, my name is [your surname]. I appear for [party name], the [party role] in this matter.

This may be simplified to:

My name is [your surname]. I appear for the [party role].

In general, it is best not to assume that the judge remembers your name. Keep in mind also that announcing your appearance is for the benefit of all individuals in the courtroom, and is also for the transcript. That said, there are different schools of thought about this and some judges prefer counsel who are well known to them to announce their appearance in the form of:

I appear for the [party role].

When in any doubt, however, always announce your name.

For criminal defence lawyers, the Americanism of appearing ‘for the defence’ is to be avoided.

If you are the first counsel on your feet it is always useful to check with the judge that they have received all the material provided by each party, such as the relevant authorities, documents and outlines of argument. In addition it is useful to enquire politely as to whether the judge has had the opportunity to read any material, and if so which material. This helps avoid unnecessary recitation of basic facts and/or law, and consequent wasting of time. Alternatively, if the judge has not had the opportunity to read the material provided, you know that you will need to take the judge carefully through the fundamental aspects of the case.

The first counsel to address the court will usually be the claimant, prosecution, applicant or appellant, as the case may be. Rarely a court will prefer to hear submissions in a different order, and sometimes, in the case of applications, a court even decides it does not need to hear from one party or the other.

After counsel for the claimant, prosecution, applicant or appellant has finished his or her submission, counsel for the opposing party will normally be heard. Again, it is usually practice then for the counsel who went first to have the opportunity to respond. Very rarely a court will give counsel for the defendant or respondent a second opportunity, and usually only when pleaded for by such counsel. This plea should be reserved for the most urgent of circumstances.

It is not common in South Australia for more than one counsel representing the same party to make submissions or examine witnesses, but it is perfectly acceptable for this to occur. Indeed, traditionally junior counsel, following submissions made by leading counsel, is asked by the court if he or she wishes to ‘follow on’. It is a terrifying moment in a junior barrister’s career when he or she is asked for the first time by a (normally very old) judge whether he or she wishes to follow on. It is generally accepted that one should resist the temptation to correct the error of your leader’s ways, although it is fair to say this is not a temptation which is generally regarded as difficult to resist. By the same token, if you genuinely consider that your leader has taken leave of his or her senses and failed to put a pivotal argument and also failed to listen to your urgent whisperings to that effect, then you do have a professional obligation to make the submission to the court yourself. Rest assured, however, most junior barristers appearing with leaders will never face this conundrum, but it is useful at least to be alert to the possibility that a particularly old-fashioned judge may ask if you wish to ‘follow on’ from your leader.

Barristers do not have opinions (and nor can they give evidence)

This is the point we began with, for which Erskine was rebuked. The key to the role-morality of the barrister is to stay completely agnostic about what verdict should be reached. This is for the court to decide, not for the barrister; that is the entire point of the cab-rank principle. Accordingly, it is a cardinal sin for a barrister to give any opinion before the court as to the merits of the case. To do so is instantly to tread on the toes of the judge or jury, and they will not appreciate it. The key to avoiding this is to keep a careful watch on your language. Do not say ‘I think ...’, ‘I feel ...’ ‘In my view ...’ or ‘In my opinion ...’ You are submitting a view to the court and it should be couched in the appropriate terms. Say ‘In my submission ...’ or ‘I submit’, or simply state the proposition you wish to make. This is well summarised by Sir John Barry:

The fundamental misconception which affects the public approach to the art of the advocate and which supplies the basis for the mistrust with which the ordinary man views the profession is the inability of the public to realise that the sincerity of the advocate is not in question, that in the exercise of his duties an advocate is not, and is not thought to be, expressing his own opinions, he is merely urging to the best of his ability all those matters which are relevant to the cause of his client, so that those whose business it is to judge should not pronounce judgment without having had the advantage of hearing all that can be said from the client's point of view.³

Just as a barrister should never give an opinion, they should never give evidence. Evidence can only come from the witness box. This is especially a risk in closing speeches. 'Common knowledge' may be assumed — it is said that a judge can take 'judicial notice' of such facts. It is not necessary, for example, to prove to the court in evidence that Adelaide is in Australia. If however you wanted to refer to the geographic boundaries of Adelaide, then this would have to be established by evidence from a witness.

Witnesses, opponents and judges in the court of a hearing

When your witness is being cross-examined by the opposition, you cannot confer with them, unless you have the consent of your opponent and the court. It is pretty obvious that you cannot stand up in the middle of the cross-examination and tell your witness that they are not sticking to the story that you prepared beforehand. But this also means that even if you break for lunch or the end of the day, you still are not allowed to confer with the witness until they have finished giving their testimony to the court. This rule does not prevent you being polite and civil to your witness, but you should be very careful about even giving the impression or behaving in such a manner as might even raise a concern to any onlookers that you might be discussing the witness' evidence or aspects of the case generally.

If you happen to see your judge on the train on your way home, you should not try to strike up a conversation with them. You should avoid any social occasions at which your paths might cross if at all possible between the beginning of a trial and the delivery of judgment. This is not always avoidable, but if you know you are attending an event at which the judge will be present, it is good practice to inform your opponent. Under no circumstance, of course, should you ever raise in conversation any aspect of the case in which you are currently appearing before that judge. If you do speak to the judge outside the court — in their chambers for example at the judge's request — the correct form of address is, with perhaps surprising simplicity, 'judge'.

It is common, particularly in a relatively small profession, for counsel for either side of a case to know each other with varying degrees of familiarity. There is of course nothing wrong with that, and nor is there a rule of conduct which prevents opposing counsel speaking to each other about a case in which they are both appearing. Indeed, on many occasions discussion between counsel can be incredibly useful. You should, however, be aware that whilst you and your opposing counsel understand that you may be friends outside of court and that this does not prevent you arguing your client's case with the utmost vigour, your client may not be quite so accustomed to these circumstances. It is, therefore, usually advisable to maintain a reasonable degree of formality with your opposing counsel at least within the precincts and surrounds of the court for the duration of a hearing.

³ Address of Sir John Barry, reproduced in J L Glissan, *Cross-Examination Practice and Procedure: An Australian Perspective* (Legal Books, Sydney, 1985).

Time and efficiency

Trials are an enormously expensive way of conducting justice, which makes it all the more important not to waste the court's time. So, be on time. Judges are sensitive to the pressures on barristers and that on a few extremely rare occasions lateness cannot be avoided. If you cannot avoid being late, inform your opponent as well as the judge's associate, so neither the judge nor your opponent is left waiting around for you. Again a matter which should perhaps go without saying, but just in case it does not, make very sure to apologise to the court and to your opponent when you do arrive late for a hearing. Remember also that blaming others for your lateness is rarely attractive advocacy and should be avoided except perhaps as part of the explanation as to why you are sorry that you have not made it on time and have thereby inconvenienced a large number of people.

Timeliness is equally important before the date of the hearing. Lists of authorities and outlines of argument should be provided on time. The purpose of providing lists of authorities is for court staff to pull them out for use in court. It puts significant strain on court staff if they have to do this at the last minute before court. Written outlines of argument are required in order to enable judges to be prepared to avoid unnecessary use of courts' time. Quite apart from this practical purpose, they are an opportunity for you to get the judge on your side: written advocacy can be equally as important as oral advocacy, and indeed a good outline of argument can form the basis of a court's judgment, hopefully in your favour.

Appearing to be concerned not to waste everyone's time can only help your standing with the court. Often in the course of a case you will find that you give estimates of how long things are expected to take. Make these often and accurate, and the rest of the court will thank you for it. Estimating time is not an easy task, but it is important not to be overly ambitious, nor overly cautious when doing so.

Barristers may find themselves with clashing court commitments. Obviously this should be avoided if at all possible. The most successful barristers, however, tend to be the busiest barristers, and a barrister should not sit around waiting for cases to come to trial before accepting new instructions, and innocent clashes are not infrequent. If this does happen, the rules of thumb for deciding priority are quite common-sense; first come first served, cases where you have done the preliminary work of statements of claim or defence take precedent, and criminal cases take precedent over civil ones. Sometimes you will be in a position to find another barrister, or even your solicitor, to do a smaller hearing for you, and sometimes a listing may be able to be moved. Clashes should in any event be addressed at the earliest possible stage.

A rather more old-fashioned rule based on the concern with efficiency and time management is the rule that requires a junior barrister being lead to be ready and able to take over conduct of a case in the event his or her leader suffers some kind of misfortune which prevents him or her from being present at the hearing. This rule is not always enforced, and in such circumstances a hearing will generally be adjourned. However junior barristers should bear in mind that sometimes these kinds of unfortunate circumstances can be the making of a junior barrister's career by presenting an opportunity which you would otherwise not have had at that stage of your career. Preparation is the key to good advocacy, and junior counsel should be as, if not better, prepared as his or her leader.

Outside the court

The standard of public behaviour which is expected of a member of the legal profession, and in particular of the Bar, outside of the courtroom, is generally a matter of formally recorded professional conduct rules. Outside of these rules, the behaviour expected of a member of the profession generally is a matter of commonsense, to be applied in light of the particular circumstances. There are, however, some matters worthy of particular mention, both in relation to a barrister's conduct generally and in relation to their interaction with other members of the profession.

When corresponding with judges in your capacity as a barrister, you should address any correspondence that you wish to come to the attention of the judge not directly to them, but rather to their associate or personal assistant. Further, unless you know a judge particularly well, you should refer to them as 'Judge' at any professional event or in professional circumstances.

As far as other members of the profession are concerned, one matter to be aware of outside of the context of the conduct of a particular case in court is the appropriate action to take if you receive instructions or take over a brief in which another barrister had previously been instructed. In these circumstances it is generally regarded as good practice to contact that other barrister in order to inform them that you have been instructed. It is usually not pleasant to have instructions transferred away from you to another barrister, but it is particularly undesirable to find out only by accident. One would, of course, hope that the barrister formerly instructed had been informed of any such decision by their instructing solicitor, but sometimes this is not the case. In any event, it can be useful to get a feel for a case, and for particular difficulties which might arise, by talking to a barrister who has previously been instructed.

There is a long standing prohibition against barristers 'touting' themselves. The absolute nature of this rule has been eroded in recent times to varying extents in different jurisdictions. Although in Australia the prohibition remains generally intact, in Britain, the rather more corporate nature of chambers, which do engage in various kinds of chambers-branded marketing, has meant the rule has been significantly softened. The intent of the rule is that a reputation and practice should be built up only on the barrister's skill in the courtroom, and not on their skill in marketing themselves. This can make life hard particularly for a junior barrister, and particularly for one who may feel as though they do not have good contacts within the profession when they start out. Barristers are, of course, entitled to any favourable reporting in the press which they receive in the course of their trials; but they may not initiate it. Once upon a time, barristers writing in the press or appearing on air were not allowed to give both their name and their profession; they had to choose one or the other. This rule has, however, now been abolished.

It remains a rule in most jurisdictions that you should not try to leverage your position as a barrister for your own personal gain. For instance, it is very bad form to write personal letters (eg, complaining to your mobile telephone carrier) on officially headed note paper. You should not even sign off a letter as 'barrister-at-law' or something similar, if the purpose is in any way to intimidate or impress whoever it is you are corresponding with outside of your professional capacity.

Finally, most people have heard of the 'cab-rank rule' in the context of practice as a barrister. In short, barristers cannot pick and choose their clients. The so-called cab-rank principle is the key to the whole role-morality of a barrister. As long as you have time, the

case is within your area of competence and properly priced, and you are not conflicted in any way, you must, in theory, accept any instructions which come your way. The rule at the civil and commercial Bar, these days, has been substantially relaxed, largely as a result of increased specialisation and the fact that the demands of commercial and civil litigation mean that it is generally very easy not to accept a new brief on the basis that you do not have time to do it. But the rule is still particularly important for those practicing in criminal law. The rule is intended to ensure that even the most unpopular people in the most unsavoury matters still have access to justice. This principle was less firmly established when Erskine defended Tom Paine, and he was roundly criticised for defending a traitor. He was even sacked from his government position as Solicitor-General for doing so. Since we began with him making a mistake, let us end with him making a classic statement of justice. When told that he was to be sacked for defending Paine, he replied:

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.

Part II

Ethics, Duties and Obligations



Photograph courtesy of the author

The Hon. Justice Jennifer Davies

Justice Davies is a judge of the Supreme Court of Victoria having been appointed on 6 April 2009. She practised as a barrister specialising in taxation law from 1983 to 1987 and from 1990 until her appointment to the Bench. She took silk in November 2004. Justice Davies held various offices at the Victorian Bar, including as a member of the Bar Council, the Chair of the Ethics Committee and President of the Tax Bar Association. Her Honour has maintained an interest in legal education and currently lectures at the University of Melbourne in taxation law and written advocacy.

3

The Importance of the Advocate to the Administration of Justice

JENNIFER DAVIES

Horace Rumpole: A barrister, my dear sir, is a taxi plying for hire. That is the fine tradition of our trade.

Role of the advocate in the justice system

Rumpole's reflections on the legal profession are legendary for their comic relief. Some of them are also insightful observations about the role of the advocate in the justice system. The taxi analogy is one example. Barristers are professionally bound to accept any brief offered that is within their area of practice, just as a taxi driver waiting at a taxi rank must accept any fare paying client. In legal lexicon, the duty on barristers to provide independent dispassionate representation is known as the 'cab-rank' rule. This duty is in recognition of the fact that everyone is entitled to representation before the law and to the full protection of the law.

Affording access to legal representation

Rumpole's character as a barrister was marked by his staunch belief in an accused's right to representation and a fair trial. This was so regardless of the nature of the crime for which the accused was charged or Rumpole's personal views about his client. Rumpole thought that the cab-rank rule was a 'fine tradition'. The importance of this 'fine tradition' was explained by Brennan J in *Giannarelli v Wraith*:

It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on the payment of extravagant fees. If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful. If the cab-rank rule be in decline ... it would be the duty of the leaders of the Bar and of the professional associations to ensure its restoration in full vigour.¹

The professional responsibility on barristers to accept a brief is regarded as a 'fundamental and essential part'² of the justice system. The duty on barristers to accept a brief in the area in which he or she practices³ ensures that those who require access to the courts will have access to legal representation. This, in turn, contributes to ensuring that those who find

¹ (1988) 165 CLR 543, 580.

² *Arthur JS Hall and Co (a firm) v Simons* [2002] 1 AC 615, 739 (Lord Hobhouse).

³ Victorian Bar, *Practice Rules — Rules of Conduct and Compulsory Continuing Legal Education Rules* 2009 r 86.

themselves before the courts have a fair opportunity to put their case or to meet the case put against them.

Affording the protection of the law

In *D’Orta-Ekenaike v Victoria Legal Aid*⁴ Gleeson CJ, Gummow, Hayne and Heydon JJ commented that in Australia, advocacy in the courts is principally carried out by those who practice exclusively as barristers. They went on to state that the barrister is ‘as indispensable to the administration of justice as the judge’ and that ‘[t]he independence of the Bar in large part therefore secures the independence of the judiciary’.⁵ The observation is not confined to the role of barristers though. Those who practice as advocates, whether as members of a separate independent Bar or in a fused profession have the same paramount responsibilities to the court in serving the interests of justice.

