*No More Cabs on the Rank? Some Reflections About the Future of Legal Practice**

His Excellency The Honourable Gordon Samuels AC
Governor of New South Wales

It is a privilege to have been invited to deliver the Sir Ninian Stephen Lecture for 1998. This occasion honours one of Australia's outstanding jurists, and a man who has given remarkable service to his own, and the international, community.

I appreciate that the title I have chosen for this paper falls a little short of total revelation. It is hardly in the "Road to Damascus" category. I had not intended to be deliberately obscure; or to avail myself of the academic technique of choosing a title of wide and indefinite ambit in order to permit the maximum intellectual manoeuvre during the period of gestation.But I must confess that the use of the word "reflections" does allow some change of focus in respect of the conclusions to which these musings may lead. Now let me be more explicit.

The reference to "cabs on the rank" identifies a fundamental rule of conduct at the Bar (and at other independent Bars in Australia) of such sanctity as to have been described as the barrister's equivalent of the doctor's Hippocratic oath.[1] The cab-rank rule or principle may be described in this way:-

> "No brief or instructions may be refused, whether to act as an advocate or to advise, unless the barrister is professionally committed already, has not been offered a proper fee, is professionally embarrassed by a prior conflict of interest or lacks sufficient experience or competence to handle the matter".[2]

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* This article is a recension of the 1998 Sir Ninian Stephen Lecture. The Sir Ninian Stephen Lecture was established to mark the arrival of the first group of Bachelor of Laws students at the University of Newcastle in 1993. It is an annual event which is to be delivered by an eminent lawyer at the commencement of each academic year.

1 A Thornton, "The Professional Responsibility and Ethics of the English Bar" in R Cranston, ed., *Legal Ethics and Professional Responsibility*, Oxford: Clarendon Press, 1995, at 68.

2 A Thornton, above n 1.

So, in short, if the barrister is available, and the brief relates to his or her field of practice and is accompanied by a proper fee, it must be accepted.

The purpose of the cab-rank principle is to ensure that no-one appearing before a court is denied representation, however vile the crime charged, or unpopular or outrageous the views or conduct in issue. The origins of the principle are said to go back many centuries[3], and it seems that such a rule has existed amongst advocates in Scotland since 27 May, 1532 when a rule of court was made which provided:- "No advocate without very good cause shall refuse to act for any person tendering a reasonable fee under pain of deprivation of his office of advocate".[4] In England it was resoundingly invoked by the eloquent language of the great advocate Erskine when, in 1792, he appeared to defend Tom Paine on a charge of seditious libel for publishing *The Rights of Man*. Erskine said:-

> "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. If the advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the judge..."

The high tone of this language has been somewhat diminished by the title which the principle now bears; and the reference to cab-rank stems, I think, from the words of a judge who placed the advocate, in ordinary daily practice, "in the position of a cab man on the rank bound to answer the first hail".[5]

The principle has been reduced to precise and mandatory terms in the New South Wales Barristers' Rules.[6] They apply only to briefs or instructions to appear before a court, and thus regulate only the conduct of barristers as advocates;[7] and although they specify particular circumstances in which a brief must (on grounds of conflict of interest for example) or may (if there is a real possibility that the barrister might be required to cross-examine or criticise a friend or relation) be refused, they do not provide for any general exception, or prescribe any means of obtaining absolution. They apply to both criminal and civil matters; they do not, of course, bind solicitor advocates, and solicitors acting in that role in New South Wales are not bound by the principle.[8]

The principle secures counsel for unpopular causes, and thus acts in protection of litigants who might otherwise be shunned by members of

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3 A Thornton, above n 1.

4 Macmillan, *The Ethics of Advocacy*, in *Law and Other Things* 171 at 179.

5 Macmillan, above n 4.

6 Rules 85-92.

7 *The Code of Conduct of the English Bar* apparently applies to briefs to advise: Thornton, above n 1.

