The Relationship between the Bar and the Bench

Bar Practice Course, 12 November 2015

The Hon. Justice Roslyn G. Atkinson AO

Thank you for the invitation to speak tonight on this celebratory occasion. I would like first of all to acknowledge the traditional custodians of the land on which we meet tonight and pay my respects to their elders past, present and emerging. I am sure that it is not the first time that people have gathered during the past millennia at the area known as Meanjin by the banks of the bountiful Brisbane River to celebrate rites of passage and the commencement of new journeys. We continue that tradition tonight.

You have all now graduated from the Bar Practice Course and so are on the threshold of your new careers as a barristers. On that, I congratulate you and, of course, your families, friends and other supporters who have helped you along the way.

What does it mean to be a barrister? As a barrister you will have many important professional relationships: with your colleagues, with solicitors, with clients, with witnesses; and of course privately with your family and friends. Tonight, however, I would like to speak to you about a relationship that will be perhaps the most important in your career. That is the relationship between the barrister and the judge.

Most judges have been barristers and so understand and empathise with the difficulties that you face as a barrister: the difficulty in obtaining clear instructions, the difficulty in making sure all the witnesses you intend to call are properly proofed, the difficulty of ensuring that you understand completely and in a nuanced way the law that applies to your case, the strengths and hopefully the weaknesses in your opponent's case and the difficulty of communicating all of this in Court both in writing and orally.

Of course, most judges were barristers, some quite a long time ago now, although of course there are many fine judges who were solicitors before they were appointed. Some of us may have forgotten, or at least tried to forget, all the stresses of being a barrister because we are more used to the difficulties encountered by being a judge. But let me assure you our experiences at the bar remain deeply seared into us.

I thought when I started at the bar that in time my nerves would quieten and eventually I would sail into court feeling completely calm. It never happened. I was reassured when I was appearing for the first time in the High Court. I was junior counsel to a very eminent Silk, one of whom I was in awe and who I was certain would be supremely confident. I saw his hand shake (just a little) as he followed the submissions with his finger. Another eminent silk in that case forgot to bring his black shoes to Canberra and had to rush off to the CBD to buy a new pair before the case got underway at 10.15. I learnt a valuable lesson: that stress and nervous tension is an inevitable part of being a barrister who has to make oral submissions. Use the energy of that stress as a motivation to higher performance rather than being overwhelmed or embarrassed about it.

While you are dealing with your intense preparation to assuage your performance anxiety, there is one bedrock principle of which you must never lose sight: your primary duty is not to your client or to win the case no matter what. Your primary duty is to the court and hence your relationship with the court is the most critical to your professional success and your professional integrity.

To comprehend this fully, you have to understand what the role of the judge is. The judge's role is to reach a decision in a particular case based on a precisely accurate understanding of all the law that applies and, often overlooked by counsel, findings of fact on all the issues in dispute between the parties. If you are thoroughly prepared on the law and the facts, and are able to communicate that honestly and clearly to the judge, you do your clients a great service. But of course, you also do a great service to the administration of justice.

The bench and the bar have a long historical association. It was originally the case that judges of the courts of England, from where that history derives, could only be appointed from the bar, as it was considered that the cloistered Inns of Court, to which barristers had to belong, provided the best training grounds for the skills required of a good judge.

Much of this tradition remains in the workings of the bench and the bar in Queensland and other Australian jurisdictions. In order to understand the continuing importance of the relationship between the judge and counsel, we should reflect on the role of courts in contemporary society. In the criminal area, courts exist so that, instead of escalating violence being the answer to a wrong, values of the entire community embodied in the law can be applied to the conduct to determine whether it was a crime and, according to the same standard, the

appropriate response is meted out to the wrongdoer. The State can bring to court a person accused of that criminal offence, so that citizens chosen at random as a jury can determine on properly admitted evidence and according to the law explained to them by the judge whether the person is guilty or not guilty and, if guilty, for the judge then to impose punishment.

Courts also exist to resolve civil disputes between citizens, corporations and governmental entities so that the answer to any problem in that area is not just that might is right, but that, where possible, justice and fairness as required by the rule of law should prevail, procedurally and substantively.

So what is the barrister's role in the hearing of criminal or civil cases in court?

The first aspect of the barrister's role in the courtroom which unfortunately must be mentioned is that the barrister should be calm and civil. It does not assist in the proper determination of disputes for the professionals involved to be too combative, too emotional, abusive or unpleasant. That is only likely to escalate conflict between the parties and its impact on the judge will be precisely the opposite of what counsel would want to achieve. Part of your duties is not to be patronising or rude to your opponent, let alone the judge. In my experience it is likely to be counterproductive.

