LOADING THE GUN: How solicitors contribute to the effective advocacy of counsel in criminal litigation[1]

Keynote address to Queensland Law Society Annual Symposium

11 March 2022 by the Honourable Justice JD Henry[2]

The criminal law, like this sentence, is loaded with ballistic metaphors about barristers. Counsel are hired guns. Risk-taking counsel think they are hotshots, whereas others think they are trigger happy. Counsel who ask few questions are keeping their powder dry. Counsel who object prematurely are giving a shot across the bow. Counsel who criticise their opponent opportunistically are taking a pot shot. Counsel tell defendants who expect them to perform miracles that they do not have a silver bullet.

In the ballistic metaphor of this session's topic, "Loading the Gun", the barrister is the expert shooter - the hired gun - and the solicitor, the supplier of and assistant in loading the all-essential ammunition. Our topic's metaphor marks the importance of solicitors not only arming the barrister with a properly prepared case but thereafter continuing to make a professional contribution to the barrister's effective deployment of the case.

My experience at the bar was that some solicitors, a minority, seemed to do neither of those things unless pushed. Some, whom I did push, remained recalcitrant and I was as happy not to be briefed by them again as they were not to brief me again. Others welcomed my requests for further professional contribution from them, apparently embracing the opportunity to do their job professionally, in concert with a barrister.

This diversity of reaction showed that while some solicitors were not contributing as they should be because they were unprofessional, others were not doing so because they had been misled by unprofessional senior lawyers and the false myths of criminal litigation espoused by them.

Four false myths of criminal litigation

It is helpful to identify and debunk four of those myths immediately. Doing so will aid your understanding of how solicitors contribute to the effective advocacy of counsel in criminal litigation.

The first myth is that the best defence is to just put the prosecution to the proof and not go into evidence. This is wrong because there will inevitably be cases in which the best defence requires the defendant's side to adduce evidence. However, to know whether it is best for the defence to go into evidence or not first requires the investigation and gathering of the evidence which might be advanced for the defence case. That takes work. By subscribing to this myth

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1 Far Northern Judge, Judge of the Supreme Court of Queensland, Judge of the Land Appeal Court of Queensland.

2 Presenter's note: My discussion of this topic for convenience references the scenario in which a solicitor and barrister act for a defendant going to trial on charges to be determined in the Supreme or District Court. However, many of the principles exposed by the discussion will be readily recognisable as having application in the context of prosecuting such cases and in respect of charges to be determined in the Magistrates Court and in respect of sentence proceedings.

its proponents avoid such work and rationalise that their job is over once they have procured a copy of the prosecution brief and sent it to a barrister, who need only put the prosecution case to proof at trial.

The second myth, linked with the first, is that the defence should not go into evidence because the right of last address will be lost by reason of s 619 *Criminal Code (Qld)*. The true position, is that the persuasive impact of a closing address depends principally upon its quality, not whether it is delivered before or after the address of one's opponent. From the advocate's perspective, the right of last say may sometimes carry a modest advantage. But addressing first may also do so because it allows you to entrench a favourable appreciation of your case and blunt the force of your opponent's arguments by getting to them first.

This second myth is linked with the first because such mild advantage as addressing last may sometimes carry is in those cases where the defence have not gone into evidence and the only focus of submissions is the merits of the evidence advanced by the prosecution. But what of those cases where there exists evidence which could be led from the accused, or some other witnesses, which has a realistic prospect of either demonstrating innocence or at least raising a reasonable doubt as to guilt? Even if you brief only a moderately talented barrister, such evidence in the hands of that barrister is likely to have a much greater persuasive effect on the thinking of the jury than the, at best, mild forensic impact of the same barrister addressing last rather than first.

The third myth is that you should not seek your client's version of events to any extent until after your client has had an opportunity to peruse the full prosecution brief of evidence. The unspoken propositions behind that approach are:

1. you should assume your client is probably a guilty liar who will want to weave a false exculpatory account around the facts eventually disclosed by the prosecution;
2. if you extract an account of events from your client at an early stage, he or she might change it later, meaning you might have to withdraw and lose work; and
3. there is nothing to be lost by not engaging with your client on the facts early.

