"Papers!"[1]

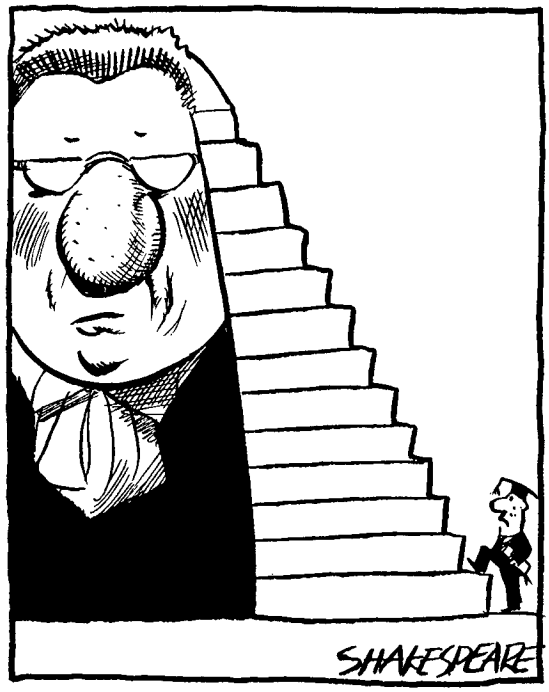
Lee Aitken

"You've got to remember that this ancient Inn wasn't born yesterday. It was born before HM Edward Three. No one's been in a hurry since. You've just got to kick your heels and look as though you like it. We've all been through it. It's good for us in the end."[2]

"The waiting for work is a terrible drawback to a young barrister's life and tends to sour his whole existence."[3]

The Carraway View

Most men[4] commence at the Sydney Bar with the same expectations as Nick Carraway in *The Great Gatsby* enters the New York bond market: "... Everybody [he] knew was at the Sydney Bar, so [he] supposed that it could support one more single man. All [his] aunts and uncles talked it over as if they were choosing a prep school ..., and finally said, 'Why - y-es', with very grave, hesitant faces." While it may once have been true that there was enough work to support the "single man", the Bar, unfortunately, is facing fissiparous pressures from lay and professional groups eager to avenge the imagined or real slights of the last thirty years of practice.[5]



In the old days, before the ravages of the recession, the introduction of paper committals and sentence indications, and the end of much common law work, the sanguine, Carraway, view was entirely justified. There was usually enough "floor work" around to keep the younger and less experienced players in peanuts, and more importantly, to provide them with the requisite forensic training to vindicate a claim to superiority as advocates over the average solicitor. There is less small work now as solicitors keep more of it for themselves. (It is here that the bar has failed as an institution since it has allowed a strong media perception to develop that all its members overcharge[6] without bringing any real craft to bear, an impression sedulously fostered by those with vested interests against the bar.)

A new mood seems to be sweeping the Street. A diaspora of sorts has begun as certain chambers follow the courts' move to other parts of the city with an inevitable downward pressure on demand for tenancies. This, in its turn, affects the price of chambers, for many of which there is at present no market because of an absence of buyers.

Subtle barriers to entry (notionally introduced to meet 'consumer expectations') are being erected to make it more difficult to commence into practice. In this, as in all life's travails, it helps to keep a sense of perspective. The ebb and flow of legal work, because of legislative or economic change, has frequently in the past[7] resulted in the collapse of a sandbar which has thrown the newer swimmers into roiling economic waters.

The best time to commence at the Bar?

Look back 30 years. A distinguished jurist, now gracing a superior Court Bench, once related a monitory tale over lunch when the economic rigours of practice were mentioned. Had he gone to the Bar one year later, so he explained, he would have had no practice at all because of now long-forgotten changes to the Landlord and Tenant legislation, and criminal work. As a result, much as now, the more senior juniors were forced down into the Magistrates' Courts and the neophytes went out backwards. And it was ever thus!

A cursory perusal of every volume of legal memoirs published from 1850 onwards speedily convinces the browser that a slow start at the Bar is guaranteed - and, of course, in the old days a pupil paid a premium to sit in his master's Chambers.