8 All higher court advocates in England, including solicitors, are bound by a modified cab-rank rule: A Thornton, above n 1, at 69.

the Bar. It is said to serve another important purpose; and that is to protect barristers from the obloquy which might attend their appearing to defend those charged with revolting offences, or to advance the civil interests of unpopular litigants, or to defend dissidents against the oppression of governments. When Erskine spoke of the advocate's duty to protect "the liberties of England", he was also defending himself against the contemporary criticism that his appearance on Paine's behalf necessarily implied his adherence to Paine's ideology. The cab-rank principle, by insisting that if the barrister is available, a brief relating to his or her field of practice and accompanied by a proper fee must be accepted, manifestly relieves the barrister from any dogmatic identity with his client's cause. This casting of the barrister as a mercenary has been very much influenced by the adversary system of trial which is adopted in Australian courts. I propose to examine that connection in a little detail, and then to consider whether the cab-rank principle continues to be useful; or whether, to adapt familiar words, its prejudicial propensity outweighs its value.

The adversary system, as many of you know, entails that the parties, and not the court, determine the issues which they will fight, and that they themselves select and call the evidence in support of them. The case is conducted by counsel for the parties, and, as a general rule, the judge's intervention is, and is intended to be, comparatively minor. It is thus the responsibility of the parties to prepare their cases and marshal their witnesses; although the court provides the formal means, backed by sanctions, by which the witnesses may, if necessary, be summoned to the trial and documents procured for inspection and tender. It is an essential consequence of the adversary system that the parties are not obliged to call all relevant evidence which they may have in their possession. They are entitled to call only that which favours their own case and, generally, need not offer that which does not.[9] The court makes the rules by which the parties regulate their contest, and the judge acts as referee. But within this regulatory framework the parties are accorded a considerable degree of flexibility and decisive choice.[10]

Traditionally, the adversary trial has been regarded as a gladiatorial combat; and sporting metaphors abound. They are not always accurate; but, as Lord Devlin has observed[11], our system is a trial of strength, rather than an inquiry on the European model produced by the traditions of the Roman Law. Since it does not involve a painstaking and wide ranging investigation conducted by an impartial inquisitor it is not designed to ferret out the truth in any absolute sense. The judge, for example, is limited to the material which the parties choose to present. To quote Lord Devlin again, the objects of the adversary system and of the Romanesque inquisitorial system are different. The one is to decide whether the

[9] *Tombling v Universal Bulb Co Ltd* (1951) 2 TLR 289 at 297, per Denning LJ.

[10] P Devlin, "The Judge in the Adversary System", in *The Judge*, Oxford University Press, 1981, at 54 et seq.

[11] P Devlin, above n 10.

prosecutor or plaintiff has discharged the burden of proof; but the other is to ascertain the truth.[12] Hence the adversary contest is intended above all to produce a winner.

There are some perceptive comments in a paper delivered by Dr W Zeidler at the Twenty First Australian Legal Convention in 1981.[13] The learned author establishes a comparison between the two systems by using, as a model, the analogy of a railway journey by two routes. The conclusion is that whereas the final destination of the English law train would be "the due and equitable process of law" that of the German law train would be "the uncovering of the truth".[14]

There have been, of course, eminent jurists who maintain that the adversary trial *is* a vehicle for the pursuit of truth - notably Lord Denning in *Jones v National Coal Board* [15]; and it has been said that it achieves this purpose because "the powerful statements on both sides of the question" for which it provides constitute the best available means of discovering the truth.[16] That proposition is unconvincing. Although in most cases the adversarial trial probably does elicit the truth, it cannot be regarded as designed to do so.

The point was nicely put by the American judge Marvin Frankel, who expressed the view that in the adversary system the business of the advocate was not the search for truth as such. He went on:- "To put that thought more exactly, the truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time."[17]

In Australia, there are statements of high authority which lead to the same conclusion, emphasising the procedural supremacy of the parties and the comparative (and deliberate) lack of power of the judge. Sir Garfield Barwick when Chief Justice of the High Court said:-

> "It is a trial, not an inquisition; a trial in which the protagonists [sic] are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, *the jury is to decide whether the accused is guilty or not*".[18]

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12 P Devlin, above n 10.