Each proposition is flawed.

Firstly, your opinion about your client's guilt or honesty is irrelevant.

Secondly, experience shows it is rarely necessary to withdraw in consequence of a client's change to a factual account earlier given to the client's lawyer. Most such changes only involve correction of minor drafting or memory errors or the provision of minor additional facts, rather than major altered facts. My own experience as an ethics counsellor was that the more frequent ethical concern in this area was lawyers, who were finding the case hard work, were too readily tempted to seize upon an inconsequential change of account as justifying their withdrawal. In any event the occasional loss of a client is a small price to pay for those much more valuable commodities, professional integrity and reputation.

The third proposition, that there is nothing to be lost by not engaging with your client on the facts early, is plainly wrong. There is much to be lost. Of course, your client is entitled to make an informed choice about what course to take[3] and is entitled to delay that choice until advised of the strengths and weaknesses of the disclosed prosecution case, including in respect of potential defences. But obtaining your client's version of events at an early stage is not inconsistent with that right. Moreover, such early engagement about the facts is critical to the

[3] See r 7.1 *Australian Solicitors Conduct Rules.*

client's interests in receiving reliable, timely advice about prospects of success and the future conduct of the litigation. In a case which will likely resolve in some form of guilty plea, obtaining your client's account of the facts early will be essential to identifying that likely resolution and advancing it promptly, to maximise your client's sentencing discount for timely notice of the intention to plead guilty under s 13(2)(b) *Penalties and Sentences Act* 1992 (Qld). In a case which will likely go to trial, or to a contested sentence, obtaining your client's account of the facts early will be critical to identifying the existence of other evidence and information which may exculpate or mitigate, so that it might be gathered before the evidentiary trail runs cold and memories fade.

The fourth myth is that by briefing a barrister the briefing solicitor is thereafter relieved of further work on the case. This myth manifests in an array of unprofessional practices. Three examples will suffice:

1. The brief forwarded to the barrister consists of a photocopy of the police brief of evidence and a one paragraph covering letter stating that counsel is briefed to represent the accused in the attached matter. The brief contains no analysis of the issues, no statement from the client or other non-prosecution witnesses or any instructions from the client as to what parts of the prosecution witness statements the client takes issue with. The flawed mindset appears to be that the barrister will tend to all that.
2. When the time comes for the barrister's conference with the client, the solicitor does not attend, instead sending the client along with a law clerk or secretary from the solicitor's firm and sometimes, no-one at all. Apparently, it is thought that the barrister is akin to an employee of the solicitor's firm and since the barrister is the lawyer on the job, there is no need to send another lawyer along.
3. Come the hearing, the solicitor might spend a small amount of time at the bar table, but otherwise remains in another court or at the office, leaving a law clerk or secretary to keep the instructor's seat warm beside the barrister. Again, the erroneous thinking is there really only needs to be one legal mind working on the case and, since a barrister has been briefed, that legal mind can be the barrister.

Solicitors who ascribe to such erroneous thinking fundamentally misunderstand their ethical and contractual obligations. They wrongly regard the barrister as a subcontractor who has been temporarily engaged by their firm to carry out a job which their in-house staff therefore do not need to perform, even though they will still charge the client for their non-performance. One of the multiple sins in such an approach is that it ignores the legal reality that the barrister is retained not by the client but by the solicitor and that the solicitor has ongoing obligations to the client as the lawyer retained by the client.

Having debunked the myths which non-contributors use as cover for their professional shortcomings, let us turn to the positive contributions which competent solicitors can make to enhance counsel's effective advocacy of the case. The timing of those contributions occurs in three phases:

1. the preparatory phase, culminating in the briefing of a barrister;
2. the preparatory phase after briefing the barrister; and
3. the hearing phase.

Phase 1: The preparatory phase culminating in the briefing the barrister

In the early life of a case, before counsel is briefed, the decisions and actions of the solicitor can have a very significant impact later upon how effectively the case can be advocated. Those

decisions and actions are too potentially numerous and varied to be canvassed now. For present purposes it is the act of briefing the barrister upon which I will focus, specifically, the content of the brief.