---

1. The title derives from the poignant picture drawn by Henry Hawkins while waiting for work at the top of five flights of stairs in a woebegone eyrie in The Temple: he listens expectantly for the footsteps and the knock on the door: "Papers! Anyone who has ever waited for work to arrive will know how I felt" - Brampton, *Reminiscences* Vol I.
2. Herbert Getliffe to his pupil in Snow, *Time of Hope* (1949) p 247.
3. Lord Maugham, *At the end of the day* (1938) p 59.
4. On the vexed subject of misogyny at the Bar, see the author's "Bars and Bras" (forthcoming).
5. If things get too tough one could think about joining the DPP; in the Report of the Joint Committee on *The Midford Paramount Case and Related Matters* it was revealed that the main case officer on a huge Customs prosecution was someone who had had two years' service after one year with a Sydney law firm (para 10.50). "It was claimed by the DPP that 'two years experience was substantial" (para f10.51).
6. See Parris, *Under my wig* (1961) p 203: "The public is fed with fantastic figures of what Queen's Counsel earn."
7. Cp Parris op cit p 204 who spoke of a "slump in litigation" in England in the early 1960s and prophesied that merger would be the English Bar's only salvation - that has not yet occurred.

"Stall-fed" juniors [8]

The only notable exception, then as now, are juniors with connections. Sir Arthur Underhill[9], for example, when commencing at the Bar, was gratified that "... on my first day I found some six cases for opinions or instructions for drafts sent by my father." He was "not unnaturally elated at this ...".[10] His delight increased when an uncle by marriage "sent ... numerous cases on shipping, insurance and commercial law, subjects with which I had no previous acquaintance whatsoever."[11]

It is on this principle that H H Morris KC answered his own rhetorical question: "Shall I send my son to the Bar? The secret of success at the Bar is attorneys - attorneys - attorneys. If your son is fit for nothing better and he has a fair supply of attorneys then by all means send him."[12] Now, one cannot complain if nepotism or connection gives some favoured junior an easy start; God's bounty is dispersed indifferently and His largesse with connections is more than compensated for by His sense of humour in distributing outstanding physical attractiveness[13], great perspicuity, or sheer doggedness, all of which prove more useful in the long run than the evanescent pleasures of a practice based solely on connection. It is better to begin, as Sir Patrick Hastings long ago remarked, "at the very bottom ... in a case that did not matter, in a Court [one] could not find; no friends [can] help..., the patronage of kind relations is merely transitory...".[14]

A threnody in all memoirs of early years of practice is the absence of work in the early days. The vital thing is not to repine. As Lord Macmillan notes, "... (W)hile in these first years the prospects of success are apt to seem remote and high hopes seem doomed to frustration, the worst thing to do is eat one's heart out in idleness".[15] (Lord Macmillan suggests the possibility of publishing and writing to eke out one's time and a bare living. Sir Patrick Hastings obtained entrée to Sir Charles Gill's chambers by producing, at great mental expense, an unreadable monograph on money-lending legislation over his summer Vacation.[16] Nowadays, the utility of writing anything may be doubted, particularly if the aim is to build up a practice. It is a sad but self-evident fact that the number of players who actually <u>read</u> anything that is written in the more ephemeral of the proliferating number of journals is very small indeed. Few men will be briefed on the basis of lucid half-page in the Law Society, or some equally august, Journal. Perhaps a concerted PR campaign based upon extensive Law Society publications <u>plus</u> lunchtime performances at the larger shopping malls would have better results).

Building a practice

Lord Maugham's fundamental question remains as unanswerable now as it did 70 years ago: "Why, one is tempted to ask, does any solicitor send a set of papers for opinion or brief to a young man when there are many more competent older ones who would be glad to do the work?"[17] His Lordship offers no response to that and the current inquirer will similarly go unrequited. So it is that for a long time one is doomed to be in that group seeking earnestly for work rather than being sought after - "all want someone to discover that they are worth consideration for employment. Then, perhaps suddenly, perhaps imperceptibly, the position is reversed; ... clients begin to want them ...".[18]

Little fish

History also makes clear that when opportunity knocks[19] you must be ready to take it. Serjeant Ballantine's advice to the beginner is completely apposite: "Never return anything at the Bar - I never do!".[20] Lord Hewart counsels "Do not neglect the day of the little fishes."[21] Henry Hawkins tells the tale of returning a criminal brief because "there was nothing to be said by way of defence, but I learnt a lesson never to be forgotten". The Circuit leader, Rodwell, was happy to pick up the brief which Hawkins had spurned:

> "My curiosity was excited to see what Rodwell would do with it, and what defence he would set up; it was soon gratified. He simply admitted the prisoner's guilt, and hoped the chairman ... would deal leniently with him. I could have done that quite as well myself, and pocketed the guinea."[22]