13 Dr W Zeidler, "Evaluation of the Adversary System : A Comparison, Some Remarks on the Investigatory System of Procedure", (1981) 55 *ALJ* 390.

14 W Zeidler, above n 13, at 392.

15 (1957) 2 QB 55 at 63-64.

16 W Zeidler, above n 13, at 392.

17 ME Frankel, "The Search for Truth: An Umpireal View", (1975) 123 *University of Pennsylvania LR* 1031 at 1037. This may be an unduly harsh judgment to apply to our own situation; but we do well to regard the adversary system without the rose coloured tinting which often embellishes it.

18 *Ratten v The Queen* (1974) 131 CLR 510 at 517.

That statement was quoted by Sir Daryl Dawson in a later judgment of the High Court, in which he put the matter in his own words thus:-

> "A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted, and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed. If the prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel. He is not equipped to do so, particularly in making a decision whether a witness should be called."[19]

The principles to which Barwick CJ and Dawson J severally subscribed were affirmed in a joint judgment of the High Court, which set out certain general propositions applicable to the conduct of criminal trials in Australia, including the rule that "save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence."[20] The position regarding the rule in civil cases in Australia is uncertain, but there is authority for the view that in a civil action the prohibition upon the judge's calling a witness is absolute.[21] It seems to me that a judge who cannot call a witness of his or her own motion, or may do so only in the most exceptional circumstances, is fatally handicapped in any endeavours to ascertain the truth.

The suggestion that neither the criminal nor the civil trial is essentially designed to discover the truth, often comes to lay persons unfamiliar with the details of legal procedure - and, indeed, to some lawyers - as profoundly shocking, almost to the degree of blasphemy.

I think it is evident, however, that the adversary trial is a combat in which the antagonists are not concerned to elicit the truth, but rather to secure a preponderance of evidence in their favour. The judge is not an independent inquisitor, and any inclination to adopt that role may well be subsequently criticised on appeal as an excessive intervention in the affairs of the parties and thus a denial of natural justice. It might be said, indeed, that our system substitutes procedural fairness for the search for truth.[22]

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[19] *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.

[20] *The Queen v Apostilides* (1984) 154 CLR 563 at 575.

[21] *Whitehorn v The Queen* supra; *The Queen v Apostilides* (1984) 154 CLR 563 at 571; *Re Enoch & Zaretsky, Bock & Co's Arbitration* (1970) 1 KB 327; *Bassett v Host* (1982) 1 NSWLR 206 at 207, 213; *Obacelo Pty Ltd v Toveraft Pty Ltd* (1986) 66 ALR 371; and see generally JD Heydon, *Cross on Evidence*, 5th Aust ed.,Vol 1, Sydney: Butterworths, 1996, at 17080 et seq.

[22] "In some situations of adversary justice, we rely upon legal institutions rather than lawyers for pursuing justice": A Gutmann, *Can Virtue be Taught to Lawyers?* (1993) 45 *Stanford LR* 1759 at 1766.

I do not suggest that the cab-rank principle is an inevitable product of the adversary system. It does not exist in the United States of America where the adversary trial flourishes. But it could not have arisen without the incidents of the adversary system. Similarly, it depends upon the availability of advocates whose professional character and rules of conduct (and particularly their relationship with the judge) are profoundly influenced, at the least, by the rules and requirements of the adversary system. Hence the cab-rank rule provides advocates who must devote themselves to their client's interests with competence, commitment and zeal,[23] but without any belief in or affection for the contentions they advance.