Content of the brief to counsel

The content of the brief will obviously vary depending upon when, in the life of the case, the barrister is briefed. The timing of the act of briefing may be influenced by an array of considerations, such as client resources, the solicitor's own experience in criminal litigation, the difficulty of the issues confronting the solicitor, the probability of whether the client will plead guilty and the solicitor's confidence in litigating the case through the committal phase in the Magistrate's court.

The most common context in which barristers are briefed prior to the committal proceeding is after the police brief of evidence has been received, to advise upon whether an application should be made to cross-examine at the committal proceeding. For reasons to which I will return, the content of the brief to counsel at that stage should closely resemble the content of the brief which would in any event be provided to counsel for the purposes of conducting the defendant's trial in the Supreme or District Court. What then should a brief to counsel to conduct the trial contain?

It should contain the following:

1. a table of contents and paginated content;
2. a summary of the procedural history of the case thus far, with relevant documents attached;
3. the solicitor's analysis of the issues in the case;
4. the prosecution's evidence, annotated with the client's instructions of what is incorrect or incomplete and what the correct position is;
5. the client witness statement;
6. the defence's other witness statements and potential defence exhibits;
7. the client's antecedents and references.

Harking back to our opening metaphor, these materials are the all-important ammunition. Each warrants elaboration.

A table of contents and paginated content

This is an elementary yet sometimes overlooked requirement. It will allow counsel to invest productive time in considering and mastering the brief rather than losing productive time flicking back and forth guessing at where a document might be.

A summary of the procedural history of the case thus far, with relevant documents attached.

It is inevitable that counsel will want to know what stage the case is at, what stages it has already gone through before the courts and any evolution of the charges and their particulars which may have occurred along the way. This is information you will readily know and can easily summarise. It should be a summary only – do not swamp the barrister with inconsequential detail. It should include reference to the substance, outcome and dates of disclosure and particulars requests and negotiations and offers exchanged between you and the prosecution.[4] Include copies of the bail undertaking, the indictment and any particulars of the

[4] The date of an offer to plead guilty on a particular basis will assume particular significance in mitigation

charges provided by the prosecution but otherwise exercise restraint. Do not overwhelm the barrister with other documents such as file notes and emails. If the barrister needs to know more about the case's procedural history the barrister can ask for more later.

The solicitor's analysis of the issues in the case

You will have been working on and thinking about the case for many months. You will have views as to the strengths and weaknesses of each side's prospective case, views as to which particular features of the evidence are important or need close attention, views as to how the case might be best defended. Give the barrister the benefit of those views in your analysis. It will inevitably assist the barrister, at the very least by giving the barrister a head start in grasping the issues.

The prosecution's evidence, annotated with the client's instructions of what is incorrect or incomplete and what the correct position is

The next content category in the brief is the prosecution's evidence, collated into sets of all evidence relating to each individual witness. So, for each witness, that would be the disclosed witness statement, transcripts of interviews with the witness, the transcript of any evidence given at the committal by the witness and the prosecution's documentary exhibits relating to the witness.

It will be no surprise to you to know your brief to counsel should include those materials, grouped together for each witness. However, solicitors should also take the time to specifically identify, in those materials, any material fact which the defendant disputes as incorrect or incomplete and note what the defendant instructs the true position is.

I have seen this done best within the pages of hard copy briefs, copied single-sided, with the written instructions being on the left, blank page, opposite the contentious fact in the statement or transcript. The advantage of that approach is that counsel can simultaneously see the fact advanced by the prosecution and how the defendant instructs it is wrong. It avoids the need for counsel to leaf back and forth between the prosecution material and instructions buried elsewhere in the brief. It promotes counsel's timely understanding of the matters in issue when preparing and reduces the risk of oversight or error when counsel is cross-examining. It also aids compliance with the requirement of the Rule in *Brown v Dunn* that the cross-examiner should fairly put to the witness a material fact intended to be advanced in contradiction of the witness.[5] It also gives you a ready means of checking, by reference to your duplicate copy of counsel's brief while instructing in court, that counsel does not overlook the point.