---

8. Henry Hawkins, *Reminiscences* Vol 1, p 67: "All blessings go with them; I never envied them their heritage. They are born to briefs as the sparks fly upwards. ... men who have never had to work their way seldom rise to eminence or to any position but respectable mediocrity. They never knew hope, and will never know what it is to despair, or to nibble the short herbage of the common where poorer creatures browse."
9. Underhill, *Change and Decay* (1938).
10. Id. 68.
11. Ibid.
12. H H Morris, *The First Forty Years* (1948) p 131.
13. This, without undue immodesty, is the author's strong suit.
14. Hastings, *Cases in Court* p 23.
15. Lord Macmillan, *A Man of Law's Tale* (1953) p 39.
16. Hastings, *Autobiography* p 87: "... I must confess that of all the tasks I have ever undertaken probably this was the most wearisome."
17. Maugham op cit 59.
18. Hastings op cit p 20.
19. The fairy stories are legion of the well-argued District Court motion, taken up at the last minute, and argued after much lucubration, which results in a huge debt-recovery practice from impressed solicitors (see, for example, memoirs by Lord Haldane, Sir Patrick Hastings and Lord Goddard - a Privy Council appeal, a fraud case, and Saturday morning(!) bank advice respectively. Compare, howver, Serjeant Ballantine, *Experiences* p 32: "I cannot say I burnt much midnight oil. No attorney, late from the country, ever routed me out and thrust a heavy brief into my hands, a circumstance which we have heard has so often been the origin of the success to eminent lawyers."
20. Given to Montagu Williams QC as recorded by him in *Leaves of a Life* (1890) p 89.
21. Jackson, *The Chief p 36.*
22. Hawkins op cit p 69.

Furthermore, it is unwise to assume that it will be possible to remedy gaps in one's legal knowledge in that quiet time before work begins to arrive. As Lord Cairns pointed out to the young Lord Guthrie, "Many men ... go to the Bar with the idea that they will get nothing to do for the first few years, and have plenty of time to read. But ... in point of fact men do soon get a chance. They are not prepared for it. They make a mess of it and are shelved for life."[23]

The right stuff: studied calm

Even for experienced former solicitors, it can be something of a trial to actually be "in the saddle" and in charge of a matter, with all depending upon fine line call judgments. What approach, then, should one take to the legal problem and the court? Studied calm. Although it may not be easy to emulate, it is suggested that Richard Bethell represents a beau ideal for those aspiring to a modern equity practice in his treatment of the court (though perhaps not one's fellow practitioners):

> "The Courts of Equity were at that time a very close borough, occupied by comparatively few practitioners who were acquainted with the subtleties of Chancery procedure. The machinery was cumbrous and slow, and a long experience was needed by those who would understand its working. There were few treatises on the various heads of practice, and still fewer reports of decided cases. ... Into this narrow circle Richard Bethell made his way with a calm assurance which startled those who had breathed its atmosphere for years. Their astonishment grew apace when, in a short time, they found the newcomer elaborating principles and assuming a knowledge of points of practice after a fashion to which none but the more venerable practitioners had hitherto aspired. He did not appear to desire any social intercourse with his professional brethren, nor to consider whether they were willing to bear his rather spinous humour."[24]

"The breath of an unfee'd lawyer"

At the start of a barrister's practice some firms, which should know better, adopt bold stratagems to obtain the dubious comfort of a counsel's opinion. Volumes of documents will arrive but without a backsheet and an opinion is then sought from the improvident. Baron Brampton counsels against truckling with any of this: "... there were a good many ... men who never got their fees at all from some attorneys; these gentlemen (the attorneys) patronised the poor pleaders by way of giving them 'a turn' as they called it, out of good nature. They never showed me that benevolence, because I determined from the first to have only business arrangements with my clients - no love - on my side, and no 'accommodation' on theirs".[25]

Bars and bars - nequid nimis

It is best, at the beginning, to keep a clear head and avoid alcoholic extravagance. Gone are those happier times when one could safely follow the precepts of Harold Morris's clerk - "May I suggest to you, sir, to make it a rule never to take any alcoholic stimulant of a morning before half past ten."[26] Although Dickens tells us that what Stryver and Carton "drank together, between Hilary Term and Michaelmas, might have floated a king's ship"[27] that does not conduce to confidence in either instructing solicitors or the court.

