

# Advertising and Touting

*Address to the Second Biennial Conference of the Australian Bar Association, Alice Springs by G.L. Davies, Q.C. of the Queensland Bar.*

An outsider looking at our profession, and indeed some of our members also, might say that we are competing in a market place, not only against one another, but also against other professions, in particular the other branch of our own profession and accountants; and that therefore we ought, as they do, to advertise the services we provide and in other ways seek to induce solicitors and ultimate clients to avail themselves of those services; that advertising is inherent in a free economy, and, provided it is not misleading, helps the consumer to exercise choice in such an economy.

On the other hand, the more traditionally minded among us would say that advertising and touting are inconsistent with the whole conception of a professional man as one who joins his professional colleagues in the performance of a service to the community, who is bound by strict rules of conduct in his relations with his colleagues and his clients, and who recognises a higher duty than that of mere compliance with his clients' wishes, whatever they may be.

There is a great deal of middle ground between those two views. And once it is accepted that either advertising or touting is permissible at all, the question becomes, of course, one of degree. The purpose of this paper is to promote discussion on these competing views and on the middle ground which lies between. Although I shall develop my own views in the course of that discussion I thought I should state them at the outset. All touting is, I think, bad and should remain proscribed. My view about advertising is, as I shall explain, less easy to state in a concise form but, attempting to state it in a sentence, I would say that, as Aristotle might have said, too much or too little are both undesirable.

There is, of course, an important difference between barristers and most other professionals in that barristers do not deal directly with the public. Because they are briefed by solicitors it is they who, for the most part, choose barristers for specific cases or opinions. But that is not always so. Some barristers have acquired public reputations, or reputations among a section of the public. As long as I can remember there has been some public awareness of the names of some barristers, particularly in the field of criminal law. And no criticism of a barrister may justifiably be made if his public reputation has arisen from no more than his participation in a case or a number of cases of great public interest. Nor is it surprising that a client may ask that that barrister be briefed for him. But the public awareness of the names of specific barristers is no longer confined to those who have appeared in particularly gruesome criminal trials. There are, I think, a number of reasons for this. One is that a better educated and more sophisticated public is correctly perceived by journalists to be interested in, for example, some commercial litigation. The BHP takeover saga is a recent example. Another reason, to which I shall return later, is unfortunately the efforts of some barristers to ensure that they obtain or retain a public reputation.

Because of increased sophistication, particularly among persons who engage in activities which frequently result in litigation (finance and insurance companies and accountants in the taxation field are examples) and because of increased awareness generally of the names of specific barristers, there is an increasing number of clients who seek to have some say in choosing their barristers. No doubt in many of these cases



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the solicitor will seek to influence choice of barrister. But it is a bold one who will overrule his clients' choice. Consequently there is some point, for those intent on advertising or touting, to seek to influence not only solicitors but also the public generally or, depending on their kind of practice or the kind of practice they are seeking, a specific section of the public.

There is a good deal of evidence, or at least strong ground for suspicion, that both advertising and touting are practiced by barristers, though how widely it is impossible to say. Nevertheless so far as I am aware there has been no great pressure put on any of our controlling bodies to relax the existing rules. My own view is that advertising and touting by barristers will increase, albeit in subtle ways, and that there will be pressure upon our constituent bodies to relax their existing rules. In a number of specific areas — damages for personal injuries and workers' compensation are obvious examples — substantial areas of work have been or will shortly be lost to the bar. There is also generally an increasing intrusion of solicitors into areas of law once thought to be the sole province of the bar.

There is little doubt that solicitors, particularly those in the larger firms, are now frequently performing work once thought of as the sole province of barristers; in particular, drawing and settling pleadings and affidavits, giving written opinions and appearing in court. By way of example, a partner in one large Sydney firm told me that his firm now almost invariably draws its own pleadings in actions and rarely briefs counsel to give opinions, doing so only when they felt some "insurance" was necessary. This is a change which has taken place only over the last few years but which, with the continued growth of the larger firms at the expense of smaller ones, I would expect to continue at an accelerating pace.

The Australian Society of Accountants allows its members to advertise, with no restrictions other than those which may be imposed by trade practices legislation. In Victoria, Western Australia, New South Wales and The Australian Capital Territory a solicitor may now advertise in connection with his practice in whatever medium he chooses — radio, television or written publication; there being no restriction on what information the advertisement may convey, providing it is not misleading or deceptive, vulgar or sensational, or suggests that he is a specialist or expert in a field. Other States are more restrictive. Touting is also widely permitted or at least tolerated.

My Bar, and I think most others in Australia, prohibits by its rules of conduct, advertising and touting. There are only minor exceptions to this.

So far I have not attempted to distinguish between advertising and touting and for the most part there is little point in doing so. I should say that I take touting to mean direct personal solicitation of work, and advertising to mean solicitation of a more public and general kind. But because there are some arguments in favour of advertising which I do not think can be advanced in favour of touting it is convenient, at least initially, to discuss them separately. Finally I will say something about the difficulty of policing some forms of advertising and touting.