I appreciate some solicitors include the information grounding such instructions as asserted facts within the client witness statement. However, that is not as helpful to counsel because it will remain for counsel to have to take the time to identify that a particular fact contradicts specific prosecution evidence and collate the information for separate use when cross-examining. That time involves a duplication of effort which the solicitor will already have gone to. That is because the solicitor should always canvass the prosecution's evidence with the client as part of the process of taking or refining the client witness statement. Since the solicitor will by that task have already identified the client's contradictions in respect of each statement, transcript and exhibit, it will involve little extra time, while the information is to

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of sentence if the prosecution later accept a plea on that basis because s 13(2)(b) *Penalties and Sentences Act* speaks specifically of "the time at which the offender … informed the relevant law enforcement agency of his or her intention to plead guilty".

5 *Browne v Dunn* (1893) 6 R 67.

hand, to administratively duplicate the noting of that information, setting out the contradictions separately in respect of each witness. That undemanding administrative task will involve much less time than the time the barrister will have to spend in going back and forth amidst the pages of the brief tracing and assembling the relevant array of contradictory information.

The client witness statement

The defendant's account of the evidence which the defendant could give as a witness if called should be set out in a signed witness statement. This is obviously vital information for counsel's use in considering and preparing the best way to advance the case. It will serve as your counsel's "proof" of your client's evidence for use in leading the evidence from the client as a witness.

A signed witness statement from your client is also preferable to mere written instructions noted by you because the solemnity of having the client check and sign the statement reduces the risk of misunderstanding and protects you from later false allegations by a client who loses and is looking to blame you on appeal.[6]

The practice of recording your client's account as a signed witness statement also has the added advantage that if your client later gives evidence and is accused by the prosecution of recent invention, the statement can be produced in evidence as a devastating riposte to the allegation.

The defence's other witness statements and potential exhibits

The brief of evidence should include the other relevant evidentiary material you have gathered for potential use in defending the case. This should include copies of signed witness statements from the potential witnesses as well as the relevant physical evidence you have gathered.

Such information may inform how counsel cross-examines prosecution witnesses and the physical evidence may be capable of being deployed advantageously by counsel during the prosecution case. Moreover, the material is critical to consideration of whether the defence should go into evidence and to counsel's preparation for that eventuality.

As to physical evidence, digital records or posts are a good example of why such evidence should be gathered early. It is well known in the digital era, that access to records of digital communications, for instance Facebook posts, can be blocked or lost. The simple instruction to your client to print or take screenshots of such records, ensuring they are preserved, can provide evidence which counsel may later be able to deploy to your client's advantage.

I note an oft overlooked category of defence witness statement is the good character witness statement.[7] This is not the occasion to lecture you on the ancient law which permits the accused to adduce evidence of good character. Look up *Cross on Evidence* if you need a refresher.[8] The present point is that it is an exceptional form of evidence which the accused enjoys the unique legal advantage of deploying and which is often overlooked. If your client is of apparently good character then give your counsel the ammunition to prove it by including character witness statements in your brief to counsel.

The client's antecedents and references

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6 See, for example, *R v Mansoori* [2019] QCA 250.

7 For example it was probably overlooked in *R v DBB* [2012] QCA 96, [55]-[56].

8 Heydon JD, *Cross on Evidence* (13th ed, 2021) Ch 10 [19005], [19100]-[19160].

The final category of content in the brief to counsel is a summary of the client's antecedents and references and other validating information about the client's personal circumstances for use in the sentence which will follow if the trial is lost.

It may seem odd at first blush that antecedents and other materials for use on sentence ought be included in the trial brief. At the very least that should occur because of the risk you may lose the trial. The usual practice in Queensland is that the court proceeds directly to sentence after conviction at trial. At this point it will be too late to take the client's antecedents and gather validating mitigating information about the client's background and circumstances. Such material should be in counsel's brief from the jump.

There are other reasons why the antecedents should be included in the trial brief. You will have gathered knowledge about your client's personal history and circumstances early in your retainer, to identify information and investigative leads of relevance to the case and to build rapport. If included in counsel's brief for trial, as it should be, the client's antecedents likewise equips counsel with knowledge of the defendant which will be useful to counsel in understanding and dealing with the defendant. It likewise may alert counsel to information about the defendant which counsel realises should be established in evidence at trial.