The keys to success
Clerking

Harold Morris, in his memoirs,[28] notes three things required for success at the Bar: the first is a good clerk; the second "is to make friends with all the members of the bar whom you meet"; the third is "advertisement". Unfortunately, good clerks are a nearly extinct species. A "good" clerk is one who actually clerks his or her floor - that is, is available to recommend upon a persuasive basis to the disinterested caller a counsel of whom that caller has never heard but who, upon the clerk's recommendation, the caller is prepared to instruct. As floor loyalty has broken down, so the possibility of such clerking has diminished. Many "clerks" now are mere factotums, ready to ensure that listings are attended to and conferees met but unable to give a recommendation upon which anyone will act. Proper clerking is worth (and paid) its weight in gold since it ensures that the newcomer at least gets a run.

Clubbability

Little need be said of clubbability; it is either in one's personality or not. If it is, it makes bearing life's forensic tribulations all the easier.

Advertisement, Pears Soap[29]
and "that most heinous sin of Huggery"[30]

But how to get a start without connections? Anciently, there were strict prohibitions against that most heinous sin of Huggery which has long been at the top of a long list of breaches of etiquette which a barrister must not commit. This was particularly so in the old days when there was an enormous

---

23. Orr, *Lord Guthrie* (1923) p 26.
24. *Life of Lord Westbury* pp 40-41.
25. Hawkins op cit p 18.
26. Harold Morris, *Back View* (1960) p 117.
27. Dickens, *A Tale of Two Cities*, "The Jackal".
28. Harold Morris, *Back View* (1960) p 118.
29. To succeed at the Bar, Morris's third requirement was "Pears Soap" - advertisement.
30. "Mr Dayrell to be presented [at the Bar Mess] for that most heinous sin of Huggery by dining with an Attorney when his brethren were assembled at the George. Guilty, a bottle free": the entry in the Midland Circuit Record for 1773 noted by Sir Frank Mackinnon in his wonderful book of bricabrac, *On Circuit* (1935) p 163.

social chasm between barristers and mere common attorneys.[31] (One may add, by way of aside, that it may well be a forced attempt to continue this notional division in present day social conditions which has led to the concerted attack on the Bar by political and professional foes.)

Serjeant Robinson in his *Reminiscences* notes the "imperative rule, before railways were generally established, that no member of the bar could enter a circuit town by any public conveyance ..." for fear of inadvertently mixing with attorneys[32].

All that has now changed. Chambers are daily besieged by "professional marketers" who, for a modest fee, will design brochures and "package" the "product" which the particular Floor may offer to solicitors. Several brethren have also considered the possibility of a half or quarter page in the quality press. All these changes came as a thunderbolt with the overnight revocation of the relevant Bar rules against advertising and touting generally.

Lord Macmillan recommends, following Dr Johnson, that anyone advising a budding junior would "have him inject a little hint now and again to prevent his being overlooked."[33] Until very recently, any attempts to manufacture and apply a little "Pears Soap" was mightily disdained. All that has changed, but at what cost? The supplying of services is particularly open to "puffing" statement and for reasons explored below, the mere statement of price is unlikely to be helpful to the potential consumer, or to lead to any increase in the demand for the supplier's services.

The future?

Now, of course, if the general public interest in access to counsel is taken too far there may be consequences which even the Trade Practices Commission in its far-sighted wisdom has not fully foreseen. Consider an American foretaste of what may shortly be the position in our own humble jurisdiction.

In *Bonfire of the Vanities* Tommy Killian is showing his client, Sherman McCoy, the precincts of the New York criminal court building in Downtown New York - merely transpose the scene to Downing Centre and relevantly alter the ethnicity of certain of the players - do we confront the future?

"Have you ever been here before?"

"No."

The biggest law office in New York. You see those two guys over there? He motioned toward two white men in suits and ties roaming among the huddles of dark people. 'They're lawyers. They're looking for clients to represent.'

'I don't understand.'

'It's simple. They just walk up and say, "Hey, you need a lawyer?"'

'Isn't that ambulance chasing?'

'That it is. See that guy over there?' He pointed to a short man in a loud, checked sport jacket standing in front of a bank of elevators. 'His name is Miguel Escalero. They call him Mickey Elevator. He's a lawyer. He stands there half the morning, and every time somebody who looks Hispanic and miserable walks up, he says "Necesita usted un abogado?" If the guy says, "I can't afford a lawyer," he says, "How much you got in your pocket?" If the guy has fifty dollars, he's got himself a lawyer.'

