SUPREME COURT
OF QUEENSLAND

Australian Corporate Lawyers Association Qld Branch
Corporate Counsel Day
The Strand at Rugby Quay, Eagle Street, Brisbane
Thursday 8 March 2012, 8:35am
"Lawyers first and foremost"

The Hon Paul de Jersey AC
Chief Justice

I am very pleased, as Patron of the Association in Queensland, to have the opportunity to contribute in this way this morning.

Practitioners in situations of employment by corporations account for a substantial proportion of the legal profession. To the best of my recollection, this dates back to the 1960's and 1970's. Before then, the legal profession as such was fairly rigidly limited to barristers and solicitors in private practice and the Crown Law Office servicing the executive government. When companies needed legal advice, they would commission it from the private profession.

As corporations proliferated and grew, concomitantly with a burgeoning State and Commonwealth economy, corporations recognized the convenience of having legal expertise directly on hand. And there was another factor. Necessarily or not, the developing economy brought with it an increasing governmental penchant for regulation. Commanding those fields, or some of them, became easier given day to day involvement.

I saw this phenomenon during my own practice at the bar during the 1970's. Contrary to previous expectations that a barrister was an expert, or could become an expert, in all legal fields, some became particularly specialized. High level financing, for example, became abstruse to the point where solicitors would rely primarily on their own opinion drawn from day to day experience, seeking Counsel's opinion only on rather confined, particularly discrete points of law. That day to day familiarity gave the specialist solicitor an across the field command which a barrister could not readily draw together.

The extent of the infusion of practitioners into the corporate world is inferentially apparent to me at every admissions ceremony. Last year, the Supreme Court admitted as many as 840 new practitioners. Private practice could not possibly accommodate even a majority of such cohorts: there are presently 1,076 barristers in private practice in this State and 8,991 solicitors with current practising certificates. The inference is clear that many newly-admitted practitioners enter the corporate world.

There you encounter a working situation and culture quite different from those which characterize the privately practising profession. As an employee, you owe the duty of an employee, and you are in continual contact with your client. You will, much more frequently than a private practitioner, be called upon to give advice which is not strictly legal advice, and in the event of litigation, that may raise difficult questions about the application of legal professional privilege.

But the point I emphasize this morning is that these sorts of unique features notwithstanding, you remain lawyers, you owe your professional lineage to the Supreme Court, and your professionalism is subject to the constraint which distinguishes the legal profession from others, being the duty to the court and the administration of the law which surpasses even the duty to the client. When I regularly express these sentiments at admissions ceremonies, I am acutely conscious that many of those being admitted may never enter the courtroom again. But living professionally within these principles does not depend on proximity to the courtroom.

It is your proximity to your client which I think ultimately distinguishes your practices. That can involve pressures which much less frequently arise in the private practise of the law. Some employers find it difficult to understand that legal ethics constrain a practitioner to an extent quite alien within the business world, where fairness depends on simple morality by and large, apart from basic regularity frameworks.

In the practice of the law, fairness is assured by rigid ethical obligation, and that is consistent with the essence of our professionalism, which is public service. Whenever a lawyer practises, he or she advances the public interest by providing expert legal services to those needing them. If problems arise, the court is there ultimately to determine any issue. The legitimacy of the judicial process, and public confidence in it, depend on its being a fair process, where a practitioner must for example inform the court of any legal authority contrary to the client's case. It is the ethical framework which largely contributes to ensuring the fairness thence authority and legitimacy of the process.

Acknowledging the pressures to which in-house practitioners may be subject, I suggest this morning that quite apart from rigid ethical constraint, in-house practitioners, perhaps more than their external colleagues, must exhibit an appropriate level of restraint, and I will illustrate my point by reference to a couple of cases over recent years. While they did not involve in-house practitioners, they appropriately raise the issue I wish to develop, which is the need to resist the temptation to stray beyond ethical bounds when burdened with client pressures.

The well-known case of *White Industries (Qld) Pty Ltd v Flower & Hart* (1999) 87 FCR 134 involved a solicitors firm faced with client pressure, bringing court proceedings they believed their client could not win, for the collateral purpose of establishing a bargaining position with a view to deferring the client's payment of monies owed to the other party. Goldberg J said this:

> "I do not consider that it is a legitimate purpose for the institution of a proceeding in this court that the purpose of the proceeding is to postpone, delay or put a barrier in front of a claim of another party and the payment of an amount due in respect of that claim. The purpose of the proceedings in a court of law is to vindicate a claimed right. ... It is not part of the legal processes of this Court that its process and procedures be used as an instrument of oppression so as to frustrate the bringing, and expeditious disposition of a legitimate claim."

A related example, though not directed at the legal representatives, is *Williams v Spautz* (1991-2) 174 CLR 509, where the High Court struck down criminal defamation proceedings brought by Dr Spautz for the ulterior purpose of pressuring his former employer, a university, to reinstate him.

Those two cases are interestingly different. *White Industries* was the beneficiary of an order that its debtor company's solicitors pay its costs of the impugned proceeding on an indemnity basis. The Federal Court held that those solicitors had breached their duty in bringing the proceeding on the client's behalf. That was essentially because the solicitors believed that the client could not succeed and instituted the proceeding so that the client could attempt to "secure some bargaining position."