When I was new to the bar I was appearing in the Magistrates Court in a quite complex civil dispute. I was briefed just before the trial. Unfortunately it became obvious to me that if the pleading stayed in the terms it was, we could not succeed at trial. I informed my opponents that I would be applying for the amendment we needed. They scoffed at me. When I rose in court to seek the amendment they chortled and talked quite loudly. It seemed to work; the magistrate just refused my application without giving any reasons. Later that day I applied again; the same response. I thought about it overnight and realised that my duty to my client required me to seek the necessary amendment.

The next morning I rose again, the talking and laughing of my opponents grew louder and the magistrate took no interest in what I was saying, so I sat down in mid-flight. The magistrate looked up puzzled. I told him it appeared that my opponents had some submissions they wished to make. They looked perplexed and disavowed that that was why they were talking. The magistrate said to them that he had found it quite hard to concentrate on my submissions when they were talking so much.

They stopped talking, I made the application, the amendment was allowed and we won the case. When I see barristers attempting to bully, humiliate or patronise an opponent in my court, I stop it immediately.

I recently conducted the criminal trial of Brett Peter Cowan accused of the murder of Daniel Morcombe. The behaviour of Mr Byrne QC and Mr Cash from the DPP and Mr Edwards as defence counsel was exemplary in its civility and courtesy to one another, the participants and the court. How important was that civility in such a terrible case.

Allied, but not completely the same, is the question of candour. As a barrister you are building your reputation from the first moment you step into Court. If you are even once attracted to the idea of being slightly deceptive or omitting something that the judge should know and that you know, you will immediately run the risk of developing a very poor reputation. The proper relationship between the Bar and the Bench depends upon the judge's capacity to be able to trust the barrister to be candid and honest.

In case you might be tempted to think that these are pious platitudes, let me relate to you a case I heard when I had the misfortune to have a dishonest legal practitioner appear before me. Her name was Debera Anne Ebbett. She appeared before me on a Friday afternoon and on the basis of her submissions I granted an interim injunction returnable the following Wednesday. She failed to tell me that she was the director of the applicant company, merely informing the court that she acted as solicitor for the applicant. Her oral application, oral submissions, affidavit and oral evidence (given on the return date) was a melange of half-truths, complete untruths, omissions and, as it transpired, fabricated documents.

I concluded my judgment setting aside the interim injunction as follows:

> "As a result of her evidence, I gave her a warning about self-incrimination and thought it appropriate that she should obtain legal representation if she were to continue. Her evidence had revealed that she had not been honest to the Court. She was cool, unflustered and loquacious when not telling the truth. Legal practitioners have a heavy responsibility to the public and to the Court to conduct themselves with professionalism and rectitude. As the Court of Appeal recently held in *Council of the Queensland Law Society Inc v Wendy Ann Wright* [[2001] QCA 58]:

> "A practitioner's duty to the court arises out of the practitioner's special relationship with the court; it overrides the duties owed by a practitioner to clients or others: see *Giannarelli v Wraith* [(1988) 165 CLR 543]. . . The lawyer's duty to the court includes candour, honesty and fairness. The appellant abused her role as an officer of the court in relying on material she knew to be false and in deliberately and recklessly misleading the court in an attempt to further the interests of her clients and family. Her conduct was made more serious by its repetition. The effective administration of the justice system and public confidence in it substantially depend on the honesty and reliability of practitioners' submissions to the court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the court; the court and the public expect and rely upon it. . ."
>
> The failure by the practitioner to comply with her duty in this case is a most serious matter which warrants further investigation. It is appropriate that the papers be referred to the Queensland Law Society and the Attorney-General."[1]

These were the days before the Legal Service Commission. The matter was heard by the Law Society and she was struck off in August 2002 for her misconduct in misleading the court. I was told later by a member of the Tribunal hearing the matter that she continued to lie to them and they had almost been convinced. After lunch on the second day of hearing she returned to the disciplinary hearing saying that she had been in that lunch break to the branch of her bank in the Queen Street mall and they had assured her that the payment she had sworn to the court she made had indeed been made and debited to her account. Unfortunately for Ms Ebbett one of the Tribunal members asked her for more details of the bank which confirmed the lie. The bank building she told them she been in just 30 minutes earlier had been a Country Road store for many years and Ms Ebbett's attempt to lie her way out of trouble led to the inevitable result.