'What do you get for fifty dollars?'

'He'll walk the guy through a plea for arraignment. If it actually involves working for the client, he don't want to know about it. A specialist."

Fees and the elasticity of demand

A most peculiar and persistent feature of the recent Bar Readers course was the constant pious adjurations from most speakers not to charge too much! (This must be counterbalanced with the sage advice of a senior clerk not to charge too little when briefed with Senior Counsel for fear of making the respective fee-notes lopsided.) But as Lord Maugham notes in his autobiography, "The most remarkable feature about the Bar is not that they cannot sue for their fees, but that it is so difficult at the outset to earn any."[34] Why, then, would one not charge the absolute limit whenever anyone was so ill-advised as to give one work?

Although the fact has completely escaped the economic rationalists, it is painfully clear, is it not, that the volume of work which an individual attracts bears little or no relation, within limits, to the fee charged; put econometeloquently at the very bottom, there is absolutely no elasticity of demand: suppose you charge $40 per hour plus sandwiches for resisting a complicated 459G notice; that will not mean that work floods into your chambers.

On the contrary, solicitors being simple men will tend to value you at your own worth and you will likely languish at that level forever.[35] Your fee would only have any relevance if the market were fully informed (which it never will be for reasons explored above), sufficiently skilled to judge the level of service being offered, and price were the sole determinant of choice of the provider of the service.

Now, at the lowest level of work, price should be the sole determinant since one man's skill will be about the same as any others. But since style is indistinguishable from product, every man is in effect his own monopolist and will charge what he can get from the market.

Market segmenting

This segmenting of the market leads to intra-Bar dissonance on fees and advertising. Anyone who has spent six or seven years before the mast, and who has painfully acquired a practice, will be most reluctant to see full, or any, fee

31. Mackinnon records the following "indictments" which illustrate Huggery: dancing with an attorney's daughter; bringing an attorney in his chaise; dancing with an attorney's wife; dining with an attorney.
32. Mackinnon op cit pp 166-167.
33. *A Man of Law's Tale* (1953) p 39.
34. Maugham, *At the end of the day* (1938) p 53.
35. See the author's "Stars and Bars" for a full analysis of the "monkeys and peanuts" syndrome.

advertising introduced. Why? "Because it's not the way we have usually done it, it's not done, etc, etc." In reality the introduction of full fee advertising will undercut to a certain extent the goodwill and connections which have been painfully garnered over the preceding five or six years and will reduce its value since in terms of sheer skill there may not be a huge difference between someone of five years call and an experienced solicitor who has heeded the Bar's siren call. (Schadenfreude for the problems experienced by the raw beginner is replicated in the case of the fourteen year man when he contemplates applying to be Senior Counsel or risk being forever consigned to the "paper" end of the Equity Division. Of course, taking silk is not without its own risks.)

The irrelevancy of paper qualifications

For similar reasons, one can perceive a general reluctance to make paper qualifications and previous experience readily available to the inquirer. Of course, mere academic qualifications are of no use whatsoever in acquiring a practice. (For just such a reason I recently counselled a young barrister against mentioning his doctorate on his card, advice subsequently confirmed by the doyen of Sydney's barristers' clerks. It is salutary to remember that the only man ever to win both the Eldon and Vinerian Scholarships at Oxford University finished his career, not as Chief Justice of the Victoria, or the Commonwealth, but as the warden of Trinity College, Melbourne).[36]

The law and the Kuhnian paradigm: smoke and mirrors

Let us cut to the chase: the real problem with the present concerted assault upon the law and its finest practitioners is that it reveals too plainly what the thoughtful observer has known in his bowels all along - we are engaged in a fairly complicated but not too difficult social science which is easily accessible to an informed and educated layman.[37] To talk of legal practice as if it were akin to brain surgery, nuclear physics, or the highest levels of pure mathematics is nonsense. In this most hierarchical of professions the wisdom of ancients is often accorded the status of Holy Writ: consider, without disrespect, Sir Garfield Barwick's view of law as science: "The common man who thinks that the law is commonsense might be right if he watched the consummate lawyer at work in all his deep simplicity, and with that ease which conceals the great learning behind the apparent simplicity. But nevertheless the law is a mystery...".[38] This strikes the seasoned ear as a little too liturgical description of even a special leave application, let alone moving a matter from Monday to next Tuesday before a listing officer.