The comments of the High Court in *D’Orta-Ekenaike v Victoria Legal Aid* highlight the important role that advocates play in the administration of justice. The right to representation and the right to a fair trial both define and are the hallmarks of our justice system. It is therefore axiomatic that those who practice as advocates, whether as members of an independent Bar or as solicitors, will play a significant role in promoting and safeguarding those rights. Members of the public do not have the legal skills to provide themselves with the full measure of the protection of the law. The public relies on the advocate to promote and protect their interests and to bring the legal skills and knowledge required to look after their interests independently and dispassionately.

Independence and objectivity

Independence and objectivity are critical facets of the advocate’s retainer. The public is entitled to expect that the person representing them is acting in their best interests and exercising independent judgment, uninfluenced by the advocate’s personal view of the client or of the client’s activities. The trust and confidence of a litigant in the advocate representing them instills trust and confidence in the legal system. Public confidence in the legal profession is fundamental to the justice system. The public is justified in lacking confidence in a legal system where litigants are represented by advocates who allow their personal views to intrude on pursuing their client’s interests.

Interface between the users of the legal system and the courts

Access to justice and the principles of a fair trial are at the heart of the justice system. Advocates have the professional responsibility to ensure that the justice system delivers both. They are the interface between the users of the legal system, namely those who have substantive rights to enforce or to protect, and the courts which have the responsibility of determining those rights justly and fairly in accordance with the law. Advocates play a vital role in the adversarial system by assisting judges to decide cases impartially, presented with all the factual and legal matters that bear upon the outcome.

Duties to the court

For this reason, the professional responsibilities on advocates extend beyond their client’s interests. The paramount duty of the advocate is to serve the administration of justice, which is best served by ensuring that the court is able to decide the case fairly, impartially

⁴ (2005) 223 CLR 1.

⁵ Ibid 105.

and in accordance with the law. Advocates therefore have duties to the court which prevail over the advocate's duty to his or her client.⁶

These duties to the court are directed at preserving the integrity of the judicial system and explain the ethical standards which counsel are expected to adhere to in their practice as advocates. A high standard of conduct is fundamental and necessary to ensure that justice is administered justly, fairly and in accordance with the law.⁷

In *Giannarelli v Wraith*, Mason CJ 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 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 ...

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.

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 epitomizes 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 to the speedy and efficient administration of justice ...

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.⁸

To put it differently, the client's interests are coextensive with the advocate's duties to the court.

Commanding the confidence and respect of the court

Central to the advocate's role is commanding the confidence and respect of the court. Judges rely heavily on the faithful exercise by the advocate of an independent judgment in the conduct and management of a case. The adversarial system places on advocates the primary role of identifying the issues in dispute between the parties, the evidence to be relied upon to resolve the dispute and the legal questions that must be decided by the judge. If the case is presented poorly, if there has been a failure to identify where the dispute lies between the parties or if unnecessary legal costs are incurred and time wasted by pursuing irrelevant issues, the adversarial system does not deliver a fair, efficient and just means for dispute resolution.

Not misleading the court

It is essential that advocates do not allow clients to take over litigation at the expense of their own independent judgment or allow the court processes to be abused. It is equally important that advocates do not mislead the court as to the law but do what they can to

⁶ *Giannarelli v Wraith* (1988) 165 CLR 543, 555-6 (Mason CJ), 572 (Wilson J).

⁷ *Hoe v Manningham City Council* [2011] VSC 37, [5] (Pagone J).

⁸ (1988) 165 CLR 543, 556-7.

ensure that the law is correctly applied to the case.⁹ If a court is misled about the law, it may cause a fundamental error to be made by the judge in the delivery of his or her decision. It is not in a client's interests to win at trial on a wrong basis because the judge was not informed of binding or persuasive authority against their case. Equally so, the administration of justice is not served if the advocate misleads the court about the facts. Inevitably there are occasions when an advocate may make a mistake about the law, inadvertently fail to bring an authority to the attention of the court, or unknowingly may make a misleading statement about the facts. If any of these circumstances arise before judgment is delivered, the advocate has a duty to bring it to the attention of the court, otherwise the court will have been misled.

Presentation of evidence

The concept of a fair trial also extends to the way in which an advocate presents evidence at trial. There is a difference between robust questioning and questions that are calculated to intimidate or demean a witness. Forceful advocacy can be expected, but 'bullying' of witnesses compromises the integrity of the evidence that is given. A witness may be intimidated by expressions of personal opinions, gratuitous comments or improper remarks from counsel during evidence. Similarly, when a witness's answers are cut off, where counsel misstates the import of the answers given or asks questions that assume facts in issue where the assumption has not been made out, a witness's testimony may be affected. This kind of advocacy distorts and corrupts the fact-finding process and is of no aid to the court. Courts have no hesitancy in viewing this kind of conduct as misconduct on the part of the advocate, tainting the trial process and deserving of trenchant criticism of the advocate.¹⁰

To give assistance

The court's task is 'to ascertain the rights of the parties'.¹¹ The court can ordinarily look to the legal representatives of the parties to assist it in the discharge of that task. Where a litigant is represented, the judge relies on the professionalism and competence of the advocate. Unrepresented litigants potentially create difficulties because the court must take care to ensure that they are not unfairly disadvantaged by his or her lack of representation. The duties on advocates extend to assisting the court when a litigant appears without representation in ensuring a just and fair trial.¹² Lack of representation does not mean that a person does not have a meritorious case to put forward. Equally so, a meritorious case may not be apparent from the way in which the case is presented by the unrepresented party, because that person does not have the legal knowledge and skills to identify their rights. The right of a litigant to a fair trial may require the judge to call upon advocates to act as *amicus curiae*. Their role is to assist the court where otherwise evidence or submissions of central relevance to the case may not be advanced.¹³ It may also mean that the judge relies on the integrity and professionalism of the advocate for the opposing party to test or tease out the aspects that will bear upon decision-making.

⁹ *Re Gruzman* (1968) 70 SR (NSW) 316, 323.

¹⁰ See, eg, *Rees v Bailey Aluminium Products Pty Ltd* (2008) 21 VR 478; *Baulch v Lyndoch Warrnambool Inc* [2010] VSCA 30, [12]-[15], [23]-[29], [71] (Neave, Bongiorno JJA and Byrne AJA); *Smout v Smout* (1989) VR 845; *Reid v Kerr* (1974) 9 SASR 367.

¹¹ *Neil v Nott* (1994) 121 ALR 148, 150 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹² *Platcher v Joseph* [2004] FCAFC 68, [105] (Tamberlin and Emmett JJ); *McWhinney v Melbourne Health* [2011] VSCA 22, [26] (Neave, Redlich and Mandie JJA).

¹³ *McWhinney v Melbourne Health* [2011] VSCA 22.

Efficient and economical litigation

Traditionally preparation for trial has been left to legal practitioners and courts have not actively participated in the trial process. However, the High Court in *Aon Risk Financial Services v Australian National University*¹⁴ ('*Aon*') has now made it clear that considerations of justice include not only justice between the parties, but also the public interest in the proper and efficient use of public resources.

There is a compelling public interest in efficient and economical litigation. Regrettably there is a perception that lawyers have been failing in their duty to assist the court to determine disputes efficiently and economically. Visions of Charles Dickens' *Bleak House* of the Chancery Court, and the lawyers who appeared there, are conjured up by the many criticisms made about delays in the court system and the cost of litigation.

Responsibility to avoid delay and unnecessary costs

Aon makes it absolutely plain (if it were ever in doubt) that lawyers have a responsibility in the conduct of litigation to avoid delay and unnecessary costs.¹⁵ Likewise advocates have a primary responsibility to the court to facilitate the just resolution of issues with minimum delay and expense. The Commonwealth and several States have given, or intend to give, legislative force to these professional duties.¹⁶ For example the *Civil Procedure Act 2010* (Vic) ('the Act') provides that the main purposes of the Act include:

To provide for an overarching purpose in relation to the conduct of civil proceedings to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.¹⁷

The Act imposes 'overarching obligations' on legal practitioners to further that overarching purpose, including the 'paramount duty to the Court to further the administration of justice in relation to any civil proceeding in which that person is involved'.¹⁸ This is achieved by avoiding undue delay and expense and only taking steps which the legal practitioner 'reasonably believes is necessary to facilitate the resolution or determination of the proceeding'.¹⁹ Furthermore, the legislation expressly provides that legal practitioners must cooperate in the conduct of the civil proceeding, must not mislead or deceive, must use reasonable endeavours to resolve the dispute, must use reasonable endeavours to narrow the issues in dispute, must ensure that costs are reasonable and proportionate, must minimise delay, must act honestly and must have a proper basis for a claim or any response to a claim.²⁰ It is readily apparent that these 'overarching obligations' codify the standard of conduct expected of legal practitioners. These are found in one form or another in the professional rules of the governing professional bodies, although arguably the obligations impose greater responsibilities on legal practitioners than hitherto they have been subject under the common law. The Act expressly provides that the court may enforce sanctions against legal practitioners personally for breaches of those obligations.²¹

¹⁴ (2009) 239 CLR 175.

¹⁵ Ibid.

¹⁶ *Civil Dispute Resolution Act 2010* (Cth); *Civil Procedure Act 2010* (Vic); *Civil Procedure Act 2005* (NSW); Queensland has implemented a number of reforms which introduce pre-litigation requirements in certain types of dispute, see, *Personal Injuries Proceedings Act 2002* (Qld).

¹⁷ *Civil Procedure Act 2010* (Vic) s 1(1)(c).

¹⁸ Ibid s 16.

¹⁹ Ibid s 19.

²⁰ Ibid s 16-26.

²¹ Ibid s 29.

Appropriate interlocutory steps

Some of the concerns about inefficiency and costly justice may be justifiably directed to the way in which courts regulate their own processes. Some of those processes do not foster practices that assist in achieving an efficient and economic system of justice. However, court processes can no longer be used as an excuse. Many courts in Australia are introducing reforms to assist in achieving the prompt, efficient and affordable resolution of disputes in the adversarial system. A key reform has been active judicial case management. This reform has been adopted by the Supreme Court of Victoria in the creation of the Commercial Court. The significance in this initiative lies in the shift from practitioner led case management to judge led case management for cases brought within the Commercial Court. Cases in the Commercial Court are managed by the judges under a docket system. When a proceeding is filed in the Court, the case is allocated to a particular judge. That judge will manage the steps that can be taken in preparation for trial to the actual hearing, if the case is not resolved beforehand.

Judicial case management is intended to assist the parties in identifying, clarifying and refining the actual issues in dispute early in the process so that preparation for trial can be structured, focused and directed to the dispute that needs to be resolved between the parties. Pleadings often do not serve their function of clearly and precisely identifying the issues between the parties. Usually that is because the pleadings are drawn early in the dispute when counsel has only a skeletal understanding of the case. Pleadings are based on instructions prior to counsel's involvement in actively working out what the case is about and how it must be proven. Defining and limiting the issues for trial at an early stage assists parties to avoid arid contests and unnecessary steps with consequential costs and delay. Effective case management also helps place the parties in a position to facilitate a resolution without adjudication whilst also ensuring that the case is appropriately made ready for trial, should that be necessary. This ensures that the resolution of the matter can be achieved in a timely fashion, even when adjudication is necessary. For these outcomes to be achieved active consideration as to what preparation a case needs must occur *before* costs are incurred and *before* time is unnecessarily wasted.

Early preparation

Advocates have a key role in this new process. Its effectiveness in achieving the objectives of efficient, economical and just resolution of disputes requires lead counsel, who will have ultimate responsibility for the conduct of the case at trial, to, by the time that pleadings have closed, have a clear understanding of the key issues, the evidence required to be adduced and the legal questions that will arise.

Structured informed preparation

Not all cases require case management and not all courts will adopt active case management practices. However, the reforms referred to highlight the valuable contribution advocates are expected to make to the adversarial system in achieving the objectives of efficient and just dispute resolution. Efficient and just dispute resolution extends to the way a case is prepared for trial, regardless of whether it is judge managed. The obvious advantage is structured, informed and directed preparation for trial, which minimises unnecessary and often costly steps and time wastage before a matter is made ready for trial. It should also encourage cases to resolve without court determination, as it puts the parties into a position, as soon as practicable, to be able to make informed decisions about settlement.

Conclusion

The role of the advocate in the administration of justice is an important and vital one — public respect for the law and the justice system is secured by community confidence and trust that the justice system will deliver just and fair outcomes according to law. This community confidence and trust is fostered by advocates exercising the highest standards of competence and professional ethics.

Jean Pierre O'Higgins: What do you say then, Mr. Horace Rumpole? Will you take me on?

Horace Rumpole: Well, I'll have to think about that.

Jean Pierre O'Higgins: Be honest. Is it my personality that makes you hesitate? Do you find me objectionable, Mr. Rumpole?

Horace Rumpole: Mr. O'Higgins, I find your restaurant pretentious and your portions skimpy. Your customers regale themselves in a dim religious atmosphere more fitting to evensong than a good night out. I find you an opinionated and self-satisfied bully. However, unlike you, I am on hire to even the most unattractive customer.'



Photograph courtesy of the author

Jonathan Wells QC

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4

*Ethical Obligations of the Advocate*¹

JONATHAN WELLS

Section I — Adversary justice: A model

Our system of administering public justice is adversary. There is a proponent and an opponent. The proponent seeks to prove; the opponent resists proof. Each must persuade.

Ours is an evolved system. It was brought to these shores with European settlement. The inherited system was the evolved product of English history, having its origins in a culture of contest which produced an accusatory process.

This system of justice exhibits at least the following features:

- The responsibility of delivering a just determination of the dispute or charge lies in the hands of an independent, impartial and learned judiciary, who play little or no part in defining the issues for decision,² or gathering the information relating to those issues; and
- The parties to the dispute or charge have the principal control over the choice and formulation of issues to be presented for decision, and the gathering and presentation of the information relating to those issues.

An evolved rationale

The rationale underlying these features is little more than a collection of beliefs about an efficient process for the delivery of justice.³

A professional judiciary is essential: A professional body of independent and impartial judges ensures that justice will be administered according to law, not according to whim.

Participatory justice: By and large, disputants will — and do — accept the results of a process which they have had a fair opportunity to participate in and influence. This notion that a system of justice should empower the disputants, not leave them disempowered, we may call ‘participatory justice’.

Proof by contest and decision after debate: Enquiry into the truth is limited to the proof or disproof of an identified allegation after fair enquiry conducted by a contest, with the opportunity for confrontation. Participatory justice is served by argument on both sides of

¹ This chapter is based on a paper presented to a Professional Development Seminar of the South Australian Bar Association on 19th May 2010.

² The control exercised by the court in managing a case is directed towards an efficient use of court time, not towards judicial choice of issues or judicial search for information.

³ David Luban, *Lanyers and Justice: An Ethical Study* (Princeton University Press, 1988) ch 5.

the dispute, by which the judicial focus is sharpened, the choices for judicial assessment presented, and the risk of something being overlooked reduced.