There is a famous statement made by Lord Brougham in defending Queen Caroline against the bill for divorce brought against her in 1820 by King George IV. It represents the acme of the zeal which a barrister is bound to bring to the representation of a client:-

> "[A]n advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means - to protect that client at all hazards and costs to all others, and among others to himself - is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other; nay, separating, even the duties of a patriot from those of an advocate, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client."[24]

The notion that devotion to the client's interests must precede even the stability of the nation proved rather too strong a draught, even for Lord Brougham's contemporaries, used as they were to the oratory of the time. When Brougham repeated the substance of this statement as a canon of conduct for the Bar, he was, it seems, rebuked by Lord Cockburn, the Lord Chief Justice, who said that the advocate owed a greater obligation to the "eternal interests of truth and justice".[25] But this phrase was as much a flourish as Lord Brougham's proposition, since then, as now, the advocate was not concerned with the truth or falsity of the client's case in any absolute sense. Indeed, the extent of the disinterest in the merits which the advocate was traditionally expected to display emerges from a judgment of Lord Chancellor Eldon in 1822, or about the same time as Lord Brougham and Lord Cockburn spoke. Lord Eldon said:-

> "He [the advocate] 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

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[23] R Cranston, above n 1, at 13.

[24] Hansard, new ser, iii, Oct 3, 1820, at 114. See W Forsyth, *Hortensius, or the Advocate*, 3rd ed, 1879, at 389; D Rhode, "An Adversarial Exchange on Adversarial Ethics", (1991) 41 *J Leg Ed* 29.

[25] R Du Cann, *The Art of the Advocate*, New York: Penguin Books, 1964, at 37; and see *Rondel v Worsley* [1997] 1 QB 433 at 502, per Lord Denning MR.

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".[26]

Hence this classic paradigm demands that the advocate should combine the zealous assertion of the factual merits of the client's case with indifference to their truth, as opposed to their plausibility. The barrister's duty has been described by Lord Denning in this way:-

"The duty of counsel to his client...is to make every honest endeavour to succeed...[H]e may put such matters in evidence or omit such others as in his discretion he thinks will be most to the advantage of his client. So also, when it comes to his speech, he must put every fair argument which appears to him to help his client towards winning his case. The reason is because he is not the judge of the credibility of the witnesses or of the validity of the arguments. He is only the advocate employed by the client to speak for him and present his case, and he must do it to the best of his ability, without making himself the judge of its correctness but only of its honesty. Cicero makes the distinction that it is the duty of the Judge to pursue the truth, but it is permitted to an advocate to argue what has only the semblance of it".[27]

The duty has been put in similar terms by an American professor of law who defines the duty as that requiring an advocate "within the established constraints upon professional behaviour [to] maximise the likelihood that the client will prevail".[28]

The adversary barrister's detachment from the merits of the client's case is enlarged by the principle that the duty to the client is transcended by the barrister's paramount duty to the court.[29] According to Lord Denning, this is an allegiance "to a higher cause", which is "the cause of truth and justice".[30] I will return in a moment to that now familiar collocation of words. The barrister is not the client's mouthpiece "to say what [the client] wants; or his tool to do what he directs". Hence, in running the case the barrister enjoys, and is bound to exercise, an independent judgment concerning tactics, evidence, cross-examination and argument. The existence of this independent judgment or discretion has been emphasised by Sir Anthony Mason, when Chief Justice, who stressed that counsel was not "a mere agent for the litigant but exercised an independent judgment in the interests of the court".[31] So while counsel will discharge the duty to make every honest endeavour to succeed - that is, to

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[26] *Ex parte Lloyd* (1822) Mont 70 (note) per Lord Eldon

[27] *Tombling*, above n 9, at 297.

[28] M Schwartz, "The Professionalism & Accountability of Lawyers", (1978) 66 *California LR* 669 at 673.

[29] *Rondel v Worsley*, above n 25, at 502; *Giannarelli v Wraith* (1988) 165 CLR 543 at 555.

[30] As above.