The position in *Williams v Spautz* was different in this way. Although the High Court affirmed the conclusion that his proceeding amounted to an abuse of process, the legal representatives for Dr Spautz were not held to be privy to that abuse. That their client was responsible for an abuse of process was established by a factual finding of the primary judge. That was that "the predominant purpose of Dr Spautz in instituting and maintaining the criminal proceedings ... was to exert pressure upon the University ... to reinstate him and/or to agree to a favourable settlement of his wrongful dismissal case" (page 516). Dr Spautz was entitled to legal representation to propound his case to the contrary. There was thus no impropriety in their acting on his behalf.

The position in *White Industries* was different in the respect previously mentioned, that is, the solicitors' own acknowledgment, communicated to their client, that the client "could not win ... if put to the test", and that the litigation was an "attempt to secure some bargaining position".

Those and other cases are interestingly discussed in an article by Tim Dare, "Mere – zeal, hyper – zeal and the ethical obligations of lawyers" published in 2004 in Volume 7 Part 1 of Legal Ethics at page 24.

Some years ago, the Australian Research Council and the Queensland Law Society sponsored interviews with practitioners with a view to identifying commonly encountered ethical issues. The results are summarised in Parker and Sampford: Legal Ethics and Legal Practice, Contemporary Issues, published by Clarendon Press in 1995. I believe them as relevant today as when published.

The interviewees reported conflict of interest as spawning the most common ethical dilemmas. But there were also problems associated with maintaining a good relationship with the client. The most usual related to "pressure being applied by clients to do something illegal or unethical" (page 225), such as backdating documents or improperly witnessing documents.

May I now raise some issues relevant to litigation which may very well arise in your work within corporations. The first of them is the disclosure of documents.

The direct relevance test for disclosure, applicable for more than a decade in Queensland litigation, obviously dictates a limitation on disclosure. It is a substantial limitation, when one recalls the *Peruvian Guano* test it replaced. One would therefore think this might spawn not infrequent challenges to the sufficiency of disclosure. But my anecdotal assessment based on the Applications jurisdiction in the Supreme Court is that the frequency of such challenges has substantially reduced over recent decades. My consequent concern is that too much disclosure is occurring, without keen regard for the direct relevance limitation. An unscrupulous lawyer driven by undue zeal may use the disclosure of documents to disadvantage the other party, requiring its lawyers to sift through volumes of only marginally

relevant material, wasting resources while at the same time garnering unreasonably large fees and charges for himself or herself.

I have heard other expressions of concern that the selection and collating of disclosable documents, not an especially gripping task in large litigation, is deputed in some cases to inexperienced lawyers, or indeed, carried out offshore, in India and South Africa for example, where the process, while less costly, may lack coordinated control.

There should be a renewed focus in day to day practice on keeping disclosure within appropriate limits, and that includes presenting documents in a form which will be comprehensible to the other side rather than confuse it.

In the Parker and Sampford study to which I earlier referred, interviewees referred to problems with the disclosure of documents. Their concerns ranged "from knowing how to deal with clients who do not want to disclose discoverable documents, to whether it is unethical to present affidavits which are disorganised or contain hundreds of documents which may be only marginally relevant" (page 230). The research also uncovered concern about "deliberate breaches of time limits and abuses of the litigation process, such as entering hopeless defences or commencing hopeless actions as a delaying tactic" (page 230).

Another illustration of undue zeal in the presentation of a client's case concerns the drafting of affidavits. This has an historical dimension. In the 1980s, with a view to reducing the length of trials, and in commercial litigation especially, courts not infrequently required the presentation of a witness' evidence in chief by way of affidavit, with oral evidence substantially confined to cross-examination. As time went on, the approach faltered. It became clear in many cases that the affidavits overstated the deponent's recollection. They were drafted by lawyers, in some cases even "settled" by Counsel, with a primary attention to what needed to be sworn to in

order to establish the cause of action, rather than what the deponent could swear to. They often swore to the issue, for example as to reliance on representations. In the result, over the last few years, courts have generally come to limit written material to what is non-contentious. I offer this as an example of undue zeal in the prosecution of a client's case.

Another example of pushing things too far was thrown up in Parker and Sampford's survey. It involved relations with other practitioners, and some subtle dilemmas, such as "whether it was ethical for a lawyer to take advantage of another lawyer's error or ignorance. The error might be an obvious one or a purely technical or mathematical one : in such cases, the lawyers generally agreed that it would be unethical not to disclose it. Where the error was due to the lawyer's inexperience or lack of attention, the lawyers had differing views" (page 231).

I revert to my topic, "Lawyers first and foremost". I have tended this morning to dwell on the ethical dimension of that theme, and the need to temper zeal with moderation, and to ensure that your professionalism as lawyers is not submerged by the predominantIt business environment in which you work. Your practices must be seen as those appropriate to a profession, and not those of a run of the mill commercial enterprise.

The national conference which I attended last year, and this annual seminar, illustrate a most commendable commitment to the development and maintenance of high professional standards in the commercial and corporate milieus in which you operate. I sincerely congratulate you on that, and in opening the conference, wish you a most stimulating and enjoyable two days.