Adjudication limited to the dispute: Efficiency in the conduct of litigation is promoted where the system is focused upon the ‘quelling of controversy’⁴ or the proof of an accusation, and confines its consideration to the information brought forward by the parties. The corollary of participatory justice is that a party cannot complain if the dispute is decided only on the information brought forward. Allowance must inevitably be made for human failings and limitations. For example, the principle that an adverse judgment or verdict may be set aside if further material information comes to light that could not have been gathered earlier; that is, an assumption underlying the model of adversary justice is shown to be invalid.⁵

The emergence of the professional advocate

It seems inevitable that the efficacy of such a system requires the participation of a trained advocate. The parties themselves will usually lack the necessary skill and experience to search out the relevant and admissible information; to assemble and present the information, test adverse information, and to present persuasive argument both in support of their case and in answer to their opponent’s case. Hence the emergence of the professional advocate to represent the client’s interests in ensuring effective participation. History supports this view.⁶

Section II — The justice dimension

But what does it mean to represent a client’s interests in ensuring effective participation?

Neutral partisanship

According to the American tradition, the standard conception⁷ or dominant view⁸ of ‘adversarial advocacy’ consists of the ‘principle of partisanship’ combined with the ‘principle of neutrality’.⁹ The principle of partisanship is said to mean that:

the lawyer is permitted and required to do *everything* to further the client’s interests *provided only* that it is neither technically illegal nor a clear breach of a rule of conduct. The principle holds even when it clearly thwarts the aims of the substantive law.¹⁰

The principle of neutrality (or non-accountability¹¹) is said to mean that:

⁴ Cf *Fencott v Muller* (1983) 152 CLR 570, 608-9 (Mason, Murphy, Brennan and Deane JJ); *Re Wakim: ex parte McNally* (1999) 198 CLR 511, [135]-[147] (Gummow and Hayne JJ); see more recently, *D’Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1, [32], [43] (Gleeson CJ, Gummow, Hayne and Heydon JJ) and *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [222] (Gummow J).

⁵ For the origins of the principle, see, D M Gordon, ‘Fraud or New Evidence as Grounds for Actions to set aside Judgments’ (1961) 77 *Law Quarterly Review* 358 (pt I), 533 (pt II).

⁶ William Forsyth, *The History of Lawyers* (Estes and Lauriat, 1875) ch VIII; Wilfrid Prest, *The Rise of the Barristers* (Clarendon Press, 1986) ch 2.

⁷ Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer’s Role* (Aldershot, 2009) 5-12; David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 20.

⁸ William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (Harvard University Press, 1998) 7.

⁹ Richard O’Dair, *Legal Ethics: Text and Materials* (Butterworths, 2001) 134; Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2007) 14-5.

¹⁰ O’Dair, above n 9, 134; cf Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press, 2010) 29-31.

¹¹ Wendel, above n 10, 29-30.

the lawyer is *not morally responsible* [ie, accountable] for either *the means* or the *ends* of representation, provided both are lawful. If the lawyer were morally responsible, it is said, the lawyer may not be willing to act zealously to represent the client's interests.¹²

In recent decades these two principles have been subjected to a sustained and eloquent attack from American ethicists,¹³ and taken up by ethicists in other common law jurisdictions.¹⁴ Their concern has been that practising lawyers, in the name of these principles, undertake in their professional lives (it is said) actions of doubtful morality which they would never undertake in their personal lives. The solutions they have variously proposed all involve the abandonment of the two principles (partisanship, neutrality) in favour of actions consistent with the personal morality of the lawyer.

It is the thesis of this chapter that, at least in the context of the Australian legal system,¹⁵ justice is the true source of an advocate's ethics, and the principles of neutral partisanship can be re-expressed as moral principles.

The business of the advocate is justice. The way it is conducted (the ethics of the advocate) must — indeed does — respond to some conception of justice. The question is; what is justice *from the advocate's point of view*?

Some thoughts on justice

Strangely, the attainment of justice, it seems, has too much of the abstract and remote about it to stir us. *Injustice* can stir us, we can engage with *injustice*. It stirs up our indignation, even our anger. But justice, it seems, is a remote, austere virtue.¹⁶ This abstraction seems to suggest an unattainable ideal in a practical and human world.

This abstraction can be demoralising for lawyers. In the eyes of the community, we (the lawyers and the judiciary) are supposed to stand for this Great Virtue, and yet the application of the law is talked of as a denial of justice, and the role of the lawyer as a cynical manipulation of rules on behalf of clients up to no good, in exploitation of the weak.

But there is a conception of justice which belongs to *lawyers* — the workers in the vineyard — and which is always ours to give: neither remote from the white water of practice, nor

¹² Parker and Evans, above n 9, 14; O'Dair, above n 9, 134; cf Wendel, above n 10, 29-31. These two principles have received their most classical treatment in academic writings that include the following: Monroe H Freedman, *Lawyers' Ethics in an Adversary System* (Bobbs-Merrill, 1975); Stephen Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities' (1986) *American Bar Foundation Research Journal* 613; see also, Robert A Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2003); Dare, above n 7.

¹³ Among them: Luban, above n 3; Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press, 2000); Deborah L Rhode, 'Ethics in Practice' in Deborah L Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, 2000) ch 1; Simon, above n 8; William H Simon, 'Lawyer Advice and Client Autonomy: Mrs Jones's Case' in Deborah L Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, 2000) ch 9; Wendel, above n 10.

¹⁴ Among them: Kim Economides, (ed), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, 1998); Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999); O'Dair, above n 9; Parker and Evans, above n 9; Stephen Parker and Charles Sampford, (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, 1995); Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (Butterworths, 1995).

¹⁵ Despite the views of some: see, Parker and Evans, above n 9, 14.

¹⁶ Cf C K Allen, *Aspects of Justice* (Stevens and Sons, 1958) ch 1, 12.

elusive, but on the contrary, a present reality in which we can, and must, become personally involved.

When the Emperor Justinian commissioned the jurists of his day to codify the Roman law, and to produce from that a version suitable for students (*the Institutes of Justinian*) they turned to Plato and Aristotle for the statement about Justice with which the work commenced: **Justice is the set and constant purpose to give to everyone their due**.

The statement is not a definition; it describes a disposition. It does not identify 'justice attained'; it describes 'justice at work'. It is a verb, not a noun. The paradox is that the disposition may be as close as we can get to a definition. If, as the late Professor Frank Dowrick suggests,¹⁷ 'the pervading idea, justice, should not be confinable within a short, verbal formula ...' it is because justice is not so much the destination as the journey. There is much to be gained, however, from signposts.

'The set and constant purpose': Justice depends on a continuing attitude; the desire, the determination, to do justice, to see justice done.¹⁸ This is not question-begging, but a truth: the desire to give everyone their due, or to see due given, is itself a continuing action of justice. The courtroom where that 'set and constant purpose' is evident is a very different place from the courtroom where it is not.

'To give to everyone their due': In our legal system, there are at least three senses in which one can talk about what is 'due', and these give rise to a *three-dimensional concept of justice*, from the advocate's point of view:

1. The first dimension anchors our adversary system of administering public justice. It is concerned with what is *due* to a person as a participant in the administration of adversary justice.
2. The second dimension responds to the values inherent in the Rule of Law. It is concerned with what is *due* to a person from the law; that is, justice according to law, not according to whim; that is, the full protection, and the full benefit, of the law.
3. The third dimension addresses the human condition. It is concerned with what is *due* to every person as a living human being; it asserts that it is the vocation of the lawyer to honour and uphold the 'unconditional preciousness of every human being';¹⁹ and, whatever the law deals out, the person affected should be treated with honour and respect as a human being. That is also, and always, their *due*.

We should not overlook the words, 'to give to everyone'. No doubt the Roman jurists contemplated that the definition applied only to the privileged few who were able to come to court, but to the modern ear, the implication is radically different: *everyone* should have access to the courts. That is part of what justice means, part of what is *due*. 'Access' means affordable and effective access. The adversary system of public justice makes it clear, I think, that pro bono legal work is an imperative of ethical lawyering.

¹⁷ F E Dowrick, *Justice according to the English Common Lawyers* (Butterworths, 1961) 219.

¹⁸ This has parallels with virtue ethics which is concerned with the moral disposition or character with which action is undertaken; see, Allen, above n 16, 5; Alasdair MacIntyre, *After Virtue*, (Duckworth, 3rd ed, 2007) ch 12; James Rachels, 'The Ethics of Virtue', in Cahn and Markie (eds), *Ethics: History, Theory and Contemporary Issues* (Oxford University Press, 3rd ed, 2006) ch 41; Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (The Belknap Press of the Harvard University Press, 1993).

¹⁹ Raimond Gaita, *A Common Humanity: Thinking about Love, and Truth and Justice* (Text Publishing, 1999) 53.

Section III — The first dimension of justice: Validating the adversary system of public justice

It was earlier contended that the development of the adversary system of public justice made the emergence of the trained professional advocate inevitable. The participation of a trained professional advocate is also necessary.

The assumptions that underlie adversary justice

The efficacious operation of the model of adversary justice outlined earlier (participatory justice) may be seen as dependent on a number of fundamental assumptions. Unless the accuracy of these assumptions can be assured, the model has little, if anything, to commend it as a supportable method of delivering public justice.

Judicial independence and impartiality is protected: it is assumed that the independence and impartiality of the judiciary is unassailable, and unassailed. Independence and collegiate impartiality is no less required of a jury in a criminal trial.

Diligence in the search for information: it is assumed that information in support of, or in opposition to, the claim or accusation will be diligently searched out and examined by the respective parties, and self-interest will promote, if not secure, that diligence.

Equal access to information: it is assumed that the disputant parties to a claim or accusation have more or less equal access to the sources of information from which they will select material (oral and documentary) for presentation to the court.

No information is withheld: it is assumed that no relevant evidence will be suppressed or deliberately destroyed.

Untainted witnesses: it is assumed that the witnesses through whom relevant information is to be conveyed to the court will attempt to give an unbiased, uninfluenced, and accurate account of what they observed of the relevant matters.²⁰

Equal resources: it is assumed that the disputant parties to a claim or accusation have more or less equal resources to enable them to advance and protect their interests in the litigation.

Equal ability to contest: it is assumed that the disputant parties to a claim or accusation will have an equal ability to present the information to the court, to test the information brought forward by the opponent, and to present argument in favour of their respective positions.

The adversary model of public justice is open to abuse

These assumptions are extremely vulnerable.

They come under great strain in a criminal prosecution, where the accused can never match the power and resources of the state. To some extent there is institutional recognition of this mismatch, and the Australian model of adversary justice has seen much development in the attempt to right this imbalance in criminal justice. Even such entrenched features as the burden and standard of proof were comparative latecomers in the evolution of the

²⁰ Again, the common law (including equity) has developed principles that apply when the assumption is shown to be invalid — as, for example, where a judgment is shown to have been obtained by fraud; see, Gordon, above n 5.

modern criminal trial. The provision of proper legal representation through state-funded legal aid, the recognition of effective legal representation²¹ as essential to a fair trial,²² the elevation of the right of silence as a fundamental right,²³ and the development of disclosure rules for prosecuting authorities,²⁴ are all truly modern attempts to ensure the accuracy of these assumptions.

In addition to these institutional efforts to right the balance, attention has been given to the role of prosecuting counsel. This warrants further exploration beyond the scope of this chapter. It suffices to note that by 1865 (long after the vicious performance of Lord Coke in prosecuting Sir Walter Raleigh²⁵) it was being proposed that prosecuting counsel should regard themselves more as ministers of justice than as advocates on a quest for victory.²⁶ By the middle of the 20th century, it came to be recognised that excessively partisan advocacy by the prosecutor could result in a miscarriage of justice.²⁷ At the same time, it was also urged that ‘the duty of prosecuting counsel is to prosecute’.²⁸ These two perspectives on the role of prosecuting counsel continue to vie for ascendancy, but the point of note is that the efficacy of essential assumptions underlying the Australian model of adversary justice is seen as dependent in no small part on the role of counsel.

These assumptions come under equal, if different, strain in civil actions. Not only is a mismatch of power and resources often to be found, but even among equally resourced parties, a system which appears to surrender so much power and influence to self-interested participants is vulnerable to abuse. For civil trials there are even less institutional checks and balances to ensure the accuracy of the assumptions. No doubt serious interferences with the administration of justice (bribery, perjury, perverting the course of justice, and the like) are punishable as criminal offences. But the criminal law is a blunt instrument for ensuring the efficacy of a model which can be compromised by more subtle abuses not easily exposed or corrected. Repeated subtle abuses left unaddressed would cause the model to crumble before long.

²¹ *R v Birks* (1990) 19 NSWLR 677 (Gleeson CJ).

²² *Dietrich v The Queen* (1992) 177 CLR 292.

²³ *Petty v The Queen* (1991) 173 CLR 95, 99; *R v Swaffield* (1998) 192 CLR 159, [89]-[98], [144]-[155].

²⁴ *R v Ward* [1993] 1 WLR 619; *R v TSR* (2002) 5 VR 627, 650; *R v Reardon* (2004) 60 NSWLR 454; *R v H* [2004] 2 AC 134, 155-6 (Lord Bingham); *Summary Procedure Act 1921* (SA) s 104; *Carter v Hayes* (1994) 61 SASR 451, 456 (King CJ); Martin Hinton, ‘Unused Material and the Prosecutor’s Duty of Disclosure’ (2001) 25 *Criminal Law Journal* 121; Martin Hinton, ‘The Prosecutor’s Duty with Respect to Witnesses: *pro Domina Veritate*’ (2003) 27 *Criminal Law Journal* 260; Director of Public Prosecutions (SA), ‘Guideline No 9 — Disclosure’ in *Statement of Prosecution Policy and Guidelines* (September 2003), 30-2; Director of Public Prosecutions (Cth), *Statement on Prosecution Disclosure* (November 1998).

²⁵ In 1603: Justin Lovill (ed), *Notable Historical Trials* (The Folio Society, 1999) vol 1, 408ff.

²⁶ *R v Puddick* (1865) 176 ER 662 (Crompton J); *R v Berens* (1865) 176 ER 815 (Blackburn J); *R v Hochester* (1865) 10 Cox CC 227. No doubt this was influenced by the inability of a defendant in England, before 1898, to give evidence for the defence; see now, *R v Lucas* [1973] VR 693, 705 (Newton J and Norris AJ); *King v R* (1986) 161 CLR 423, 426 (Murphy J); *DPP (Cth) v Saxon* (1992) 28 NSWLR 263, 267 (Kirby P); David Ross, *Ross on Crime* (Lawbook, 3rd ed, 2007), [16.6305]-[16.6315].

²⁷ *Boucher v The Queen* (1954) 110 CCC 263; cf *R v Banks* [1916] 2 KB 621 (CCA); *McCullough v The Queen* (1982) 6 A Crim R 274; *Nicholas v The Queen* (1989) 45 A Crim R 299; see also, *Libke v The Queen* (2007) 230 CLR 559, [33]-[53] (Kirby and Callinan JJ), [71]-[85] (Hayne J, Gleeson CJ and Heydon J).