If you are dealing with a science, or mathematics, the discoveries are inevitably made by young men. In law, on the other hand, the perquisites go to the liverish, those who have hung on, learnt human nature, and have a wide knowledge of men, judges and affairs. It follows that you cannot "discover" anything new about the law at all: there is no Kuhnian paradigm to break unless you are a Lenin sort of lawyer and, up early one morning, decide to overthrow the entire State.

Someone like Lord Denning, who moderately reconfigures a few of the working concepts, is greeted as an innovator. But you cannot be a legal Isaac Newton: if you appear in the Court of Appeal one fine day and suggest that the law of tort should be permanently suspended and replaced by a law of obligations of your own making you will be taken in hand by a tipstaff and made the subject of a care order. Once accept the absence of scientific knowledge, and for these purposes doing things with rules or "smoke and mirrors" hardly counts, and disdain from a misinformed public is sure to follow.

Lobotomies and litigants in person

A simple example will demonstrate why the law has lost whatever "mystique" it once enjoyed among the credulous: if you were to hand a trepanning instrument to an educated, sober and unsqueamish layman he would not for one second contemplate opening the skull of the unconscious patient. If you hand the same layman an Act of Parliament, or a wills precedent, and ask him to explain either of them to a court as litigant in person he will make a fair fist of it and will be surprised that anyone could be paid $5,000 a day for doing so. (Was not Horatio Bottomley in his days, when appearing for himself, more than a match for most counsel sent against him?)[39] That, in a nutshell, explains why the legal profession in general, and the Bar in particular, is wide open for a cheap media shot.

The dislocation between the hard science and the "money" ends of the law and medical professions is illustrated by the respective treatments medical and legal university staff attract from practising colleagues. In medicine, to be a theoretical player you must be attached to some great teaching hospital where you confront and write copiously about the most complex medical problems upon which you consult in your specialty. (You may, of course, make more money running your "24 hour carbuncle clinic" up the Parramatta Road but at the international conference you are not remotely a contender).

In law, on the other hand, the campus is usually regarded by a practitioner as the province of the halt and the lame - only

36. Lawson, *The Oxford Law School 1850-1965* p 119.
37. It is this feeling which is behind the drive to make certain aspects of practice (such as conveyancing, will-drafting(!) and debt collection) a free-for-all in which qualified and unqualified alike will compete for work.
38. The passage is set out in extenso in the Frontispiece to Marr, *Barwick* but no precise citation is given to it by the author.
39. Marjoribanks, *Marshall Hall* p 132 describes the success which Bottomley and Marshall Hall with respect to defending libel actions for John Bull by having Bottomley appear as litigant in person, thus "enjoying to the full the licence always allowed to the litigant in person ...". This continued until Douglas Hogg, later first Lord Hailsham, hit upon the stratagem of suing the publishers alone which meant that Bottomley could take part only as a witness.

in the last few years have our own judges,[40] who previously adopted the English model, begun to recognise the contribution made by the writers of treatises.[41]

The new law schools and a message for practitioners

The view which the Federal government through its minions in DEET takes of the value of "legal educators" (and by inference, the legal system) may be seen by the fact that a law[42] professor, twenty years ago, earned as much as a District Court judge, and now earns half that amount! Yet, although he does not perceive it, that is a bell which tolls for the legal practitioner, however little he thinks that the academic world affects him: in that drop in academic salary, the legal practitioner should see the studied disregard of his own skills and position. Combined with this devaluation of the skill involved is a great opening up of access to legal education - as many lawyers are in training as are now in practice and each new "university" strives to add a law school to its training; it is, after all, an easy Faculty to establish since all that is required is a foundation grant for the library and few retired operators to teach what they can remember. The impact of this is slowly filtering through to the professional level. There is an indirect control over the solicitor's profession in the sense that there is a limited number of places available at College of Law and Workshop and all sorts of limited practice restrictions are now imposed before a full certificate can be granted[43]. The Bar has faced a similar problem and is subtly adding "barriers" by increasing the time which must be spent in the Bar Reading programme. (A suggestion by the author to a senior legal educator that a better response would be to withdraw accreditation from law schools which did not cover enough evidence, practice, and procedure to satisfy the rigorous standards of the Sydney Bar met with a guarded response. The whole question of Bar entry is going the way of New York where any punter with an LLB in his knapsack can arrive, do the BAR BRI course for seven weeks and then sit the Multi-state and NY examinations. No doubt the Trade Practices Commission would approve. At present the Bar would lack the internal resources to operate in such a way but that could easily be resolved with sufficient funding under persuasion from a Supreme Court bench responding to "public interest pressures" to ensure a satisfactory standard of advocate.)