Her troubles didn't end there. In 2005 she was convicted by Byrne SJA of contempt of court and sentenced to perform 75 hours of community service. So unfortunately it happens. Sometimes lawyers mislead or even lie to the court. When that happens the consequences of

[1] *Surefire Holdings P/L v Oxley Sportsdrome P/L* [2001] QSC 85 at [63]-[64].

their behaviour, if uncovered, can be catastrophic for them. If not uncovered, it is catastrophic for the administration of justice.

Judges expect and need to be able to rely on legal practitioners to be honest. We also expect to be able to rely, as does the public, on the competence of the legal practitioner.

A significant aspect of the reliance placed by a judge on a barrister is that the barrister will have thoroughly researched the case and be entirely familiar with all of the facts, as well as all of the relevant law, both substantive and procedural. This is not an easy task and sometimes you will fail to live up to your best intentions in this area, but if you are endeavouring to do the best job you possibly can, you may find that the judge is not quite so harsh on you for this failing as the judge would be if you failed to be honest or candid.

There is a well-known saying with regard to barristers that they are "servants of all, yet of none". This phrase reflects many aspects of life at the Bar. The general principle known as the cab-rank rule is that a barrister should accept any brief offered to her or him, within the barrister's ability and for an acceptable fee, regardless of whether the client is a citizen or the State, and no matter the client's class, status, political beliefs, religion or any other personal characteristic.

At the same time, however, the hallmark of the Bar is its independence, both in its ethos and the way that it functions. A barrister is "no mere mouthpiece" for the direct expression of the client's views via skilled elocution; you have not tonight become "a hired gun". Instead, you must be independent in giving your counsel – indeed, it is from that function that the term "counsel" derives. You must apply your incisive legal mind to both factual and legal analysis, being frank and fearless in providing your client with advice based on the conclusions you reach. That is what you owe your client to serve their best interests and, of primary importance, that is what you owe to the courts and the system of administration of justice. If barristers did not advise against the pursuit of unmeritorious actions; pressed baseless submissions; or, worst of all, made deliberately false claims, our system of justice would be hopelessly compromised. As a democratic society based on the rule of law, we cannot afford that.

At the same time, barristers at the private bar are employed by no one, being required to operate as sole practitioners, and are thus their own masters. That independence carries with it great responsibility to exercise your abilities with all due care and skill. Nonetheless, practising in chambers will mean that you are never truly alone, which will become happily apparent when

briefs come to be passed your way or when you seek advice from counsel more senior to you. Those of you who are to become Crown Prosecutors or enter the employed Bar in other areas will also enjoy this camaraderie in different ways, but in no professional circumstance may your independence be compromised.

The independence of the Bar as an institution is also of fundamental importance, as demonstrated by events in recent Queensland history. An independent judiciary must be supported by an independent legal profession; neither exists to be a rubber stamp for the will of the legislature or executive.

Pro bono work undertaken by barristers is also of great assistance to the administration of justice and something that I would greatly recommend you do throughout your careers at the Bar. Justice is not the preserve of those of might or means; it must also be afforded to those who are vulnerable or disadvantaged. Self-represented litigants are not a rarity in our court system today and while it is an individual's right to be self-represented,[2] courts operate far more effectively when all involved have a substantial level of skill and understanding of the law and the legal system. Judges must often almost bend over backwards to ensure that self-represented litigants receive a fair hearing, but must take care that this is not to the disadvantage of other parties. At the same time, the collegiate nature of our adversarial system – as may be compared, for example, with the more competitive character of the United States' Bar[3] – means that opposing counsel are also put to greater effort to assist self-represented litigants to be fully apprised of the details of the case and what they are required to do.

Accepting a pro bono brief for a client who would otherwise go unrepresented is not only a service to the client but also of substantial assistance to the court, and the effective and efficient administration of justice. When you find yourself in that situation, you must provide your pro bono client with the best possible legal representation. It is never an excuse to say to the court that you are ill-prepared because you are doing a matter pro bono. Judges will respect you for doing pro bono work to the best of your ability and also for treating a self-represented litigant with civility and respect, and assisting the judge to work in a rational way through the maze or thicket which can be created by an ill-disciplined or overwrought litigant in person.