²⁸ Christmas Humphreys, ‘The Duties and Responsibilities of Prosecuting Counsel’ [1955] *Criminal Law Review* 739, cited in *Alister v The Queen* (1984) 154 CLR 404; see also, *R v Karounos* (1995) 63 SASR 451, 465-6 (King CJ); *Deritz v The Queen* (1999) 109 A Crim R 329 (WA CCA), [66] (Parker J); *Subramaniam v The Queen* (2004) 79 ALJR 116 (HC), 127-8; Lord Devlin, *Trial by Jury* (Hamlyn Lectures, 1956) 122-3.

The professional advocate as custodian of justice

It is the independent, professional advocate who must be relied on more than any other participant to uphold the efficacy of the assumptions essential to a supportable system of public justice. It is their conduct which can promote (or defeat) effective participation in the administration of independent and impartial justice. It is their conduct which can prevent (or procure) many of the abuses otherwise open to a determined, self-interested party. In this sense, we can propose that the professional advocate is the custodian of our adversary system of justice.

Many of the conduct rules can be seen in this light.

Judicial independence and impartiality must be protected: The professional advocate has a vital role in upholding the assumption that judicial independence and impartiality is unassailable. Thus:

- no attempts to improperly influence the judge²⁹ (including expression of personal opinion)³⁰
- restraints on communication with the judge³¹
- no jury tampering³²
- no personal criticism of the court³³
- restraints on the making of, and the contents of, press statements³⁴
- pro bono representation³⁵

The gathering and presentation of information must be directed towards the ascertainment of the truth: The court must be confident of ascertaining the truth from the information presented. It is a necessary condition of any system of justice that it be capable of reasonably accurate fact-finding. There is a real risk that in a system where the gathering and presentation of evidence is left in the hands of the parties, the search for truth will be hampered or compromised by the self-interested selection or suppression of information, or by an inability to gain access to sources of information (whether by reason of a lack of resources, or inability to compel disclosure).

²⁹ Stephen Corones, Nigel Stobbs and Mark Thomas, *Professional Responsibility and Legal Ethics in Queensland* (Lawbook Co, 2008) 330 (duty to be civil); Bradley Wendel, *Professional Responsibility* (Aspen Publishers, 2nd ed, 2007) 232; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 191-3.

³⁰ Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, 1999) 355; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 146; South Australian Bar Association, *South Australian Barristers' Rules 2005* r 3.11 ('SABR'); Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 43 ('UBR') [Note: the South Australian Bar has adopted the UBR, which replaced the SABR, as from 1 October 2010, with some local variations. References in this chapter will be to both, as there are curious omissions in the Uniform Rules. Where there is reference to only one version, it can be assumed that there is no equivalent in the other. Importantly, the omission does not mean that the omitted standard no longer operates].

³¹ G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 4th ed, 2010) [17.180].

³² Wendel, above n 30, 232; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 200.

³³ Wendel, above n 30, 249; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 197.

³⁴ SABR rr 3.15-3.18; UBR rr 75-7; see also, Wendel, above n 30, 247; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 197.

³⁵ SABR pt 10.

Access to information: it is thought that the self-interest of the litigant in civil litigation will promote diligence in the searching out of evidence in support of, or in opposition to, a cause. Further, equality in access to information is promoted by wide powers of pre-trial disclosure which give rise to professional obligations.³⁶ In the criminal jurisdiction the unequal powers and resources of the State in the gathering of information are sought to be balanced by duties of disclosure, legal aid and the standard of proof.

Selection or suppression of information: it is assumed that the interposing of an advocate will ameliorate the worst excesses to which the self-interested client might otherwise be given. Thus:

- no giving of false information³⁷
- no suppression of information³⁸
- no destruction of evidence³⁹
- no witness tampering⁴⁰
- no witness coaching⁴¹
- restraints on the knowing presentation of a perjurious witness/client⁴²
- no unfair forensic tactics.⁴³

There must be an effective and efficient participation by the parties: The parties must each have the learning, judgment and skills to identify the issues for determination, gather the information that will advance their respective causes, and seek to persuade.

Herein lies a dilemma. How can the advocate be the custodian of the adversary system of public justice while at the same time advancing the cause of the client? The search for resolution takes us to the *second* and *third* dimensions of justice.

³⁶ Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (Butterworths, 4th ed, 2005), 514; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 174; cf *Brookfield v Yevad Products Pty Ltd* [2004] FCA 1164, [369] (appeal dismissed, see, *Yevad Products Pty Ltd v Brookfield* (2005) 147 FCR 282, [10]).

³⁷ SABR 8.1-8.3, UBR 26-8; see also, Ross, above n 37, 551; Corones, above n 30, 328, 355; Boon and Levin, above n 31, 356-8; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 171, 216.

³⁸ Adverse precedents (SABR rr 8.7-8.9, UBR rr 31-4); Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 183-5; court misunderstanding of proposed orders in civil proceedings (SABR r 8.6, UBR r 36); in ex parte hearings (SABR rr 8.4-8.5, UBR rr 29-30); incomplete discovery; see also, Ross, above n 37, 536; Corones, above n 39, 350; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 187-8 (ex parte proceedings).

³⁹ Ross, above n 31, 526; Boon and Levin, above n 31, 364 (discrediting a truthful witness).

⁴⁰ Witness prevention (SABR rr 7.11- 7.13, UBR rr 73-4); witness deceiving (SABR r 8.21); communication with witness on own (SABR rr 5.7, 7.13); see also, Ross, above n 31, 533.

⁴¹ Witness coaching (SABR r 8.22, UBR r 68(b)); witness tainting (SABR rr 8.25-8.26, UBR rr 70-1); witness under cross-examination (SABR r 7.10, UBR r 72); see also, Ross, above n 37, 559; Corones, above n 30, 330 (duty to be civil), 358 (coaching); Wendel, above n 30, 242; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 140, 204, 214.

⁴² Inducing witness perjury (SABR rr 8.23- 8.24, UBR rr 68-9); allowing client perjury (SABR rr 6.6, 8.28); see also, Ross, above n 37, 562; Boon and Levin, above n 31, 365 (calling a perjurious witness); Wendel, above n 30, 203, 218.

⁴³ Ross, above n 37, 515, 530, 555; Wendel, above n 30, 231, 233; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 146-7.

Section IV — The second dimension of justice: The Rule of Law

It will be recalled that the *second* dimension responds to the values inherent in the Rule of Law. It is concerned with what is *due* to a person from the law — its full protection, and its full benefit.

The advocate has no divided loyalty: Always and only what is 'due'

It is sometimes said that the advocate has a *dual* loyalty — to the client, and to the court, and that where there is a conflict of loyalties, the overriding loyalty, or duty, is to the court (justice).⁴⁴ It may be correct to emphasise (consistently with our model of participatory justice) that the advocate's role is to ensure that the client's interests are effectively and fearlessly represented, but any suggestion that the advocate's duty to the client is different from, *and will sometimes conflict with*, the duty to the court is apt to be misleading.

In truth, there is only one duty for the advocate: the duty that justice demands — according to which the only interest of the client which the advocate is committed to represent is the client's interest in claiming and receiving their 'due': participatory justice, and the full protection and full benefit of the law. This requires the advocate to identify that claim in the client's instructions, basing all advice upon a professional assessment of its soundness, and presenting it competently, fairly and persuasively.

In other words, the advocate's commitment to a fearless pursuit of the client's interests is not a commitment to *every* interest of the client. Rather, it is a commitment to the client's interest in seeking what is due to them. It follows that the advocate does not represent, either in or out of court, any interest of the client that is not an appeal to this justice; as, for example, dealing unlawfully, dishonestly or unconscientiously with others or with the court; taking unjustifiable advantage of others; taking unjustifiable advantage of, or making unjustifiable use of, the processes of the court to achieve what the client *wants*, rather than what is the client's *due*.⁴⁵

Professional, not partisan, zeal is the theme

The qualities of independence and learning are indispensable to the advocate. The 'set and constant purpose' is at risk without independence; that is, without freedom from political or social influences, and from conflicting duties and interests, from anything that might compromise the advocate's representation of the client's appeal to justice. The advocate must be learned because justice is administered according to law, not according to whim. The advocate must be competent to identify, and contend for, what is 'due' to the client.

Yet independence and learning count for nought if the advocate places them at the service of *every* interest of the client, without discrimination. For then there is truth in the cynic's claim that *independence* is an invitation to licence, and *learning* a euphemism for a saleable commodity. Such a claim, however, is incompatible with the commitment of a professional advocate. A profession claims for itself the pursuit of a community ideal in priority to any self-interest. The commitment of the professional advocate is to the administration of justice. Advocates are rightly expected — and expect each other — to exercise a self-discipline for the attainment of that ideal; that is, to subordinate self-interest, and to identify, in order to represent, the legitimate interests of the client.

⁴⁴ Corones, above n 30, 346; Boon and Levin, above n 31, 353-4.

⁴⁵ More narrowly expressed by Wendel, above n 10, ch 2, as 'client's legal entitlements, not client's interests'.

Section V — The third dimension of justice: Honouring the client's humanity

Relational justice; justice for lawyers

It is the Australian philosopher, Raimond Gaita, who speaks of 'the inalienable preciousness of each human being'.⁴⁶ He explains that despite the danger of its sounding 'sentimental or soft-headed', he can find no better way of expressing an idea which avoids both the secular philosophical tradition of inalienable rights, inalienable dignity, of persons as ends in themselves and the religious traditions of the sacredness of each human being.⁴⁷

The Australian-born bio-ethicist, Margaret Somerville, seems to be reaching for the same idea when she speaks of the 'secular sacred'.⁴⁸ She expresses the view that respect for the inherent worth of human life is 'the religion of humanity', the only cohesive bond in a diverse and secular world.⁴⁹ She concludes, with the French philosopher Paul Ricoeur,⁵⁰ that 'something is owed to human beings simply due to the fact that they are human'.⁵¹

Honour and respect is the justice that every advocate, indeed every lawyer, can give to their client. The lawyer's concern is with their client: it is not about equality, in the sense of equal distribution; it is about an equal relationship, an 'acknowledgement of human fellowship'.⁵² The lawyer's conception of justice is not distributive; it has application in relation to *the sole other*.

Most often a client's relationship with a lawyer is brought about by some experience of failure: failure of relationship; failure of trust; failure of confidence in one's own abilities; failure of hope; failure of heart; failure of integrity; failure of expectation; failure of effort. This is hard for most to bear. The lawyer is not a mere witness to this failure; she or he becomes involved in it, simply by being retained. The image of the 'lawyer-statesman' is not the preferred model of virtue:⁵³ Rumpole is closer to the mark. It is in this relationship with felt failure that the lawyer gives, and the client receives, justice.⁵⁴ This is justice from the lawyer's point of view; it is not the justice observed from outside the system. We may call it 'relational justice'.

Relational justice is marked, therefore, by an action and disposition on the part of the lawyer which gives *honour* and *respect* to the client, to their unconditional preciousness as a living human being. Although both honour and respect is due to every person as a living human being, the more radical of these is honour.

Respect is an attitude of restraint, closely aligned with the notion of 'toleration'.⁵⁵ It does not give justice; rather it avoids injustice. It is not an act of engagement; rather it is an attitude

⁴⁶ Gaita, above n 19, 4.

⁴⁷ Ibid 5.

⁴⁸ The context, her 2006 CBC Massey Lectures, is her search for a 'shared ethics' to identify what it means to be human in the era of 'techno sapiens': Margaret Somerville, *The Ethical Imagination — Journeys of the Human Spirit* (Melbourne University Press, 2006), 53-93.

⁴⁹ Ibid 119.

⁵⁰ Paul Ricoeur, *Oneself as Another* (K Blamey trans, University of Chicago Press, 1992); also, Ngairé Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) esp, ch 6, 7.

⁵¹ Somerville, above n 48, 119-20.

⁵² Gaita, above n 19, 10.

⁵³ Kronman, above n 18.

⁵⁴ A like analysis can be offered for judges: see, Kronman, above n 19, ch 6.

⁵⁵ 'Toleration' as a political idea has sometimes been resorted to in exposition of liberal, democratic values (Preston King, *Toleration* (Allen and Unwin, 1976); David Richards, *Toleration and the Constitution* (Oxford University Press, 1986) but it has not proved satisfactory, despite its connection with religious freedom.

of disengagement. *Honour* is a declaration of value, and an act of engagement. It positively gives justice, rather than merely avoiding injustice. The act and attitude of honouring declares the preciousness of the client as a living human being even when respect has been forfeited.⁵⁶ I can respect without engagement, without relationship; I can never honour without engagement, without an equal relationship of human fellowship with the client. In the end, even where a person has so failed as to forfeit all respect in the eyes of the community, honouring remains as the indispensable instrument of justice: it is the lawyer who stands next to their client, the condemned murderer, at the gallows.⁵⁷ Hence, Rumpole.

Section VI — The claim to justice: Resolving the dilemma

The question was asked earlier; how can the advocate be the custodian of the adversary system of public justice while at the same time advancing the cause of the client? The answer, it is submitted, lies in the advocate's concern to vindicate what is 'due' to the client; that is, the client's claim to justice in its three dimensions.

Advocate's conduct grounded in these dimensions of justice

There are conduct rules which may be seen as grounding this concept of justice from the advocate's point of view:

- competence⁵⁸
- independence⁵⁹ and objectivity⁶⁰
- no expression of personal opinion in advocating the client's case⁶¹
- no personal interest in the result⁶²
- disclosure of adverse authority⁶³
- no baseless allegations⁶⁴
- no unfair forensic tactics⁶⁵
- dealings with opposing counsel⁶⁶

⁵⁶ Gaita, above n 19, 9-11 (the reason for bringing criminals to justice), 54-5 (Eichmann).

⁵⁷ This is the paradigm.

⁵⁸ Boon and Levin, above n 31, 345.

⁵⁹ Sole practitioner (SABR rr 3.2-3.6, UBR rr 16, 45, 107); cab-rank principle (SABR rr 4.3-4.12, UBR rr 21-4, 95-9, 100, 104, 113); see also, Ross, above n 37, 219, 223; Corones, above n 30, 332, 366-9; Boon and Levin, above n 31, 347 (from State), 348 (from clients); Wendel, above n 30, 397 (Lawyer-witness rule); Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 146, 148, 312-3.

⁶⁰ SABR rr 3.9-3.10, UBR rr 41-2.

⁶¹ SABR r 3.11, UBR r 43; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 146; and no familiarity with the court (SABR r 8.13, UBR r 63); Boon and Levin, above n 31, 355.

⁶² SABR rr 3.12, 4.7, 8.29, UBR r 95 (see also, SABR rr 6.13-6.16, UBR rr 46, 113-114); Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 312-3.

⁶³ SABR rr 8.7- 8.9, UBR rr 31-34; see also, Wendel, above n 30, 209; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 183-5.