[31] *Giannarelli*, above n 29.

use every means permitted by the law and by the canons of professional conduct - he must also have an eye "not only to his client's success, but also to the speedy and efficient administration of justice".[32] Hence, counsel will determine which arguments to put and which points to take, and how many witnesses to call. The importance to the Bar of its members' independence, even in the face of their clients' wishes, is emphasised by the motto of the New South Wales Bar Association which is "Servants of All Yet of None".

Further, barristers are bound to discharge a duty to the court which may be directly contrary to the interests of their clients and indeed, in some circumstances, fatal to the client's case. Rule 25 of the Bar rules (which reproduces a rule of conduct which has long been regarded as binding members of the Bar)[33] provides:-

> "A barrister must, at the appropriate time in the hearing of the case, inform the court of any binding authority or any applicable legislation which the barrister has reasonable grounds to believe to be directly in point, against the client's case, if the court has not yet been informed of that matter".

It follows that we have an advocate zealously engaged to further the interests of the client, within the bounds of law and professional propriety, who will nevertheless determine independently the forensic means by which that purpose will be achieved, and must subordinate duty to the client to duty to the court. But how are we to interpret the invocations of truth and justice as necessary objectives in the barrister's conduct of the case, when we have seen that truth is not an issue?

In such statements "truth and justice" are really hyperbolic synonyms for honesty and fairness. Indeed, the duty to justice consists of a collection of rules which establish the forensic obligations of the advocate.[34] "To say of a barrister that he owes a duty to the Court, or to justice as an abstraction, to act in a particular way in particular circumstances, may seem to be no more than a pretentious way of saying that when a barrister is taking part in litigation he must observe the rules; and this is true of all who practise any profession".[35] For example, it is well established that a barrister "must not consciously misstate the facts [and] must not knowingly conceal the truth".[36] But he or she may be economical with the truth. Hence, counsel for the accused is not bound to correct a prosecutor who evidently believes (contrary to the truth) that the client has no prior convictions.

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[32] *Giannarelli*, above n 29.

[33] *Glebe Sugar Refining Co v Greenoch Harbour Trustees* (1921) SC (HL) 72 at 73-74, per Lord Birkenhead LC.

[34] C Miller, "The Advocate's Duty of Justice: Where does it belong?" (1981) 97 *LQR* 127 at 127-128.

[35] *Saif Ali v Sydney Mitchell & Co* (1980) AC 198 at 220, per Lord Diplock.

[36] *Rondel v Worsley*, above n 25, at 962.

It follows from these various prescriptions that the barrister on the cab-rank will fight zealously for the client's cause without necessarily believing in it, will impose a battle plan whether the client likes it or not, remains firmly independent of any moral defects in the case, and reserves the right to terminate the client's prospects (with maximum prejudice) by referring the court to a conclusively adverse authority which the opponent has not mentioned, and of which the judge is presumably ignorant.

These obligations not to deceive or mislead the court and to inform it of all relevant decisions and legislation, however unfavourable, are the product of the adversary system. A court which is not equipped to ferret out the facts for itself must be able to rely on the honesty of counsel. A judge without a law clerk or a research assistant (as was traditionally the case in England and Australia; but is no longer so here) must be able to rely on counsel to research and present all the relevant law.[37]

Ever since Erskine's defence of Tom Paine the theory of the lawyer's moral independence of the client's cause has been asserted by the Bar as a fundamental feature of the adversary system of trial. This concept establishes the context for a rule which, in effect, forbids barristers to form any judgment about the moral quality of the client's case. This is the ethos of the cab-rank principle. It ensures the desired independence, since it would be unconscionable to require a barrister not only to accept the client's brief, but to embrace his moral values as well.[38] As it is, the cab-rank principle acts rather as a recruiting agency for the adversary trial.

I have tried to show that the adversary trial has been a potent force in establishing the cab-rank principle. Assuming that, with some modifications, the adversary system will continue to govern our trial procedure, is there continuing need to preserve the cab-rank?