### Advertising

I intend to approach the topic by considering first what reasons may be advanced in favour of allowing barristers to advertise, and then to consider some reasons against it.

The main reasons which, it seems to me, may be advanced in favour of allowing advertising, roughly graduated in order of boldness, are:

- (1) to assist newly admitted barristers in establishing their practices;
- (2) (which is much the same thing) to assist those barristers who do not have the social or business contacts of some of their colleagues;
- (3) to allow those who possess qualifications and/or experience either generally or in specific fields to advertise those facts;
- (4) to better inform solicitors and the public so as to enable them to make a more informed choice;
- (5) to stimulate competition thereby reducing fees, increasing efficiency and so providing a better service. The argument may be put less highly; the fact that a ban on advertising is anti-competitive is seen by some as sufficient; and
- (6) advertising will result in more work for the bar.

As to the first and second of these it is undoubtedly true that, particularly at the larger bars, there are bright barristers who are not doing as well as their less bright colleagues, simply because they are not known. In Queensland, a newly admitted barrister is allowed to advertise in "The Proctor", the newsletter of the Queensland Law Society, though only once, the fact that he has recently gone into practice, together with his address and telephone number. Should he be allowed to do more? For example, if he obtained a first class Honours degree, or some university prize, should he be allowed to state that? Should he be allowed to disclose some or all of his university results? Should he be allowed to disclose his previous practical training? And should he be allowed to advertise more than once?

There is, I think, a good deal to be said for an affirmative answer to each of these questions, although there would be few, I imagine, who would think that such advertising should be uncontrolled as to what can be disclosed or the manner in which it can be disclosed. I would give an affirmative answer to each of these questions. It should not be difficult to implement a controlled system of advertising whether it be by means of a directory published by the Bar Association or by means of advertisements inserted in the appropriate solicitors' journal, or both. Once the decision is made to allow advertising of this kind for newly admitted barristers there is no reason in principle why it should not be allowed for all barristers. I would therefore also allow such a controlled system of advertising for all barristers. The precise

form and content of this, though important, is not, I think, within the ambit of this paper.

Although as I have said I think that the advertising of qualifications and experience should be allowed in a controlled way, I think it would be wrong, at least at the present time, to allow a barrister to advertise that he possesses expertise either generally or in a specific area. I do not think that the question of specialist advertising can be considered in the absence of some system of specialist accreditation; in other words a course of specialist study and training which is acceptable to the controlling professional body. There is no doubt that the law is increasingly more complex and that there are now many barristers practicing as specialists. But at the present time in some cases barristers acquire specialist practices by accident rather than design and in some by design rather than expertise. No doubt allowing a newly admitted barrister to advertise the fact that he has an honours degree in family law or that he has a degree in town planning may help to launch him on a specialist career in family law or planning law. But it seems to me that more than this is needed; that there is a need for some system of specialist accreditation. Nevertheless it is sufficient to say here that until there is some such system of specialist accreditation it would be unwise to allow barristers to advertise expertise, rather than academic qualifications or experience, in any specific area. The distinction may be a fine one between advertising that one has practiced only in family law for five years on the one hand and, on the other, advertising that one is a specialist in family law. Nevertheless I am inclined to think that until there is some system of specialist accreditation the former should be allowed, subject to the sort of controls that I have mentioned, but the latter not allowed.

The fourth argument which I mentioned in favour of advertising was to better inform solicitors and the public so as to enable them to make a more informed choice. I would accept this argument to the extent that it would allow advertising of the kind I have already mentioned. But further than this I would not go. Advertising which is overtly persuasive rather than simply stating relevant facts about the barrister concerned clearly would not assist in relevantly informing the solicitor or client. And even some advertising which did no more than state facts, such as a percentage of cases won or amounts of damages that had been obtained would not, I think, be relevantly informative. There are as I shall mention a little later other good reasons why advertising of this kind should not be permitted.

The fifth reason which I mentioned, that advertising reduces fees and/or increases efficiency is more controversial. Some American surveys claim to demonstrate this. Whilst I would accept that allowing barristers to advertise the fees which will be charged in a specific matter may result in reduced fees I would be inclined to think that this would, more often than not, also result in a reduction of the quality of work resulting from the cutting of corners in order to do the work for a reduced advertised price whilst still making a profit. In any event, at least in the case of the surveys which I have seen, the situation in America before advertising of fees was allowed was that there was no restriction upon maximum fees; so that the American experience may not be relevant here where in almost all jurisdictions the maximum fees which barristers may charge, or at least which may be recovered in litigation, are either fixed by a scale or subject to taxation.