---

[2] See *Collins (alias Hass) v The Queen* (1975) 133 CLR 120, 122; *Supreme Court Act* 1995 (Qld) s 90.
[3] Chief Justice Murray Gleeson, 'Bench and Bar', in Geoff Lindsay and Carol Webster (eds), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002) 37, 39.

For justice to be real and accessible to all members of our society, it is important that it not be conceived of and practised by a self-perpetuating oligarchy defined by class, wealth, gender or any other irrelevant characteristic. Of course, you are all individuals of intellect and ability who have spent countless hours learning and practising the law. However the development of those capacities is for the good of the community, not the social standing or the accumulation of wealth which may or may not attend them.

It is desirable that the composition of both the Bar and the Bench more closely resemble that of the broader population. This will only occur if these institutions are seen to be open to all. For that reason, I am glad to note that there are a number of women among the group of graduating Readers this evening and that you hail from diverse backgrounds. Given the large proportion of judges that are drawn from the Bar, judicial diversity in the coming decades will only benefit from valuing difference at the Bar today.

These words are not tokenistic; distinct life experiences allow individuals to perceive circumstances in quite different ways and it is imperative that the judiciary continues to keep pace in its understanding of the community that it serves. We can, and of course do, educate ourselves, but it is even better when we are able share in the wealth of experience of others.

Fortunately the celebration of diversity is a little different from some of my experiences during and as a result of this course. I am told that the Bar Practice Course prize has been abolished and I make no comment on that; but let me regale you with my own experience of winning that prize.

I was informed beforehand that I would be given the prize in a public ceremony by Cedric Hampson QC, then the doyen of the bar. I was told the prize I would be given was a cheque, always welcome at that stage of your professional life, and a tie. Mr Hampson would hand me the tie. A tie. Not a scarf; not an item of women's clothing; not something androgynous; but an item of men's clothing. Should I accept it or object? I was intending to go to the Bar. I did not say anything and accepted the tie. I kept it for a few years but it only served to remind me of the unreconstructed nature of the profession I had joined and eventually I freed myself of it by throwing it out.

I know you are thinking that at least I got a cheque. How bad could that be? I was an articled clerk; my child care costs exceeded my income; I had a cheque from the Bar Association from the same bank I banked at. Perhaps I could cash it. I took it to the bank and enquired. "What's

it for?" I was asked. I was quite pleased and said I had been awarded it as a prize by the Bar Association as the best student at the Bar Practice Course. "What, best barmaid?" he asked. I began to realise that being a female barrister would not be without its challenges, and so it was. Of course, at that time we had no female judges or magistrates in Queensland. How different it finally is now. But let me quickly point out that no matter what discriminatory attitudes I may have faced even then they were never from judges, who always respect the well-prepared barrister who assists them and acts with integrity.

As then-High Court Chief Justice Gleeson observed in an essay to mark the centenary of the New South Wales Bar Association, the relationship between the Bench and Bar is changing, in part due to the expansion of the judiciary and the legal profession.[4] However, the nature of our common law judicial system is such that judges will always rely on barristers for the day-to-day functioning of the court system. Unlike in civil systems, where judges themselves must search for the relevant legal and factual materials, in our system those tasks fall to the parties' legal representatives. The costs of preparation (except in public prosecutions) are borne privately by the individuals involved, rather than being a burden on the public. The only task that falls to the judge, albeit a very great one, is making the relevant decision. Of course, this also makes it all the more important that barristers be prepared to take pro bono briefs, however the point I wish to make is that judges in the Anglo-Australian common law tradition are greatly dependent on legal representatives, and primarily barristers, to define the issues to be decided; to identify the relevant evidence; and to present it to the court in a comprehensive and comprehensible manner.

As I remarked at the outset, these are not easy tasks. For the most part, we on the Bench have been tested by them, too. The Bar is set at a high standard, but much of what it demands can be achieved through thorough preparation, and the exercise of courtesy, integrity and candour. That is what your duty to the court demands of you and will not pass unnoticed by the Bench or by your colleagues at the Bar.

You have all travelled a long road to be here tonight; the paths of some will have been more winding, as it was for me, than others. But the journey does not stop here. Life at the Bar is one of constant learning. There will always be some new challenge, some quirk in the case to nut out or some particularly obscure point of law to analyse. That learning is ongoing in the

[4] Ibid 39-40.

judiciary, too, as we aim to keep pace with changes in the law and the community we serve. Your earnest efforts to assist us in our judicial work are invaluable to the proper functioning of our system of law and justice. I wish you all the very best as you commence your careers at the Bar.