The Bar Rules contemplate that barristers may be reluctant to accept a brief in certain circumstances. The rules are intended to overcome these scruples. But what scruples? Clause 6 of the Preamble to the Rules offers a clue. It suggests that "the provision of advocates for those who need legal representation is better secured if there is a Bar whose members (a) must accept briefs to appear regardless of their personal prejudices...". "Personal prejudices" is a singularly pejorative way to describe the conscientious and soundly based moral objection which might lead a barrister to refuse a brief to protect or advance the interests of a litigant which the barrister believes to be contrary to the public interest.

The Bar's cab-rank rules, although they came into force as recently as 1 July, 1994 still bear the imprint of their origin, which was primarily to secure representation for persons accused of unsavoury crimes. I very much doubt whether undertaking a criminal defence of any kind, or

[37] R Cranston, above n 1, at 15-16.

[38] W Pue, "Becoming Ethical : Lawyers' Professional Ethics in Early Twentieth Century Canada", (1991) 20 *Manitoba LJ* 227 at 252-253.

seeking to enforce or rebut any species of tortious liability, is likely these days to involve professional or social stigma.

It is obvious, of course, that as a general rule the actions of a lawyer and client, and their moral responsibility for them, are distinguishable. There may be exceptional cases where the involvement of the lawyer in the client's affairs, typically in commercial situations and in advising upon tax avoidance schemes, might be such as to establish that the lawyer has embraced the objects of the client's activities and is accountable, both morally and legally, as a result.[39] But I leave out of account the activities of lawyers as entrepreneurs[40] or, to use an American idiom, as deal makers.[41] In the ordinary case, the crime or the tort has been committed before the actor seeks the advice of the lawyer. "In these situations, the lawyer's task is to assist their client through the scrutiny of the adversarial process, and the lawyer is not responsible for the client's actions."[42]

Moreover, it is arguable that for the lawyer to assist others in understanding and realising their legal rights is always morally worthy.[43] As we have seen, the cab-rank principle is designed to secure representation for a litigant and to protect the barrister from any adverse consequences which might attend acceptance of a brief. In our modern commercial world, dominated by corporate influence, the context is a very much more complex and sophisticated one than that which obtained when Erskine made his appeal for the independence of the Bar.

In twenty years in practice at the Bar, including a term of office as President of the New South Wales Bar Association, I have not encountered any case of a barrister seeking relief from the obligations of the cab-rank principle, or any complaint by a solicitor or litigant that a brief has been refused. Anecdotal evidence which has come to me since is equally devoid of either kind of incident. I do not think that this is because the principle exerts a potent influence over the affairs of the Bar. I think it more probable that of recent times it has contained its own balancing mechanism. There is no necessity to invoke it, partly because the inclinations of counsel are well known, and partly because most barristers regard it as a matter of honour to comply with the basic ethic of the cab-rank principle, unless there is good reason to the contrary. Where a brief is declined, solicitors or lay clients do not request, or examine, the reasons.

The principle is still flown at the Bar's masthead, and now generally

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[39] M Schwarz, above n 28; R Painter, "The Moral Interdependence of Corporate Lawyers and their Clients", (1994) 67 *Southern California LR* 507; R V Gyles, *Criminal Liability of Professional Advisers*, NSW Bar Association, *Bar News*, Summer, 1988 at 23; M McHugh, *Jeopardy of Lawyers and Accountants Acting on Commercial Transactions*, paper presented to the Law Society of Western Australia's Summer School, 11 February 1988; and see *Forsyth v Rodda & Anor* (1989) 42 A Crim R 198.

[40] *Leary v Commissioner of Taxation* (Cth) (1980) 47 FLR 414 at 434-435, per Brennan J.

[41] Painter, above n 39, at 512.

[42] Painter,above n 39, at 508.