The final reason which I mentioned as being advanced in favour of advertising is that it will result in more work for the bar. Again American surveys claim to show that advertising by lawyers in America resulted in greater community awareness of lawyers' services and consequently in more work for the profession. Although, as I mentioned earlier, barristers may look not only to solicitors but also, in some cases, to others as persons who have some say in their engagement, it remains true that, for the most part, it is solicitors who will make the final choice. And I do not see advertising as having the effect upon solicitors of causing them to brief barristers more. Even if I am wrong in this I would be inclined to think that advertising to this end could adequately be done at a corporate level. It is possible, for example, that advertising by Bar Associations or this body might convince solicitors and such of those clients who frequently have some say in briefing barristers that work such as settling pleadings and affidavits and giving opinions on legal questions is (if that is the case) more efficiently and more cheaply and better done by barristers than solicitors.

There are a number of arguments which may be advanced against advertising. Some of those which are commonly advanced are, not in any particular order:

- (1) That advertising places too much emphasis on achieving success rather than upon the ethical duties of a barrister including his overriding duty to the court;
- (2) That in order to provide a cheaper and competitive service barristers may be tempted to cut corners and lower standards;
- (3) That advertising, by emphasising the money earning aspect of our profession, lowers our own and other persons respect for the profession;
- (4) That advertising promotes exaggeration and even dishonesty; and
- (5) That misleading advertising is extremely difficult to police.

This argument that advertising may cause the erosion of a barristers ethical duties including the duty to the court because it places too much emphasis on success presupposes that such advertising will assert or imply that the barrister is likely to be more successful rather than better than his colleagues. No doubt the line between these two is a thin one but I do not think that the argument can be properly advanced against an advertisement which states only qualifications or experience either generally or in a particular field. Beyond that I consider that the argument is a valid one.

The same may be said of the argument that advertising will lower standards of competence in the race to compete.

I do not think there is any doubt that advertising other than of the kind which I would allow lowers our own and other persons respect for the profession. At first sight that argument may seem both pretentious and old fashioned. Yet one of the most important characteristics of our profession is its dignity which is inextricably linked with the dignity of the entire judicial system. I think that uncontrolled advertising and even controlled advertising which goes beyond the sort of information which I earlier envisaged, would result in the erosion of this dignity.

The fourth reason, that advertising promotes exaggeration and dishonesty is I think self evident. Our own experience in litigation, for example, actions pursuant to Section 52 of the *Trade Practices Act*, shows this to be true of others.

I shall defer consideration of the last argument advanced, that misleading advertising is difficult to police, to a little later.

In summary with respect to advertising I think that there is a good deal to be said for allowing barristers to advertise qualifications and experience. Furthermore if there were some system of specialist accreditation I would allow advertisement of that also. The way in which this is to be implemented should, I think, be controlled by the relevant controlling body by itself producing a directory and/or settling the form of advertisements to be inserted in solicitors' journals. Beyond that I would be reluctant to go. I can see no advantage to the public or to the profession in doing so; and I can see a real possibility of a consequent erosion of our ethical standards, of our standards of competence and of cherished characteristics of our profession.

### **Touting**

Whilst advertising, when done, is generally so public as to be visible to all, touting may be and often is surreptitious. Despite the fact that it too is contrary to the rules of at least my Association, I have no doubt that it is prevalent.

Of course, it is not always easy to determine what is touting. A barrister may have mixed motives in taking a solicitor to lunch or inviting him to a party or attending a seminar. There is no doubt that many barristers do all of these things with a view, at least partly, to soliciting work.

There is no justification for it in principle. Whereas some limited form of advertising may be seen to be merely the conveying of relevant information about a practitioner, the better to enable the solicitor (or his client) to make a more informed choice of barrister, touting cannot have even that virtue.

### **Policing Advertising and Touting**

So far I have discussed advertising in the sense of inserting an advertisement in a periodical or producing a directory for circulation among solicitors. That is not difficult to police. But there are more subtle means of advertising which are very difficult to police. I have already accepted that a barrister in an important case cannot be accused of advertising if the case and his name are reported in the newspaper. But have you wondered how it comes about that some barristers seem to be mentioned in the papers more frequently than others of their colleagues who seem to do the same kind of work; or that some barristers seem to be reported even in the most trivial cases? Have you noticed that there always happens to be a reported in court when you are appearing against a particular barrister? And have you sometimes wondered, when reading a newspaper article about a barrister (so common these days), at the diligence and investigative skill of the reporter who managed to glean some facts or statistics about the barrister which you thought must have been known only to the barrister?

There is at least good ground for suspecting that some barristers talk to the press with a view to self promotion. But I can see no way of policing this. If a barrister is prepared to talk to the press and to ensure that an article is written about him without containing any direct quotations he is unlikely to admit that he did so.

The same is true of touting. You may at least strongly suspect that a barrister has taken a solicitor (or potential client) to lunch or invited him to dinner in order to solicit work from him. But it seems to me impossible to prove this.

Advertising of the above kind and touting may result in unfair advantages to the brazen and dishonest whilst being undetectable or at least unprovable. Perhaps all that a controlling body can do is to require an explanation and so at least to embarrass the barrister concerned into telling an untruth.