Work habits or are you Heyman Drewer?

Let us assume you have garned a practice. You will be working tirelessly, servicing those solicitors who instruct you, sure in the knowledge that if you do not do so there are "...whole nestfuls of others with their beaks open, waiting to be fed."[44] And now the great paradox will strike you - you are "successful" because every waking moment concerns some questions of crop liens, or avals. Yet, you have no time to do anything else.[45] In his famous novel, *We, the Accused*, Ernest Raymond portrays the very model of a successful barrister. His paragon strikes a familiar chord with anyone attuned to the workings of the Sydney Bar. Heyman Drewer KC is the prosecutor of Presset, the accused and this is how he succeeded at the Bar:

> "A man who, secretly to his own surprise, has achieved the whole of his ambition is always as healthy and happy as a child at play. ...He had nothing [to begin] on his side but his dour Scotch will. Still, the will had set his mouth, emptied his eyes of gaiety, and driven him to London. In his early days of devilling in London, when he watched the great men come and go, and endured their ill-temper and their snubs, he had often been near to despair; but the good Scotch will had clenched his fists and advanced his jaw .... Frustration fanned a fire of determination, and he worked as no one else; and the work did not tire him, because his ambition was driving him; nay, the work kept him well, because it was release... he outdid all other juniors in his preparation of a case. 'Not a loophole' was his motto; 'not a weak link'. And soon one of the great men perceived this, and was glad to have him as his junior. The great man stretched down a hand

40. The demystification (and consequent commercialisation) of judicial office is a separate topic in itself. Long gone are the days when one would "revel in the glory of being a judge". It attracts no knighthood or other honorific, upon appointment or retirement. It is now subject to constant ill-informed media sniping and its emoluments are capped by a Remuneration Tribunal. It is no wonder that certain retired officers seek to make money upon retirement to "top up" their pensions, nor that the Attorney cannot attract anyone to the post and has to advertise; if he seeks a cause he need look no further than the government's constant denigration of the legal profession.
41. See, for example, the recent statements of Kirby P (see, for example, his Honour's references in Equiticorp Finance Ltd (in liq) v BNZ (1993) 11 ACLC 952, 990 to the academic discussion of economic duress) and Steyn LJ (see, for example, his Lordship's discussion in Surrey County Council v Bredero Homes Ltd [1993] 3 All ER 705, 714 on the third principle of restitutionary recovery) in which both have acknowledged the importance of academic discussion. In this, of course, the English courts are now drawing much closer to the Continental position where the jurist is the key developer of the law - whether this means that our judges will become more like civil servants (as is the case with Continental judiciary) is an open question.
42. A medical professor has a clinical loading and the opportunity for private practice, as well as access to the latest publicly-funded technology which is necessary to conduct research. None of these applies to the law professor.
43. In Western Australia, for example, where formal articles are still required to be served, 47 applicants were still without a training post from the 1993 intake in early 1994.
44. Parris, *Under my wig* p 204.
45. This is because the successful or fashionable man will take the lion's share of the work - The Earl of Birkenhead's aphorism on work at the bar was repeated frequently throughout the recent readers' course. For those who have forgotten it, it goes mutatis mutandis like this - "There are 1,500 barristers at the Sydney Bar, there is enough work for 1,000, and it is all being done by 500".

and pulled him on to the first step. ... He worked; how he worked! He sought no social life and made few friends, for he grudged the time; he went to few theatres, less concerts, and never an art gallery, for, if he returned from his chambers at seven o'clock, it was with plenty of work in his hands to fill the hours from dinner to bed. And gradually his well-known thoroughness secured him briefs that involved a mastery of detail; and the money came with them, and more and more thrilling labour into the small hours, but less songs and less friends. And he counted himself a happy man!"

There are many Heyman Drewers walking Phillip Street. This sort of image has long been encouraged by the hard men of the profession. But where are the snows etc? Sir Valentine Holmes[46], the "legendary"[47] Wilfrid Hunt - who remembers anything of them now? Willes Chitty, the most famous practitioner of his generation, overworked to such an extent that he was eventually compelled to retire as a Queen's Bench Master[48]. Many a local Silk can be found at the end of a long Term quivering with overstrain which is only partially relieved by a sojourn in Bali. Too much of such a regimen leads to a triple by-pass, alcoholic excess, or being found face down at your desk with a stogey in your mouth. Yet, of course, there is no other way. The very definition of "success" is to be completely overworked.