[43] See Fried, "The Lawyer's Friend: The Moral Foundations of the Lawyer-Client Relation", (1976) 85 *Yale LJ* 1060 at 1075.

serves the purpose of advancing an argument in support of the importance of a separate Bar. In *Stop Press*, the monthly newsletter of the New South Wales Bar Association for November last year, the then President, Mr David Bennett QC pointed out that one of the virtues of the independent Bar was that it offered the cab-rank rule. He went on:-

> "Unlike solicitors, we may not and do not refuse briefs because it might offend our other clients. We represent all who come to us regardless of our personal views about their causes or their credibility. This could not practicably be done by the megafirm and it is difficult for a firm of any size. Our sole practice rule enables us to ensure that this type of conflict is largely avoided".

Obviously this statement, which plainly refers to civil and not criminal litigation, employs the cab-rank principle to serve a somewhat different purpose than that for which it was originally intended. It suggests that in place of the disapproval or denunciation which might be levelled at a barrister appearing for a client who is generally disparaged, there has been substituted the risk of losing an existing client whose interests are incompatible with those of a new client. The creation of conflict with existing clients by accepting instructions from a new client is seen in the United States, where the cab-rank principle does not exist, as one of the problems for the lawyer who wishes "to represent any client whose needs fit one's particular capacities and who cannot otherwise find counsel".[44]

It is to be observed that Mr Bennett's statement does not seem to me to suggest that the cab-rank principle demands that the lawyer in all circumstances will accept a new client notwithstanding that the retainer will offend an existing client. His fundamental point is that the Bar's sole practice rule means that any such conflict will not very often happen. Indeed, it would seem to require regard for principle and taste for self-abnegation of masochistic degree to require a barrister to accept a brief at the cost of losing an existing client who might, in any case, be entitled to think that its priority should have been preferred. One can well imagine cases where the interests of the existing client, and those of the new client, are totally incompatible; if they are, for example, head to head rivals in an extremely volatile and competitive market.

I do not consider that the cab-rank principle, as it is framed in the Bar Rules, should be preserved. For my own part, I support the continued existence of an independent Bar, if I may be forgiven for expressing a personal view in my present station in life, and there are many good reasons which support this standpoint other than explicit adherence to the traditional cab-rank principle.

I think that the example of client conflict supplies the first ground upon which the cab-rank principle should be honourably retired. As I have said, its ethos is well embedded in the traditional practice of the Bar,

[44] Fried, above n 43, at 1079.

whose members generally honour the obligation to make their services widely available, and to refuse a brief or instructions only for sound reason.

I do not consider that the principle should be retained as an insurance against hard times; against the possibility that our political climate might turn harshly against dissenters so as to require vigorous and perhaps unpopular defence in the courts of our civil liberties.[45] I believe that the Bar's tradition of independence is sound enough to meet that contingency, and does not need such support as the present cab-rank rules provide.

Secondly, the independence and detachment from the client which the Bar has adopted, and recent decisions of the courts have affirmed, conveys to many litigants (especially the small non-corporate clients) an air of Olympian condescension. The barrister's professional privilege of independent judgment, combined with poor communication skills, may seem insufferably paternalistic.[46] Hence, I favour some muting of the traditional disregard for the merits of the client's case. There is a fertile field of argument here, which I have no time to till.

Thirdly, the cab-rank principle as framed overlooks completely one aspect which is, to my mind, of considerable importance. As I have said, the rule seeks to secure representation for litigants and to protect the barrister against any consequential criticism. It therefore completely overlooks the circumstance in which a barrister may be offered a brief to support a corporate litigant whose mission - it may be to sell tobacco or armaments, or dubious patent medicines to Third World countries - the barrister finds wholly distasteful. I cannot think that there should be any principle which requires an advocate to suppress moral scruples of this kind which go rather further than mere "personal prejudice", and which should be recognised by any professional association.

To return to the original metaphor, I would not wholly abolish the cab-rank. But I favour modifying the present terms of hire, and providing grounds upon which a fare may be refused.

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[45] D Rhode, above n 24, at 33.
[46] A Gutmann, above n 22, at 1769.