⁶⁴ In pleadings (SABR rr 8.10, 8.13, 8.16, UBR r 63); in cross-examination or submissions (SABR rr 8.11, 8.14, 8.17, 8.18-8.20, UBR rr 59, 63-6); see also, Ross, above n 37, 523, 528-30; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 171.

⁶⁵ Courtesy (SABR r 8.32); see also, Ross, above n 37, 515 (unfair court tactics), 530 (insults and intimidation), 555 (tricks in presenting or discrediting material); Corones, above n 30, 334 (duty to the court); Boon and Levin, above n 31, 356-9; Wendel, above n 30, 231 (generally), 233 (taking advantage of an opponent's mistake); Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 146-7 (backdoor proof), 142 (embarrassment and delay), 171-4 (frivolous advocacy).

⁶⁶ Must be accurate (SABR rr 7.1-7.3, UBR rr 48-50); communications must be kept confidential (SABR r 7.4); communications with the court in absence of opposing counsel (SABR rr 7.6-7.8, UBR rr 53-5);

- dealings with others (other party,⁶⁷ witnesses,⁶⁸ third parties⁶⁹)
- the ‘hopeless’ case⁷⁰
- unlawful conduct of the client⁷¹
- pro bono representation⁷²

It is not to be supposed, however, that these conduct rules mark out the limits of ethical expectation, whether in or out of court. The overarching, organising principle is the advocate’s commitment to justice. The foregoing discussion has suggested some elements of the justice inherent in our system which, as advocates, we are called on both to uphold and to give. It is by reference to these accessible elements of justice that we can identify an immediate, practical, useable ethic for a professional advocate in a liberal democracy subject to the Rule of Law.

We may venture, therefore, a reformulation of the principles of neutral partisanship. The advocate is permitted and required to represent fearlessly a client’s claim to justice, and to advise without fear or favour. The advocate is accountable for the moral quality of that representation: its commitment to justice from the advocate’s point of view.

Section VII — Postscript: Justice has no boundaries

The notion of justice sketched out in this chapter has important consequences for our community and professional relationships.

Justice in the community

It means that we represent and reinforce the community’s commitment to doing justice (giving honour and respect) and seeing that justice is done (seeking what is due). It is up to us to expound this justice to our community; to draw attention to injustices, and to support moves to improve the quality of our laws, so that they conform to due process and are directed to just ends. It is up to us to review our own practices to ensure that none is unnecessary or inefficient; to charge fairly for work competently and efficiently carried out; to act honestly, fairly, promptly and competently.

Justice to the client

It means that we listen; advise fully and competently, without fear or favour; identify the client’s claim to justice and pursue it faithfully, patiently and fearlessly, even in the face of vilification. Whatever the law deals out to our clients, we can give them — and insist that

notice of particular matters (SABR rr 7.14-7.19); no vilification (SABR r 3.22); see also, Ross, above n 37, 523; Corones, above n 30, 330 (duty to be civil), 350 (candour); Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 141.

⁶⁷ Direct communications with opposing solicitor or party (SABR rr 5.8, 7.9); see also, Ross, above n 31, 533; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 141.

⁶⁸ See above, ns 42, 43.

⁶⁹ Must not be unduly threatening (SABR r 7.5); no discrimination (SABR r 3.19); no sexual harassment (SABR r 3.20); no vilification (SABR r 3.21). See further, paragraph on ‘justice to colleagues’ later in this chapter.

⁷⁰ Ross, above n 37, 504, 512; Corones, above n 30, 334; Boon and Levin, above n 31, 356-9; Wendel, above n 30, 238 (frivolous pleadings, motions and contentions).

⁷¹ SABR rr 8.27-8.28, UBR rr 78, 80; see also, Corones, above n 30, 325; Wendel, above n 30, 255; Restatement of the Law Third, *The Law Governing Lawyers* (American Law Institute, 2000) vol 2, 4, 222, 225.

⁷² SABR pt 10.

they be given — honour and respect as members of our community, as unique human beings. We can stand with them even, especially, in failure.

Justice to colleagues

It means that we treat opposing advocates and lawyers not as enemies but as professional colleagues representing opposing interests to a common end, a just application of the law. We betray our commitment to justice if we are not courteous and understanding; fair and honest; trusting and trustworthy; prompt and attentive; ready to give help and guidance when it is asked for. We can expect reciprocity, but our conduct towards our colleagues is unconditional. None of this detracts from the advocate's commitment to their client's cause: vigorous contest does not have to be conducted with animosity, and is more effective without it.

Justice to staff

Our staff, and all with whom we work are also our colleagues. Our commitment to justice rings hollow if we behave unjustly towards our staff. It is up to us to be courteous, understanding and supportive, trusting, fair and honest. Again, there is nothing conditional about this.

Justice to ourselves

It means that we do ourselves justice — by maintaining our competence; by being conscientious and thoughtful; by being honest with ourselves; by seeking help when we need it; and by preserving our physical, mental, emotional and spiritual well-being.



Photograph courtesy of the author

Michael Grant QC

Michael Grant QC was appointed as the Solicitor-General for the Northern Territory in November 2007. He is also the Statutory Supervisor for the Northern Territory legal profession. Following his admission, Mr Grant worked as a solicitor-advocate with the Northern Territory Attorney-General's Department. He then joined the private bar and was appointed as Queen's Counsel in 2006. He has also chaired a number of statutory and disciplinary tribunals, and lectured in Ethics, Torts and Taxation Law at the Charles Darwin University.

5

The Obligations and Duties of Silk and their Juniors

MICHAEL GRANT

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. This is a delicate relationship, and it carries exceptional privileges and exceptional obligations.¹

Historical development of the barrister's role

It is instructive in undertaking any examination of the practical obligations and duties of barristers to consider briefly the historical development of the barrister's role. Proceedings in the courts of the early Middle Ages were generally informal, and the litigants presented their own cases.² Commencing from late in the twelfth century, the practice developed that there could be no action in the king's common law courts without a writ from the king. A writ was a command from the king for the execution of justice by the court in accordance with a particular form of action and procedure. These were originally limited to actions to determine questions concerning title to land, debt and satisfaction, and damages for injury done to a plaintiff's person or property. The limitation on the available forms of action made it impossible to obtain justice in many cases, leading to the invention of new writs.³

Specialisation

With the growth and increasing complexity of the writ system, litigants were permitted by the courts to have their cases conducted by persons educated in the law. Then, as now, the conduct of a case involved the preparatory stages and the oral presentation of the case to the court. As a consequence, there arose a demarcation between officers who specialised in those functions performed outside court and officers who specialised in advocacy.⁴ The preparatory work was generally performed by officers of the courts called *attorneys*, who were the equivalent of the modern day solicitor. The oral presentation of a case was undertaken by specialists called *narrators*. During the fourteenth century the specialist narrators organised and styled themselves as *serjeants-at-law*, and for some centuries thereafter the bulk of the advocacy in civil litigation was conducted by that order, largely by

¹ *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 298 (Kitto J).

² L B Curzon, *English Legal History* (MacDonald and Evans Ltd, 1968) 199.

³ Ibid ch VI.

⁴ M White, 'The Development of the Divided Legal Profession in Queensland' (2004) 23(2) *University of Queensland Law Journal* 296.

reason of the fact that it had an exclusive right to plead and practice in the Court of Common Pleas and a right to appear in the King's Bench and other courts.

At this same time, there developed the office of *apprentice of the law* held by those narrators not appointed as serjeants. They came to be known as *barristers*. The barristers had a right of appearance in the King's Bench and the Exchequer, and occasionally assisted the serjeants in the Court of Common Pleas.⁵

Formal demarcation

From the sixteenth century, the demarcation between attorneys and barristers was formalised. A rule was adopted precluding barristers from direct engagement by a client, and an attorney was required to act as the middleman between client and barrister. Prior to that time, attorneys had customarily conducted cases together with barristers, but now their work became concentrated on conveyancing and the drafting of pleadings. They were also excluded from membership of the inns.⁶

The *solicitors* emerged as a recognised professional class in the latter half of the sixteenth century. Originally agents who attended generally to the business of clients, the solicitors came to specialise in the conduct of litigious business.⁷ They assisted attorneys in the preparation of cases in the common law courts, and performed a similar function to the attorneys in the more recently constituted courts of Chancery, Star Chamber and Admiralty.

The institution of the professional bodies

The attorneys gradually amalgamated with the solicitors and in 1831 that grouping formed the Law Society to control the education and admission of solicitors. That society became the model for the law societies in the various Australian jurisdictions.

Over the course of the eighteenth and nineteenth centuries, the role of the serjeants diminished and the order was ultimately dissolved. This development coincided with the enlargement of the jurisdiction of the courts of King's Bench and Exchequer — in which cases were conducted predominantly by barristers — and a corresponding growth in the importance of the role of the barristers. In 1894, the General Council for the Bar was formed to control the education and admission of barristers. That council became the model for the bar associations in the various Australian jurisdictions.

The office of King's or Queen's Counsel

The designation of King's or Queen's Counsel evolved within this structure. In the thirteenth century various courtiers had responsibility for pleading the King's cause in civil cases and representing the royal interest in the prosecution of criminal cases. In the fourteenth century, the monarch retained four serjeants, called King's Serjeants, to advise and act on his behalf in those matters.⁸ By the end of the fifteenth century, the King's Serjeants had been replaced by the Attorney-General and the Solicitor-General in the conduct of the legal work of the Crown.⁹ The increase in the volume of that work was such

⁵ Curzon, above n 2, 201.

⁶ Curzon, above n 2, 202.

⁷ Sir W J V Windeyer, *Lectures on Legal History* (Law Book Company of Australasia, 2nd ed, 1957) 144.

⁸ Curzon, above n 2, 205.

⁹ The Attorney-General and the Solicitor-General are the law officers of the Crown, and are subject to specific attention in the next chapter.

that towards the end of the sixteenth century senior barristers were engaged to assist the Attorney-General and the Solicitor-General in their work.¹⁰ They were designated as *King's Counsel learned in the law* and were obliged to give their services to the Crown, in priority to any other litigant, when asked to do so.¹¹ By the eighteenth century the King's Counsel had ceased to act as assistants to the law officers and their duties to the Crown had become nominal;¹² and by the early nineteenth century, when the bounty of £40 a year traditionally paid to silk was withdrawn, King's counselship had long since been looked upon as 'a grade in the profession of the law, instead of an office'.¹³ The designation is now solely one of rank and precedence.

The role of the barrister

The hallmarks of the barrister's role are specialisation in advocacy in litigious business, independence and sole practice.

The first broad purpose of the obligations imposed on barristers is to ensure that cases are conducted and submissions are made with the degree of candour and probity necessary for the proper administration of justice.

The second broad purpose of the obligations that govern practice in the style of a barrister is to afford litigants representation without interference from political considerations, and without regard to sources of power and patronage. Independence and freedom from business association ensure that barristers are available to represent individuals and corporations without risk of conflict of interest and without regard to the popularity or otherwise of the client's cause. As Sir Owen Dixon observed when he was sworn in as Chief Justice of Australia:

The Bar has traditionally been, over the centuries, one of the four original learned professions. It occupied that position in tradition because it formed part of the use and the services of the Crown in the administration of justice. But because it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the Bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence, and owing allegiance to none.¹⁴

Recent structural reforms

Against that historical background, there were certain obligations and duties that devolved upon silks and juniors which might be described as structural in nature. With the advent of the National Competition Policy, the 1990s saw the regulatory structures of the legal profession subjected to an increased level of review and scrutiny. The result was the abolition of certain requirements and prohibitions that had previously governed practise as a barrister.

Direct access to barristers

The primary structural rule that characterised practice in the style of a barrister for some 500 years precluded barristers from direct engagement by a client, and required that barristers accept instructions only on brief from a solicitor. In 1994, the Trade Practices

¹⁰ Windeyer, above n 7, 142.

¹¹ Curzon, above n 2, 206.

¹² Windeyer, above n 7, 142.

¹³ John Campbell, *Lives of the Lord Chancellors* (7th ed, 1878) vol 3, 21.

¹⁴ (1952) 85 CLR xi-xii.

Commission completed an inquiry which was critical of the practice of not allowing clients direct access to barristers on the basis that it was anti-competitive.¹⁵ Following upon the conclusions of the *Hilmer Report* on micro-economic reform,¹⁶ a cooperative scheme of federal and state legislation was introduced which applied the competition principles to all businesses and professions, and empowered the regulator to bring proceedings to enforce those principles, including upon the legal profession.¹⁷

Faced with this threat, the Law Institute of Victoria and the Victorian Bar Association were the first to respond, making some tentative moves to allow clients direct access to barristers. Direct access is now permitted in all Australian jurisdictions, subject to certain qualifications. The relevant provision of the national model conduct rules prepared by the Australian Bar Association reflects the principle that whilst barristers are now permitted to accept direct access briefs, they are not required to do so. It also reflects the principle that in more complex matters the acceptance of a direct access brief will be, or may become, ill-adapted to the advancement of the client's interests.¹⁸ Fewer difficulties potentially arise in not having a solicitor involved where the matter requires only the preparation of advice, rather than litigious business calling for interviewing and taking statements from witnesses, serving subpoenas, correspondence with opposing solicitors and the filing and service of court documents.¹⁹ For similar reasons, simple criminal matters are considered to be more suited to direct access briefing. It remains the case that some barristers refuse to accept briefs directly from members of the public. That reticence is more prevalent amongst senior counsel. Some barristers will only accept briefs directly from other professionals such as accountants, engineers and architects who are themselves acting on behalf of a client.

Some jurisdictions have gone further in their current conduct rules to proscribe the acceptance of direct access briefs in certain circumstances. In Victoria, for example, direct access to a barrister is not permitted where:

1. the matter involves an appearance in court in a civil case unless the written permission of the Ethics Committee is obtained;
2. the matter involves an appearance in a criminal case in the County Court or higher courts; or
3. the barrister concerned considers that the interests of the client require a solicitor to be instructed.

The 'two-counsel' rule

Until relatively recently, the Bar rules in the Australian states and territories prohibited senior counsel from drafting pleadings and other documents necessary for the conduct of contentious proceedings. As a result, in matters where senior counsel was briefed it was practically necessary to engage a junior counsel to draft pleadings and other documents. Quite apart from this practical requirement, the Bar rules in the various states and

¹⁵ Trade Practices Commission, 'Study of the Professions: Legal' (Final Report, 1994).

¹⁶ F Hilmer, M Rayner and G Taperell, 'National Competition Policy' (Report, Committee of Inquiry, 1993) ('The Hilmer Report').

¹⁷ C Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25(3) *University of New South Wales Law Journal* 676.

¹⁸ As is discussed further below, the national model conduct rules oblige a barrister to refuse to accept or retain a direct access brief if the absence of an instructing solicitor would seriously prejudice the barrister's ability to advance the client's interests.