Brief to advise on applying to cross-examine witnesses at committal

I said I would return to the scenario where counsel is to be briefed to advise on applying to cross-examine witnesses at a committal proceeding.

Where counsel is briefed to provide such advice the content of the brief to be provided should be as identical as practicable to the content just recommended for the brief to appear at trial. Why? Because the cross-examination of witnesses should only occur for a purpose. The purpose necessarily depends upon the known issues in the case. Counsel advising on such an application need to know as much as possible about the case, including what information and evidence the defence has in order to identify what should be cross-examined about at committal and to assess prospects of such an application succeeding. Putting it another way, counsel need to picture the case as if it was going to trial and consider in that light what additional information would usefully be pursued through cross-examination at committal. Hence the need for a brief akin to that which you should provide in briefing counsel for trial.

The preparatory phase after briefing the barrister, when you should each be contributing to the preparation of the case

I turn next to the preparatory phase after briefing the barrister, when you should each be contributing to the preparation of the case for trial; each value adding to the singular goal of acting in the best interests of the solicitor's client.

Main contributions

The main contributions the solicitor will make during this phase will most commonly involve discussions with counsel about the issues in the case and arranging and participating in counsel's conferences with the client and other potential defence witnesses.

Importantly the solicitor should not be a passive participant in discussing the forensic issues in the case with counsel. The occurrence of a two-way discussion allows each participant to contribute their view. But more than that, even if those views are different, discussion of them reduces the chance of important points being overlooked and it brings focus to counsel's thinking on the real issues in the case and how to deal with them.

As to pre-trial conferences, conducting them is a topic upon which I have spoken at length elsewhere, in a paper titled *Conducting conferences with clients charged with offences*, so I will not dwell on the topic in detail here.[9] It is sufficient for present purposes to emphasise two points. The first is that counsel's first conference with your client should be held early, long before trial, leaving time for you to pursue extra evidence or information identified as needed by the conference and leaving time for such further conferences as are needed. The second point is that the solicitor should not be an unthinking, passive presence at counsel's conferences with the client and other witnesses. Of course, an orderly approach to conferring with the witness will involve counsel doing more talking than the solicitor. However, the solicitor should follow what is occurring in order to ensure matters are thoroughly covered with the witness and to intervene if something appears to have been misunderstood or overlooked.

Safeguarding counsel's contribution

In making an active contribution to the barrister's conferences with the client and other potential witnesses, and in discussing potential litigation tactics, the solicitor will not only be value adding to the quality of the representation of the client. The solicitor will also be monitoring the quality of the barrister's professional contribution; safeguarding the quality of the service the solicitor has retained in exercise of the solicitor's responsibility to the solicitor's client.

The starting point to that quality assurance role is briefing a barrister who is appropriate to the advocacy task at hand. Solicitors need not always brief the best and brightest barristers, and the nature of their case, indeed the nature of their client, are all considerations which may influence which potential barrister is better suited to the brief at hand. Bear in mind, though, that the responsibility of monitoring the barrister's performance will not vanish merely because you have briefed a particularly talented barrister.

Some apparently talented barristers are hopeless time managers, and some take on so much work that they leave inadequate space in their diary for proper preparation, which includes conferring with the solicitor, the solicitor and client, and sometimes other potential defence witnesses. Do not be bluffed by the barrister who keeps resisting or postponing conferences. The convening of a conference at which the case has to be discussed will encourage even the more disorganised barristers to actually read the brief properly in order that they may make a sensible contribution at the conference. In a similar vein, a discussion between solicitor and counsel, in which the solicitor raises issues in the case, will soon reveal whether the barrister has indeed read and understood the brief.

It is important that you press a briefed barrister who has not sought to discuss the case with you or conduct pre-trial conferences with the defendant or other witnesses. If you force on such discussions and conferences, rather than letting the barrister get away with them occurring only the day before the case is to start, you will leave time available to, if needs be, terminate the barrister's instructions and brief a new barrister who does have time to perform the necessary preparation in your client's case.