Art and artefact

It is a sobering fact to remember that, pace those who would treat the matter more spiritually, the practice of law is a mere craft, like any other and that of the great exponents of it a fair criticism is that "... Outside [their] craft in which [their] competence [is] immense, [they are] as simple and unsophisticated, as insensitive and commonplace, as many great legal minds."[49] The daily practice of law, whether it be in a court arguing a case, advising in conference, or writing an opinion, is aimed solely at the production of an artefact, good for here and now but likely immediately to be overwhelmed by the tide of events. The pressure of practice leaves little time for reflection, or deeper analysis.

Furthermore, for most business clients the legal profession is nothing more than a nuisance. Sir Neville Faulks records in his autobiography his meeting with a very senior member of a mercantile family:

> "I was kept waiting quite a time before I was shown into the presence. It was made quite plain that the great man, whom I had not the slightest desire to see, and of whose existence I was unaware, was very busy indeed. I have never been so heavily patronised in my life ...".[50]

For the same reason, it was said of Nubar Gulbenkian that he dispensed with all his counsel over time except for Cyril Radcliffe and in the end he tired even of him. The failure of the Bar institutionally to confront directly allegations of inutility and venality has resulted in the position in which we now find ourselves where the debate is largely directed by those with malign intent who find a ready reception in the media.

With respect to the end product, pressure of time and business is such that only a specific amount of attention may be safely devoted to analysing any question. (As a very junior counsel one has time to set virtually any problem as a libretto but that time must soon pass else one goes under through financial inanition.) Gone is the time when one could emulate Mr Lee, the conveyancing counsel (when that title meant something) at whose feet Lord Westbury learnt his craft: "He would settle and resettle his drafts, recast and revise his opinions, and discuss the point of a case with his pupils with perverse iteration, 'hunting and winding it through all possible ambages', hauling and tugging it till it would yield no further doubt or difficulty."[51] There is, in short, little time for art.[52]

Sauve qui peut

It is a powerful Chinese curse to be "living in interesting times". Despite the aspersions which they may cast upon its individual members[53], there is no doubt whatsoever that the boys of the old brigade take a very great pride in the Sydney Bar as an institution. A strong oral tradition exists, handing on from one generation to the next tales of the derring do and imbecility of an earlier time. One may claim, without grandiloquence, that an independent bar is one of the few groups left able to resist the continuing encroachment of executive power - no doubt this is a salient cause of the fire which it has lately drawn. If its members now break rank in an endeavour to maintain individual "market share", or offer a full "amalgam" service which, of necessity, will undercut the need for a separate bar at all, or sell out by taking the poisoned chalice offered by large enterprises to offer "in-house" services, all may be lost institutionally. Whether the Sydney Bar will continue as it was before or is, though its members do not realise it, in the middle of a vast structural reformation with calamitous consequences for the fringe players is at present only a matter of speculation. This much is true - powerful opponents are circling and it will, as always, be better to hang together than to hang separately. ❑

46. Sir Valentine Holmes was in virtually every big civil matter in the English courts for a period of 25 years from 1925 to 1950.
47. Per Hoffman J in Re Beatty [1990] 1 WLR 1503, 1508.
48. See Alexander, *The Temple of the Nineties* pp 104-105: "During the sittings of the Courts he rushed about the courts or interviews clients without admission all day long. From about 10 pm and for long hours afterwards he read briefs, drafted pleadings or wrote opinions. Saturday and Sunday hardly afforded any relief. It was nerve-wracking work and it took its inevitable toll."
49. Raymond op cit p 324.
50. Sir Neville Faulks, *A law unto myself* p 125.
51. Nash, *Life of Lord Westbury* Vol 1 (1888) pp 37-38.
52. Only real artists, like Sir Frederick Jordan, wear well judgment-wise. The contributions of many higher on the judicial totem pole have been forgotten within a generation.
53. Many of the comments which one hears from experienced players bring to mind that famous comment of Lord Macnaghten when some issue of judicial incompetency arose. A committee of the judges began its report "Conscious as we are of our own deficiencies ...". Some worthy complained that he was not aware of any deficiency whereupon Lord Macnaghten felicitiously changed the opening to "Conscious as we are of the deficiencies of each other ...".