¹⁹ As is discussed further below, a barrister is expressly precluded by the national model conduct rules from undertaking work properly within the province of a solicitor's duties.

territories (with the exception of South Australia)²⁰ provided expressly that a Queen's Counsel could not appear in a court or tribunal unless a junior counsel was also briefed.²¹

These restrictions were gradually relaxed. In 1982, the New South Wales Law Reform Commission recommended the adoption of a new 'two-counsel' rule which would allow a Queen's Counsel to accept instructions without a junior, and require a Queen's Counsel to decline a brief with a junior where the use of two counsel in the matter was not justified. In response to that recommendation the New South Wales Bar Association amended the relevant rule in 1984. The rule as amended still gave a Queen's Counsel latitude to require a junior where counsel considered it was necessary for the conduct of the case or the fulfilment of 'professional or other like commitments'. It remained uncommon in practice for Queen's Counsel to appear without a junior. In following years the rule was abolished in all Australian jurisdictions. A corollary of the relaxation of the 'two-counsel' rule was that Queen's Counsel were necessarily permitted to do the associated written work which had previously been the exclusive province of junior counsel. It remains the case that in practice most complex litigation is still conducted with the services of both senior and junior counsel.

Whilst it may be noted that these developments took place at or about the same time as attention was brought to bear on micro-economic reform and anti-competitive practices,²² it has been suggested that there is no inconsistency between the two-counsel rule and the relevant provisions of the Competition Code.²³

The 'two-thirds' rule

The 'two-thirds' rule was inherited from the English legal system. It provided that counsel briefed along with Queen's Counsel was automatically entitled to receive at least two-thirds of the senior's fee. The rule was abolished in England in 1971, leading to its abolition in most Australian jurisdictions.²⁴ Whilst the rule was abolished, it remained common practice for juniors to charge two-thirds of their senior's fee.

In its *Final Report on the Study of the Legal Profession* delivered in March 1994,²⁵ the Trade Practices Commission recommended the elimination of '[a]ll professional rules which ... set fees and retainers according to fee scales or variants on the two-thirds rule for charging by QCs and junior barristers'. The practice has now been abandoned. The rates charged by both senior and junior counsel are now dictated by operation of market forces having regard to the standing, experience and expertise of the barrister concerned.

²⁰ Julian Disney, Paul Redmond, John Basten and Stan Ross, *Lanymers* (Law Book Company, 2nd ed, 1986) 131.

²¹ This rule was subject to various exceptions and qualifications. In Queensland, for example, the rule did not affect the existing practice relating to a Queen's Counsel appearing alone in the Court of Disputed Returns. In South Australia, Tasmania, Western Australia and the Northern Territory, in which the profession was theoretically fused, Queen's Counsel could appear with an instructing solicitor as junior counsel in appropriate circumstances.

²² D Weisbrot, 'Competition, Cooperation and Legal Change' [1993] *Legal Education Review* 1.

²³ The President of the Bar Association of Queensland sought an opinion from David Jackson and Peter Franco in relation to the issue in 2007, which came to that conclusion.

²⁴ Except in Queensland, where it continued to apply.

²⁵ Trade Practices Commission, above n 15.

The general obligations of counsel

The ethical obligations that apply in the conduct of advocacy have been dealt with in the preceding chapter. They include such matters as the duty to the court, the duty to the client, independence in terms of compliance with the client's and instructing solicitor's wishes, duty to the opponent, the responsible use of court processes and the integrity of evidence. There is a further set of obligations and duties imposed on barristers which apply to practice generally, rather than specifically to the advocacy function. These obligations bind both senior and junior counsel, and include such matters as permissible areas of work, the cab-rank principle, the refusal and return of briefs, the efficient administration of justice, media comment and confidentiality.

As already noted, the Australian Bar Association has formulated a set of national model conduct rules. Those rules have been prepared on the premises that:

- barristers owe their paramount duty to the administration of justice;
- barristers must maintain high standards of professional conduct;
- barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully and with competence and diligence;
- barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues;
- barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients; and
- the provision of advocates for those who need legal representation is better secured if there is a Bar whose members must accept briefs to appear regardless of their personal beliefs, must not refuse briefs to appear except on proper professional grounds, and compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

Whilst there are some differences, the national model conduct rules are generally consistent with the conduct rules that applied in each state and territory Bar. As all Australian bar associations have now agreed in principle to the one set of conduct rules, the following discussion of the general obligations of counsel is conducted with reference to the national model conduct rules.

The work of a barrister

The range of work barristers are able to undertake is governed by their specialisation as advocates and the need to practise only on their own account in order to maintain independence. It is for that second reason that a barrister is precluded from working in partnership or incorporated practice with any person, employing any other legal practitioner, or being employed by any person.²⁶ It has already been seen that the restrictions that previously precluded senior counsel from undertaking certain categories of task have now been lifted, in theory at least. Barristers' work is restricted to:²⁷

1. appearing as an advocate;
2. preparing to appear as an advocate;
3. negotiating for a client with an opponent to compromise a case;
4. representing a client in a mediation or arbitration or other method of alternative dispute resolution;

²⁶ Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 21.

²⁷ *Ibid* r 15.

5. giving legal advice;
6. preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
7. carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
8. such other work as is from time to time commonly carried out by barristers.

A barrister is expressly precluded from undertaking work properly within the province of a solicitor's duties, including acting as a general business agent; conducting correspondence in the barrister's name on behalf of another person with anybody apart from the opponent in the matter briefed; acting as a person's sole representative in dealings with a court other than when actually appearing as an advocate; accepting service of any document on behalf of a client; serving court process; conducting conveyances; administering trusts; obtaining probate or letters of administration; incorporating companies for clients; preparing or lodging taxation returns; and holding moneys on trust.²⁸ Those proscriptions do not apply in circumstances where the barrister is undertaking the task without fee and as a private person rather than as a legal practitioner.

A barrister must also refrain from undertaking investigative activity which may put himself or herself at risk of becoming a witness and having to relinquish the brief.

There are also restrictions on the type of non-legal work barristers may undertake. A barrister must not engage in another vocation which:

1. is liable to adversely affect the reputation of the legal profession or the barrister's own reputation;
2. is likely to impair or conflict with the barrister's duties to clients; or
3. prejudices a barrister's ability to attend properly to the interests of the barrister's clients.²⁹

So, for example, it might be considered inappropriate for a barrister to also run a brothel, even in those jurisdictions in which prostitution is legalised. On the other hand, there would not appear to be any stricture, in terms of ethical obligations, against a barrister entering politics whilst remaining in practice. As a matter of reality, however, modern political imperatives discourage members of the backbench from pursuing vocations that would interfere or come into conflict with the performance of their political duties, or which might give rise to the perception that insufficient attention was being devoted to electoral work. Government Ministers are absolutely precluded from maintaining private practice.

The rules also provide that a barrister may not use or permit the use of the professional qualification as a barrister for the advancement of any other occupation or activity in which he or she is directly or indirectly engaged, or for private advantage, save where that use is usual or reasonable in the circumstances.³⁰ It is difficult to conceive in modern times of a situation in which a barrister might use that professional qualification for private advantage. One would have thought the day long past in which reference to qualification as a barrister might have exerted some special influence or leverage. It is not immediately obvious, for example, that the use by a barrister of professional letterhead in the context of a private debt dispute would be in any way improper. Nor would there seem to be anything objectionable in a barrister making application in that capacity for development approval

²⁸ Ibid r 17.

²⁹ Ibid r 13.

³⁰ Ibid r 14.

on his or her own private account. The position in each of those examples would obviously be different for a judicial officer. The words ‘usual or reasonable’ would also seem to have a possibly imprecise character in this context. It might convincingly be argued, for example, that the use of the post-nominal ‘QC’ in making application for membership of a club or association was both usual and reasonable. The scope and operation of the rule in the present day is not entirely clear.

The cab-rank rule

The cab-rank rule has been described as the cornerstone of the profession's ethical standards. It operates to preclude a barrister from refusing to accept a brief in a field in which he or she practises or professes to practise. The basis of the rule was described by Lord Pearce in the following terms:

It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter; and that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full and fair hearing to be in the right. It is also a judge's (or jury's) solemn duty to find that out by a careful and unbiased investigation. This they simply cannot do, if counsel do not (as at present) take on the less attractive task of advising and representing such persons however small their apparent merits.³¹

In its modern formulation the rule is subject to a number of provisos.³² First, it only has application if the brief is within the barrister's ‘capacity, skill and experience’. Secondly, the obligation to take the brief will only arise where there is no other professional or personal engagement which might prevent the barrister from giving proper attention to the matter. Thirdly, the fee on brief must be ‘acceptable’ to the barrister. Fourthly, the operation of the cab-rank rule is subject to various qualifications (discussed further below), including that a barrister is not obliged to, and in fact must not, accept a brief in which there is a conflict of interest,³³ or which would involve the advancement of illegal or improper conduct. This latter exception does not preclude a barrister from assisting a client in finding a loophole in the law or providing advice in relation to the legality of a proposal or structure for taxation purposes.

It has been recognised that the operation of the cab-rank rule is vulnerable to erosion by matters such as increasing specialisation and the pursuit of greater commercial reward. As Sir Gerard Brennan observed whilst Chief Justice of Australia:

The cab-rank rule, so often and so rightly advanced as a cornerstone of the profession's ethical standards, can be easily negated 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.³⁴

³¹ *Rondel v Worsley* [1969] 1 AC 191, 274.

³² Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 21.

³³ *Ibid* rr 21(d), 95, 97, 112.

³⁴ ‘Profession or Service Industry: The Choice — Opening Address’ (Speech delivered at the Australian Bar Association Conference, San Francisco, 18 August 1996).

That vulnerability is given some recognition in the national model conduct rules. So it is that a barrister is precluded from setting the level of an acceptable fee with the intent of deterring a solicitor from continuing to offer a particular brief.³⁵ A barrister is precluded from 'third line forcing' by requiring that a particular barrister also be engaged in the matter as a condition of acceptance of the brief.³⁶ A barrister is also precluded from entering into any arrangement with another person in relation to his or her practice which would impose an obligation on the barrister to refuse to accept a brief other than for those reasons within the spirit of the cab-rank principle.³⁷ That preclusion does not prevent a barrister entering into a general or special retainer which only gives a right of first refusal of the barrister's services to a particular party.³⁸ In those circumstances, the barrister concerned must refuse to accept a brief from any other person if offered a brief to appear in the case within the terms of the retainer.

Refusal to accept or retain a brief

Closely allied to the operation of the cab-rank principle are those rules which govern the circumstances in which a barrister *must* refuse to accept or retain a brief, and the circumstances in which a barrister *may* refuse to accept or retain a brief.

As already adverted to in the preceding discussion, a barrister must obviously refuse to accept or retain a brief in circumstances where it is a direct access brief and the failure to retain an instructing solicitor would seriously prejudice the barrister's ability to advance the client's interests,³⁹ or where the barrister is already committed to appear on another brief and would thereby not be available to appear on any other brief on that day.⁴⁰ The other circumstances in which a barrister is obliged to refuse to accept or retain a brief fall into five broad categories.

The first is where the barrister is in possession of information confidential to some person other than the client which may be material to the client's case and the person entitled to the confidentiality has not consented to its use.⁴¹ This rule reflects the general position that a legal practitioner is constrained from acting in a matter in which the misuse of confidential information is a real possibility.⁴² Other provisions of the rules reflect the general operation of the equitable duty of confidentiality. A barrister is precluded from disclosing or using confidential information obtained in the course of practice except as compelled by law or in pursuance of consent from the person entitled to the confidentiality.⁴³

The second broad category is where the acceptance or retention of the brief would give rise to an actual or potential conflict of interest. The potential for such conflict will arise where the barrister's personal interests or those of a close associate are at odds with those of the

³⁵ Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 22.

³⁶ *Ibid* r 23.

³⁷ *Ibid* r 24.

³⁸ *Ibid* r 95(c).

³⁹ *Ibid* r 95(k).

⁴⁰ *Ibid* r 98.

⁴¹ *Ibid* rr 95(a), 97.

⁴² See, eg, *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501.

⁴³ Australian Bar Association, *Barristers' Conduct Rules* (at February 2010) rr 108, 109. In *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316, where it was held an advocate who receives documents or information from another party pursuant to litigious processes is bound by an implied undertaking to use those documents and that information solely for the purposes of the litigation. A breach of that implied undertaking will constitute a contempt; see also, *Hearne v Street* (2008) 235 CLR 125.

client;⁴⁴ where the barrister may be a witness in the case or, in appeal proceedings, was a witness in the case at first instance;⁴⁵ where the barrister has a personal financial or property interest in the outcome of the case (apart from the prospect of a fee);⁴⁶ where the matter involves a dispute as to the barrister's fees, or is for the recovery of costs from a former client;⁴⁷ and where the barrister has previously advised or acted for another party to the matter, discussed the issues with a person who has an interest in the matter adverse to the client's interests, or acted for or advised a person otherwise materially connected to the matter (such as an arbitrator where the matter is in connection with the arbitration).⁴⁸

The third category is where the barrister's acceptance of the brief might give rise to an apprehension of bias. This will occur where the brief is to appear before a tribunal constituted by a member of the barrister's family or household;⁴⁹ or where the brief is to appear before a court of which the barrister was formerly a member, or a court from which appeals lay to a court of which the barrister was formerly a member, and the appearance would occur within five years of the barrister ceasing to be a member of the court in question.⁵⁰ The imposition of a five-year quarantine period is clearly arbitrary given that the question whether an apprehension of bias arises in any particular case can only be determined by the court to which such an application is made.

The fourth category is where the barrister's own personal or professional conduct may be attacked in a case.⁵¹ That preclusion is not absolute, and is subject to the test of reasonableness. A barrister will not be obliged to return a brief in those circumstances where the allegations have been raised in order to prevent the barrister from accepting the brief, and may be refuted without impairing the barrister's professional disinterest in the substantive issues arising in the matter.⁵²

The final category has already been discussed in the context of the cab-rank principle, and is where the barrister is subject to a general or special retainer that validly precludes the acceptance of the brief.⁵³

There are then those circumstances in which a barrister is entitled, but not obliged, to refuse to accept or retain a brief to appear before a court. That entitlement is always subject to the qualification that a barrister who wishes to return a brief must do so in enough time to give another legal practitioner a proper opportunity to take over the case.⁵⁴ The entitlement generally arises where the manner in which the case is being conducted, the particular circumstances of the case, or the barrister's other professional or personal engagements would impair the barrister's capacity to advance the client's interests.⁵⁵ So, whilst there is no requirement to refuse a direct access brief, a barrister is at liberty to refuse or return a brief which is not offered by a solicitor.⁵⁶ Senior counsel may also refuse

⁴⁴ Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 95(b).

⁴⁵ *Ibid* rr 95(d), (e).

⁴⁶ *Ibid* r 95(g).

⁴⁷ *Ibid* r 95(h).

⁴⁸ *Ibid* rr 95(i), (l), (m).

⁴⁹ *Ibid* r 95(j).

⁵⁰ *Ibid* r 95(n).

⁵¹ *Ibid* r 95(f).

⁵² *Ibid* r 96.

⁵³ *Ibid* r 95(c).

⁵⁴ *Ibid* r 104.

⁵⁵ *Ibid* r 99(b).