The distinction between client decisions and counsel's forensic decisions

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9 The Honourable Justice James D Henry, 'Conducting conferences with clients charged with offences', delivered at the Cairns Judiciary CPD Series 2017/2018, 12 December 2017.

Having emphasised the importance of you being an active and, if necessary, assertive contributor, it is timely to reflect upon the distinction between core decisions for the client and forensic decisions for the barrister. The *Barrister's Conduct Rules* relevantly provide:

> "41. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's wishes where practicable.
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> 42. A barrister will not have breached the barrister's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:
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> (a) confine any hearing to those issues which the barrister believes to be the real issues;
>
> (b) present the client's case as quickly and simply as may be consistent with its robust advancement; …"

Those two rules underscore that the exercise of the advocate's expertise, the very task for which the barrister has been briefed, necessarily requires forensic decisions to be made in advocating the client's case as effectively and persuasively as possible. Those decisions are for counsel to make in discharge of counsel's expert role. As Gleeson CJ observed in *Nudd v R*,[10] they are usually decisions which bind the client, for "were it otherwise, the adversarial system could not function".

However, while it is important that the client and solicitor do not get in the way of the barrister performing the barrister's expert role, it is equally important that decisions which remain to be made by the client personally are not usurped by the barrister. The decision whether to plead guilty or not guilty and the decision whether or not to go into evidence at trial are each decisions for the client to make. Of course, they will be decisions upon which the barrister and, for that matter, the instructing solicitor may provide advice, but there is no requirement that the client follow such advice. A client's resistance to following advice on these decisions will not provide a basis for counsel to withdraw. As a result, some counsel, unimpressed by having to pursue a course they personally disagree with, transgress from reality testing the defendant's decision into browbeating the defendant into submission. If this occurs, it is important the solicitor intervenes to protect the client's interests.

Guard against the browbeater

It is illogical for a competent counsel to behave in this way. If the defendant wants to "roll the dice" and go to trial despite the risks you have thoroughly explained then that is the defendant's choice as the charged citizen. In my experience at the bar there was something liberating about pressing on in a case where I thought the defendant unwise not to accept a proffered plea bargain or where I thought the risks of going into evidence outweighed the advantages. After all, they were not my choices; expectations of success were lower and unexpected success would be no poor reflection upon my advocacy.

It is as well to alert you that the type of barrister I earlier mentioned – the type in the minority, who keeps avoiding your requests for timely conferences and discussions – is often the type of

[10] [2006] ALR 161, 164.

barrister who will try and browbeat your client into pleading guilty on the eve or morning of trial. A barrister's retainer with the solicitor may be structured in such a way that the barrister will be paid the same amount whether a listed trial turns into a sentence on the morning of the listed trial or proceeds through the entirety of that day as a trial. Such fee arrangements will almost invariably result in the barrister being paid a greater sum than would have been the case had the matter been identified as a sentence at an earlier stage. Further, it sometimes seems unusually serendipitous that the result of a listed trial falling through on day 1 is that the briefed barrister just happens to have other briefed work the following day – work they could not keep if the trial were to continue. Of course, the best safeguard against a last-minute change of plea is that the solicitor has insisted upon timely pretrial conferences with the barrister. This allows the client plenty of thinking time and avoids the prospect of the client being overwhelmed by advice which is only being delivered at the last moment, with little time for consideration and reflection on it.

Do not swamp the barrister with supplementary documents

Before leaving the pre-hearing phase I should also identify a bad habit some solicitors have developed, in our digital era, of swamping the briefed barrister in the run up to the hearing with multiple emails and additional documents which do not assist the barrister to prepare for the hearing and often distract the barrister from doing so. It is as if, because the barrister is now another lawyer working on the case, the solicitor feels the need to copy the barrister into every last communication the solicitor is having with the client, the court or the opposing party. Many such communications relate to tasks which a solicitor should perform and they belong in the solicitor's file, not the barrister's brief. In a similar vein, rather than vetting recently received and often lengthy documents, the solicitor just dumps them on the barrister. The barrister is briefed to advocate for the defendant at trial, not act as a second solicitor. The barrister's preparation time is valuable. I spoke to various barristers in preparing this paper. They all asked me to ask you to spare them from your email and document barrages and leave them alone to prepare.