⁵⁶ *Ibid* r 99(a).

a brief where he or she reasonably considers that the client's interests also require the services of a junior counsel in the matter and none has been briefed.⁵⁷

A brief may be refused or returned where it may require the barrister to cross-examine or otherwise criticise a friend or relation,⁵⁸ where there is a personal or business relationship between the barrister and the client or another person involved in the matter,⁵⁹ or where the brief is to appear before a judge whose relationship with the barrister is such as to make such appearance undesirable.⁶⁰ In that latter category, the appearance might be considered undesirable either because the relationship between judge and counsel is particularly close in a personal or business sense or, more unfortunately, because the relationship is marked by some particular antipathy.

A brief may be returned where the solicitor or client refuses to arrange such attendances as are requested and necessary for the purposes of permitting adequate instructions to be taken, ensuring that the client understands the advice given, avoiding delay, or otherwise protecting the client's interests.⁶¹ In a similar vein, a brief may be returned if the barrister's advice as to the conduct of the case, including the question of compromise, has been rejected or ignored,⁶² or where the barrister's request for the provision of an instructing solicitor independent of the client has been refused.⁶³

The nature of the matter and the seniority of the counsel may also bear on a barrister's entitlement to refuse or return a brief. Senior counsel may decline to take a brief which he or she reasonably considers does not require the services of senior counsel.⁶⁴ Whilst the terms of the rule invest senior counsel with a discretion in such matters, most senior counsel would consider themselves ethically bound to refuse a brief in those circumstances.

There may also be circumstances affecting the barrister's own interests which entitle a barrister to refuse or relinquish a brief. That will be the case where the instructing solicitor does not agree to be responsible for payment of the barrister's fee, or where the barrister has reasonable grounds to doubt that the fee will be paid reasonably or promptly or in accordance with any costs agreement.⁶⁵ Briefs accepted under a speculative fee arrangement attract special treatment. Under such arrangements, the payment of the barrister's fee is contingent upon the client succeeding in the action. Speculative fee arrangements have been criticised on the bases that they often involve an unreasonable 'uplift' of the usual fee, and force on the barrister concerned an interest in the outcome of legal proceedings that may promote a conflict with professional duty. Ranged against those arguments, many clients with a meritorious case but insufficient funds to prosecute the matter would be denied legal representation in the absence of speculative fee arrangements. The High Court has recognised the legitimacy of speculative fee agreements, provided that the practitioner concerned believes the client has a reasonable cause of action or defence, and that the arrangement is not one — as is common in the United States — in which the fee is calculated by reference to some percentage of the damages that might ultimately be

⁵⁷ Ibid r 99(j).

⁵⁸ Ibid r 99(e).

⁵⁹ Ibid r 99(k).

⁶⁰ Ibid r 99(l).

⁶¹ Ibid r 99(f).

⁶² Ibid r 99(g).

⁶³ Ibid r 99(h).

⁶⁴ Ibid r 99(i).

⁶⁵ Ibid rr 99(c), (d).

awarded.⁶⁶ That decided, the rule now is that a barrister may return a brief accepted under a speculative fee agreement if the client has unreasonably rejected a reasonable offer to compromise contrary to the barrister's advice.⁶⁷

The return of briefs in criminal matters also receives special treatment. Even in circumstances where a barrister would usually be entitled to return a brief, he or she may not do so where it involves defending a client charged with a serious criminal offence unless the circumstances are exceptional and compelling and there is adequate time for another legal practitioner to assume proper conduct of the case, or where the client has given fully informed consent to that course.⁶⁸

There are also circumstances in which a brief may not be returned or handed over unless certain conditions are satisfied. A barrister must not return a brief in order to accept another brief unless the instructing solicitor or the client, having been fully informed as to the reasons for the request, has expressly permitted the barrister to do so.⁶⁹ Nor may a barrister return a brief in order to attend a social occasion unless the instructing solicitor or the client has expressly permitted the barrister do so.⁷⁰ Finally, a barrister must not hand over a brief to another barrister to conduct the case, or any appearance within the case, unless the instructing solicitor has consented to that course.⁷¹

Efficient administration of justice

Barristers are sometimes compared to builders, usually jocularly, for their inability to complete the job within the timeframe first indicated or requested. As with many generalisations, this characterisation is both unfair and inaccurate; but most barristers have at some stage in their careers experienced difficulty meeting deadlines for the completion of a task. Sometimes those deadlines are self-imposed, sometimes they reflect the aspirations of the instructing solicitor or client, and sometimes they have been set by an order or rule of a court. Leaving aside those cases where the delay is due to some failure on the part of the client or instructing solicitor to provide necessary information or materials, delay on the part of a barrister is usually attributable to the exigencies of a busy practice. Even allowing for those exigencies, it is important to recognise that dilatory attention to a brief may constitute unprofessional conduct, and may in extreme circumstances constitute professional misconduct and/or a contempt of court.

The importance of compliance with court-imposed deadlines is given specific attention in the rules of conduct. A barrister must ensure, so far as is reasonably possible, that the work the barrister is briefed to do is conducted in sufficient time to enable compliance with all orders, directions, rules or practice notes of the court concerned.⁷² In circumstances where the barrister has reasonable grounds to believe that the work will not be completed on time, he or she has an obligation to inform the instructing solicitor or the client of the matter as soon as possible. In the event that there is some failure to comply with a court-imposed deadline, the appropriate course is for the instructing solicitor to make an application to the court for an extension of time. A failure to comply with an order of a court is, technically speaking, a contempt. In the context of a litigious matter, the most

⁶⁶ *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 203.

⁶⁷ Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 100.

⁶⁸ *Ibid* r 101.

⁶⁹ *Ibid* r 102.

⁷⁰ *Ibid* r 103.

⁷¹ *Ibid* r 106.

⁷² *Ibid* r 56.

significant case management order is the fixing of a hearing date. A failure to prepare a case for trial or hearing on the date fixed may have significant ramifications for the claims of other litigants seeking a hearing date and the efficient use of court resources.⁷³ For those reasons, as well as the dictates of professional courtesy, a barrister must inform the opponent and any other advocate involved in the case as soon as the barrister has reasonable grounds to believe it will be necessary to make an application to adjourn a hearing date, and of the facts and grounds of the application.⁷⁴ It is also incumbent on the barrister concerned, with the opponent's consent, to apprise the court of the pending application as soon as possible.

Compliance with deadlines is not the only obligation a barrister bears in serving the efficient administration of justice. A barrister must ensure that only those matters properly at issue in the case are submitted to the court for determination. To that end, the barrister must ensure that the case is confined to identified issues which are genuinely in dispute; that the case is ready for hearing as soon as practicable; that the issues in dispute are presented clearly and succinctly; that the evidence is limited to that which is reasonably necessary to advance the client's interest in the case; and that he or she only occupies such of the court's time as is necessary to advance the client's interest in the case.⁷⁵ The English courts have adopted case management practices by which a timetable for the conduct of the trial is set and imposed. So, for example, if a cross-examination has not concluded by the end of the allotted time, no further cross-examination is allowed except in exceptional circumstances. It has been shown that it is possible to adopt such practices without any material compromise of the quality of representation or the requirements of natural justice. The Australian courts might be expected increasingly to follow this path.

Media comment

There was a time, before the rise of the celebrity lawyer, when barristers would not make any comment to the media in relation to matters in which they were currently or formerly engaged. The foundation for that position was that the role of the barrister is to advocate a client's cause in court, and barristers should avoid the appearance of any personal identification, agreement or sympathy with that cause. Otherwise, members of the public may be apt to misconceive the barrister's function as something other than that of professional and independent advocate. As Lord Eldon observed:

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.⁷⁶

That remains the underlying principle informing the various bar rules in relation to media comment. As Glenn Martin SC, then President of the Australian Bar Association, observed in February 2006 in relation to amendments to the Western Australian Bar rule governing media comment:

As far as I am aware it has always been a rule of practice that barristers may not express their personal opinions about the case in which they are involved or might be involved. This new rule does not depart from that. The principle underlying this new rule and its predecessors is that a barrister's role is

⁷³ See, eg, the discussion in *Sali v SPC Ltd* (1993) 67 ALJR 841, 843-844.

⁷⁴ Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 58.

⁷⁵ *Ibid* r 57.

⁷⁶ *Ex parte Lloyd* (5 November 1822); reported as a note in *Ex parte Elsee* (1830) Mont 69, 70.

to present his or her client's case to the court and not to the public through the media. It is the client's case which is important, not the barrister's opinion of it. The WA Bar's new rule still sensibly permits the provision of information to assist the media in the reporting of matters before the courts.

Many people, not just barristers, are concerned to ensure that we are not confronted with what occurs in some American jurisdictions where the merits of a prosecution or civil case are fought out in the media. All lawyers have to be careful to ensure that the role of the courts is not demeaned by side shows developing in which the issues are presented in 'soundbites'.

The relevant provisions of the national model conduct rules are generally reflective of those principles. So far as proceedings generally are concerned, barristers are not permitted to publish or take any step towards the publication of material which appears to express the opinion of the barrister on the merits of a current or potential proceeding other than in a genuine educational academic discussion on matters of law.⁷⁷ The publication of any material which is known to be inaccurate or which discloses confidential information is, of course, also proscribed.⁷⁸

More rigorous strictures apply to current proceedings in which a barrister is appearing, and to any potential proceedings in which a barrister is likely to appear. In those circumstances, the barrister must not publish or take any step towards the publication of any material concerning those proceedings except:⁷⁹

1. by responding to unsolicited questions with answers limited to information as to the identity of the parties and witnesses already called, the nature of the issues in the case, the nature of the orders made or judgment, and the client's intentions as to any further steps in the case; and
2. subject to the operation of legislation or court practice, by supplying at the request of the client or instructing solicitor, or in response to unsolicited questions, copies of pleadings as filed and served, copies of those parts of affidavits and statements received into evidence, copies of transcript of evidence given in open court, and copies of exhibits admitted without restriction in open court.

The better position remains that it is no part of the function of a barrister to speak publicly on record to the media on behalf of a client in litigation or in a dispute that is pending or is unresolved. That is properly done by the client on their own behalf, either personally or by the use of an appropriate spokesperson.⁸⁰ Barristers should not be publicly linked with a client's cause, lest they be perceived as a mere mouthpiece of the client rather than subject to an overriding duty to the court. Care is particularly important in unresolved proceedings lest there be any infringement of the sub judice rule giving rise to a contempt of court, and lest there be any interference with the appeals process. Questions of client confidentiality and legal professional privilege, to which it is difficult to give mature consideration in the course of a doorstep interview, also arise. Finally, media appearances and attributed public comment by barristers may have the unfortunate appearance of self-aggrandisement and/or self-promotion of that barrister's reputation and practice.

⁷⁷ Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 75.

⁷⁸ See also, *ibid* rr 95(i), (l), (m), in relation to the implied undertaking to use documents and information received through the litigious processes solely for the purposes of litigation.

⁷⁹ Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 76.

⁸⁰ Statement by K J Martin, President of the Western Australian Bar Association, 12 May 2006. There is no preclusion on a barrister advising a client what may or may not properly be said during the course of a statement to the media.

The role of junior counsel

With the abolition of those rules of practice that limited the type of work that senior counsel could undertake, the role of junior counsel who is being led can no longer be defined by simple reference to those limitations. The role of junior counsel:

will depend on the particular circumstances of [the] matter. Factors such as the nature of the brief, the number of counsel retained, the style and characteristics of the leader, the experience of the junior, the resources and views of the instructing solicitor and the instructions of the client will all contribute to determining the tasks that the junior has to perform in a given case.⁸¹

Subject to that qualification, the Bar Practice Course conducted by the New South Wales Bar Association provides a useful catalogue of the tasks that might generally be undertaken by junior counsel in conferences, advisings, case preparation and hearing. That catalogue, with some modifications and additions, is set out below.

Conferences

Junior counsel will usually be the point of contact between counsel and instructing solicitor. Prior to the conduct of any conference between solicitors and counsel (whether with or without the client), junior counsel must ensure:

1. that he or she has ascertained the purpose(s) for which the solicitor (and/or client) wishes to confer, has ascertained the matters to be determined during the course of the conference, has prepared an agenda (where appropriate), and has apprised senior counsel of those matters;
2. that he or she has sufficiently mastered the brief to be able to address the matters for consideration during the course of the conference;
3. that he or she has prepared a relevant chronology of events for senior counsel;
4. that he or she has explored with senior counsel their respective views in relation to the legal and forensic issues to be discussed during the course of the conference, and has sought senior counsel's direction as to how and by whom those views will be expounded and presented during the course of the conference; and
5. that during the course of the conference he or she expresses any dissent from the views of senior counsel with diplomacy.

Advisings

In certain circumstances it will be appropriate that advice on some particular aspect of a matter be attended to by junior counsel without the involvement of senior counsel. Where the advice is to be prepared jointly, or drafted by junior counsel and settled by senior counsel, junior counsel must ensure:

1. that he or she has conferred with senior counsel to determine whether senior counsel wishes junior counsel to prepare a draft, or whether certain sections are to be prepared by junior counsel and certain sections prepared by senior counsel;
2. that he or she has comprehensively researched the authorities dealing with the issues the subject of the advice, including by the use of electronic research facilities and to ensure that there is no matter pending before the High Court the determination in which might affect the law on the topic; has prepared a bundle of the relevant authorities for consideration by senior counsel; and has prepared a bundle of the relevant documents from the discovery for consideration by senior counsel;

⁸¹ M J Slattery QC, 'The Role of Junior Counsel When Working with Senior Counsel' (Bar Practice Course, New South Wales Bar Association, 1997) (as updated by D C Price, April 2010).

3. that, so far as is possible, he or she has drafted the advice using a style and format that is acceptable to senior counsel; and
4. that, once settled by senior counsel, the advice is carefully proofread to rectify any typographical errors and to include only correct citations from the authorised reports (where available).

Case preparation

In the usual course, junior counsel will have responsibility for the initial preparation of documents including pleadings, witness statements, applications and affidavits in support, written submissions and lists of authorities. All important documents should be submitted to senior counsel for consideration and/or settling prior to filing or service.

Junior counsel should also maintain a case calendar to ensure compliance with, and to keep senior counsel apprised of, all orders, rules and practice notes governing the filing and service of pleadings, statements of evidence, affidavits, expert reports, notices of admission and objection, tender bundles, lists of authorities and written submissions.

Subject to the idiosyncrasies and preferences of senior counsel, junior counsel should highlight or mark up particularly relevant passages in senior counsel's set of authorities prior to oral submissions.

Hearing

A number of factors will bear upon when junior counsel will be present in court during the course of a hearing. In the ordinary course, junior counsel will be present in court at all times. The size of the legal team will sometimes assume significance in the context of a trial. So, for example, when a jury is present in a criminal matter or where the opponent is a litigant in person not all members of the legal team may be present in the courtroom. On occasion, senior counsel may require his or her junior to undertake research or drafting tasks outside court during the course of the hearing. On the other hand, there may be circumstances in which senior counsel will be absent and require junior counsel to assume conduct of the matter for that time. These are matters for determination by senior counsel, and it is important that junior counsel is not absent from the courtroom without prior consultation.

Subject to that qualification, during the course of the proceedings junior counsel should:

1. ensure at the outset that he or she understands the leader's expectations in terms of the division of labour during the course of the trial, including any witnesses to be taken or submissions to be made by junior counsel. If junior counsel is to undertake the cross-examination of witnesses, the court will only permit cross-examination of a witness by more than one counsel in special circumstances;⁸²
2. liaise with the instructing solicitor to ensure that there is both a tender copy and a working copy for the judge(s) of every document to be tendered in the case and, in circumstances where a list of authorities has not been filed in advance, copies for the court and opposing counsel of authorities to which counsel intend to refer;
3. keep notes of evidence and, in long cases, keep a running draft of final submissions;
4. maintain a running list of issues to be covered in the cross-examination of each witness;
5. maintain a list of exhibits and documents marked for identification;

⁸² *Phillips v Phillips* [1966] 1 NSW 49; *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15.

6. maintain a list of all requests made by the judge(s) in relation to additional materials, further clarification on points of law, etc;
7. act as a buffer and filter between the instructing solicitors and senior counsel; and
8. only communicate by written note when senior counsel is on his or her feet.

A junior should always maintain a complete working set of documents that will be required during the course of the trial. Senior counsel as a class are notorious for misplacing documents that have been provided to them, sometimes only minutes before. While there are meritorious exceptions to this rule, documents handed to senior counsel should be regarded much as aeroplanes flying into the Bermuda Triangle until the leader demonstrates he or she can be trusted as bailee.

A junior must always be prepared to step into the shoes of his or her leader in the event of absence, illness or indisposition. Some notice is preferable but apparently not obligatory or always possible.

Civil liability of barristers

Barristers are subject to the same obligations and duties as other professional service providers to exercise reasonable skill, care and diligence in the provision of services to clients.⁸³ In Australia, however, barristers and solicitor-advocates have a limited immunity from civil proceedings for negligence.

The basis of the immunity

The basis of the immunity was restated in the decision of the High Court in *D'Orta-Ekenaike v Victoria Legal Aid*.⁸⁴ The Court reaffirmed the decision in *Giannarelli v Wraith*,⁸⁵ to the effect that barristers and solicitor-advocates were immune from civil proceedings for work performed in the course of advocacy and in the course of preparing for a hearing. In that earlier decision, Mason CJ explained that the basis of the advocate's immunity lay in public policy. The majority in *D'Orta-Ekenaike* reasserted the immunity on the ground of the need to provide finality to disputes.

If barristers and solicitor-advocates were open to suits in negligence, it would have the effect of retrying the original action. This was the basis of the earlier English decision in *Rondel v Worsley*,⁸⁶ where it was considered undesirable to invite a 'chain-like course of litigation'. Similarly, in *Saif Ali v Sydney Mitchell*,⁸⁷ the court expressed the view that, as a matter of public confidence, it was important 'back door' methods of obtaining favourable judgments be eradicated. For these reasons, the law discourages relitigation except by means of appeal. As the majority observed in *D'Orta-Ekenaike*:

The question is not, as may be supposed, whether some special status should be accorded to advocates above that presently occupied by members of other professions. Comparisons made with other professions appear sometimes to proceed from an unstated premise that the law of negligence has been applied, or misapplied, too harshly against members of other professions, particularly in relation to factual findings about breach of duty, but that was not a matter argued in this Court and should, in any event, be put to one side. Nor does the question depend upon characterising the role

⁸³ This is subject to the qualification that barristers do not have a contractual relationship with their clients and are under no contractual duties (with the limited exception of cost agreements under legislation).

⁸⁴ (2005) 223 CLR 1 (*D'Orta-Ekenaike*).

⁸⁵ (1988) 165 CLR 543.

⁸⁶ [1969] 1 AC 191.

⁸⁷ [1980] AC 198.

which the advocate (a private practitioner) plays in the administration of justice as the performance of a public or governmental function.

Rather, the central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of relitigation would arise. There would be relitigation of a controversy (already determined) as a result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy. Moreover, it would be relitigation of a skewed and limited kind. No argument was advanced to this Court urging the abolition of judicial or witness immunity. If those immunities remain, it follows that the relitigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. An exception to the rule against the reopening of controversies would exist, but one of an inefficient and anomalous kind.⁸⁸

The general immunity of participants in the court process

The limited immunity afforded to advocates forms part of a broader principle. Witnesses have absolute immunity from liability for anything they say in court. This rule is considered necessary as a matter of public policy to encourage witnesses to express themselves freely. Judicial officers also enjoy an immunity from suit, because the alternative position would be inimical to public policy. The rationale for this position has been put in the following terms:

No judge should be harassed by the thought that: 'If I do this or that, I may be sued by this or that prisoner or this or that litigant.' Rather than subject a judge to influences of that kind, the law says that no litigant can bring action against him for anything done by him in his judicial capacity.⁸⁹

As Gleeson CJ noted in *Keefe v Marks*,⁹⁰ the reasons underlying the immunity extended to judges, jurors and witnesses have equal application to the immunity of advocates. Similar public policy considerations necessarily apply to the role of counsel in court.⁹¹ Given the adversarial nature of the legal system, in the absence of the immunity counsel would inevitably be subject to harassment and second-guessing in relation to forensic decisions made during the course of trial. That in turn would affect the ability of counsel to further the administration of justice in a given matter. It would also have an unfair operation, as many tactical decisions taken in the conduct of a trial require account to be taken of a multiplicity of considerations. Those decisions are not readily amenable to retrospective dissection and attempts to apply some objective measure of performance. These principles have been summarised in the following terms:

It is therefore important to emphasise that the immunity is not for the benefit of counsel, but for the administration of justice, and it is in this respect that the advocate differs from other professionals. The adversarial system, it is argued, relies to a large extent on counsel exercising independent judgment in the conduct of a case. The witnesses to be called, the scope of cross-examination, the points of law to be raised, and the like, are all determined by the advocate, not the judge. The exercise of this judgment is important not only for the client's success, but for the efficient administration of justice, and the courts must rely upon the advocate's observing that duty.⁹²

⁸⁸ (2005) 223 CLR 1, [44]-[45].

⁸⁹ *O'Reilly v Mackman* [1983] 2 AC 237, 251-3 (Lord Denning MR).

⁹⁰ (1989) 16 NSWLR 713, 717.

⁹¹ See, D Bates, 'The Litigation Solicitor's Defence of Relying Upon Counsel's Advice' (1996) *Queensland Law Society Journal* 393.

⁹² G Hampel and J Clough, '*Giannarelli v Wraith*: Abolishing the Advocate's Immunity from Suit: Reconsidering *Giannarelli v Wraith*' (2000) 24 *Melbourne University Law Review* 1016.

The English position

D'Orta-Ekenaike also considered the immunity in light of the decision of the House of Lords in *Arthur J S Hall & Co v Simons*.⁹³ There, the House of Lords, overturned its previous decision in *Rondel v Worsley*⁹⁴ and abolished the immunity. The High Court determined that matters informing the position in England and Wales have limited application to the Australian situation. The decision in *Hall v Simons* is based in large part on the fact that recent procedural reforms in the United Kingdom have substantially relaxed the onus that rests on a defendant before summary judgment will be entered. On that basis, the House of Lords was satisfied that any weak or vexatious claims that might follow upon the abrogation of the immunity could be dealt with in summary fashion. The situation in Australia remains that a proceeding will not be dispensed with on a summary basis unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed.⁹⁵

The majority in *D'Orta-Ekenaike* also drew attention to the fact that the position adopted by the House of Lords in *Hall v Simons* may be understood as influenced, if not required, by the *Human Rights Act 1998* (UK) and the consequent application of art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁹⁶ That article was then understood as securing the right to have *any* claim relating to civil rights and obligations brought before a court or tribunal. In Australia, there is no general right of that kind in competition with the principle that controversies, once quelled, should not be reopened.

Alternative mechanisms

The immunity does not affect other mechanisms designed to protect the public interest. Disciplinary structures operate to control the conduct and practice of barristers. The nature and purpose of disciplinary proceedings is to protect the public.⁹⁷ In addition, the criminal appeal system allows those convicted to bring appeals based on their lawyers' errors where justified.⁹⁸

Extent of the immunity

The ambit of the immunity is no greater than is necessary to satisfy the public interest grounds discussed above. It extends only to 'in court' work and out of court work which 'is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing'.⁹⁹ As Mason CJ observed in *Giannarelli v Wraith*, 'to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity'. That approach was endorsed by the majority in *D'Orta-Ekenaike* in the following terms:

Should the boundary of the operation of the immunity be withdrawn?

... we consider that no sufficient reason is proffered for doing so. In particular, there is no reason to depart from the test described in *Giannarelli* as work done in court or 'work done out of court which leads to a decision affecting the conduct of the case in Court', or as the latter class of case was

⁹³ [1999] 3 WLR 873 ('*Hall v Simons*').

⁹⁴ [1969] 1 AC 191.

⁹⁵ See, *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62.

⁹⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, signed 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

⁹⁷ *Wentworth v NSW Bar Association* (1992) 176 CLR 239, 250-251.

⁹⁸ See, eg, *TKWJ v The Queen* (2002) 212 CLR 124.

⁹⁹ *Rees v Sinclair* [1974] 1 NZLR 180, 187 (McCarthy P).

described in the Explanatory Memorandum for the Bill that became the Practice Act, ‘work intimately connected with’ work in a Court. (We do not consider the two statements of the test differ in any significant way).

As Mason CJ demonstrated in *Giannarelli*, ‘it would be artificial in the extreme to draw the line at the courtroom door’. And no other geographical line can be drawn that would not encounter the same difficulties. The criterion adopted in *Giannarelli* accords with the purpose of the immunity. It describes the acts or omissions to which immunity attaches by reference to the conduct of the case.¹⁰⁰

In *D’Orta-Ekenaike*, McHugh J provided a useful catalogue of matters falling within the scope of the immunity, viz: failing to raise a matter pertinent to the opposition of a maintenance application;¹⁰¹ failing to plead or claim interest in an action for damages;¹⁰² issuing a notice to admit and making admissions; failing to plead a statutory prohibition on the admissibility of crucial evidence; and, negligently advising a settlement.¹⁰³ His Honour referred also to examples given in the reasons of Gleeson CJ in *Keefe v Marks*, including: interviewing the plaintiff and any other potential witnesses; giving advice and making decisions about what witnesses to call and not to call;¹⁰⁴ working up any necessary legal arguments; giving consideration to the adequacy of the pleadings;¹⁰⁵ and, causing any necessary steps to be undertaken to have the pleadings amended.¹⁰⁶ To these examples may be added failing to tell a court that certain criminal offences of an accused had already been taken into consideration by another court.¹⁰⁷

Outside the area of immunity a barrister is in a position analogous to other professionals sued for negligence.¹⁰⁸ Barristers have the same exposure as solicitors for negligence in such matters as failing to advise the availability of possible actions against third parties; failing to advise the commencement of proceedings in a particular jurisdiction;¹⁰⁹ the negligent compromise of appeal proceedings; and, advising in non-litigious business.¹¹⁰

The position of junior counsel

Being led in a matter by senior counsel does not thereby quarantine junior counsel from liability in negligence. As the Full Court of the Federal Court observed in *Yates Property Corporation Pty Limited v Boland* observed:

But when a case is a difficult or complex one or when it involves a substantial sum of money, the client or the solicitor will form the view that it requires the attention of two counsel and then leading counsel is retained. That does not mean that the role of junior counsel is diminished. On the contrary, as anyone who has practised as leading counsel will know, senior counsel places great reliance on junior counsel for all aspects of the preparation of a case for trial ... It was quite wrong of junior counsel in those circumstances to act on the assumption that he had no responsibility for any aspect of the advice and decision-making involved in bringing such a large case to trial.¹¹¹

¹⁰⁰ (2005) 223 CLR 1, [85]-[87].

¹⁰¹ *Rees v Sinclair* [1974] 1 NZLR 180.

¹⁰² *Keefe v Marks* (1989) 16 NSWLR 713.

¹⁰³ *Biggar v McLeod* [1977] 1 NZLR 321 (affirmed in *Biggar v McLeod* [1978] 2 NZLR 9); *Kelley v Corston* [1997] 4 All ER 466.

¹⁰⁴ *Bateman v White* [1996] PNLR 1.

¹⁰⁵ *Somasundaram v M Julius Melchior & Co (a firm)* [1988] 1 WLR 1394; *Del Borrello v Friedman & Lurie (A Firm)* [2001] WASCA 348.

¹⁰⁶ *McFarlane v Wilkinson* [1996] 1 Lloyd’s Rep 406.

¹⁰⁷ *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692.

¹⁰⁸ *Saif Ali v Sydney Mitchell & Co (a firm)* [1980] AC 198, 231 (Lord Salmon).

¹⁰⁹ *MacRae v Stevens* [1996] Aust Torts Reports 81-405.

¹¹⁰ See discussion in the supporting judgment of McHugh J in *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 52-3.

¹¹¹ (1999) 85 FCR 84, 111.

Liability for costs

It should be noted finally that barristers and solicitor-advocates may be subject to orders that they pay the cost of proceedings personally in certain circumstances. A superior court has an inherent jurisdiction to make such an order, and various state and territory legislation gives power to the court to make orders requiring barristers to pay costs.¹¹² That power is only exercised in exceptional circumstances, such as advising the institution or continuation of proceedings with no prospects of success, or where the conduct of a proceeding is unduly delayed or protracted by negligence, misconduct or default on the part of the barrister. Such orders are frequently referred to under the compendious description of 'wasted costs' orders.¹¹³

That power will not be exercised lightly, for fear that barristers will take an overly conservative approach and so deny litigants access to the courts.¹¹⁴ So, a case must be plainly unarguable, as opposed to barely arguable, before an adverse costs order will be made. Further, the order will only be made where the conduct giving rise to the claim 'relate[s] clearly to a fault in relation to the advocate's duty to the court not in relation to the opposing party, to whom he owes no duty'.¹¹⁵ It is also made clear in the judgments that the claim against the barrister should be clearly proved; the court is not entitled to speculate what may be behind the conduct in question, and the barrister is entitled to the benefit of any doubt accruing on counsel's side.¹¹⁶

¹¹² See, eg, *Supreme Court (General Civil Procedure) Rules 1996* (Vic) r 63.23; *Legal Profession Act 2004* (NSW) ss 344, 348.

¹¹³ *Ridehalgh v Horsefield* [1994] Ch 205, 226; *Campbell v Air Transport System Pty Ltd* [2006] NTSC 40.

¹¹⁴ *Medcalf v Mardell* [2003] 1 AC 120, 143 (Lord Hobhouse).

¹¹⁵ *Ibid*; see also, *Da Sousa v Minister of State for Immigration* (1993) 114 ALR 708, 712.

¹¹⁶ *Steindl Nominees Pty Ltd v Laghaijar* [2003] 2 Qd R 683, [42] (Williams JA); *Ridehalgh v Horsefield* [1994] Ch 205, 237.