The hearing phase

Prepare and participate as a lawyer

If you are to make a professional contribution to the barrister's effective deployment of the case during the hearing, ensuring that two legal minds are on the job for the defence at the hearing, you should review the brief and think about the looming hearing as if you had to be the advocate. It is also necessary that you closely follow events at the hearing, actively thinking about the unfolding case as a lawyer. Approaching your role in that way is likely to prompt a contribution at the bar table which the barrister will find helpful. It will also guard against diverting the barrister's attention with thought bubble suggestions prompted by a barely superficial understanding of the issues in the case.

When the case is underway and your counsel's examination or cross-examination of witnesses is unfolding, you should be double-checking that all of the critical issues are actually raised with the witness. For some barristers, the challenge of listening to the answer to the question they have asked while at the same time starting to think about the next question to come, results in them failing to realise a critical piece of evidence has not been extracted. A solicitor who is actively listening to the case and tracking the oral evidence against the witness statement will be well placed to realise this has happened and communicate the oversight to the barrister.

When the solicitor's barrister is cross-examining a witness, the barrister may be obliged to take the witness to task in accordance with the Rule in *Browne v Dunn* but overlook doing so. Again, if the instructing solicitor is observing the case, applying his or her mind actively as a lawyer to it, the solicitor can identify the oversight and to communicate it to the barrister.

An area in which I found my instructing solicitors' active legal thinking about the case particularly helpful was their feedback on potential points to make in the closing address. A good advocate will have prepared a closing address prior to the trial but will invariably refine its content as the case progresses before finally delivering it. It is helpful to the barrister to be able to take time out as the trial progresses to hear the instructing solicitor's thoughts on the points which ought be made in the closing address. It is good practice for the instructing solicitor to accrue a list of address points which are prompted by developments as the trial progresses. This does not involve the same structured thinking as is required to actually compose the closing address, but it will provide a convenient checklist to make sure that points of importance, which ought be highlighted or neutralised during the closing address, are not missed by the barrister.

After addresses, during the summing up, solicitors should actively apply their legal minds to what the judge is saying, with a view to alerting counsel if the summing up contains error or is unfair to the defence case. It is the obligation of all practising lawyers in the case to assist the judge in ensuring that the summing-up does not contain error and fairly puts the respective cases. When a trial judge fails to do that, as from time-to-time manifests itself on appeal, the success of such an appeal could be influenced by whether or not a redirection was sought, it being easier to establish error than a miscarriage of justice.[11]

Running the bar table

The instructing solicitor plays an important part in the administration of an efficient bar table. The solicitor should think ahead about the barrister's needs at the bar table during the trial and discuss those needs with the barrister.

Experience shows that most barristers, once on their feet, tend to pick up and place papers down without any regard to whereabouts they are putting them and soon lose track of them. You should keep your duplicate copy of counsel's brief free from your counsel's clutches. You should also have a system by which a copy of any documentary exhibit before the court can be quickly found amongst the documents at the bar table. In some instances, this may involve the compilation of a folder in which copies of the documentary exhibits are kept, or at the very least a system by which the copies of exhibits found elsewhere in the existing brief can be quickly turned up. You should also maintain an exhibit list at the bar table, readily visible and available to both of you to be able to promptly isolate the number of an exhibit.

Minimise distractions from counsel's in-court performance

The solicitor's in court role includes preventing distracting behaviours and appearances on the part of anyone associated with the defence team which may distract counsel or the audience's attention from the merits of counsel's advocacy.

The effectiveness of advocacy is impaired when the attention of the audience, the jury or judge as the case may be, is diverted from it by distractions in the courtroom. Examples of potential

[11] See for example *R v Van Der Zyden* [2012] QCA 89; *R v Coyne* [2021] QCA 110.

distractions which the solicitor can counter are the in-court appearance and conduct of the solicitor, the client, and the client's entourage in the public gallery.

The points I now make reflect that the theatre of the trial, how your side presents in the eyes of the audience you are trying to persuade, can influence the impact of counsel's advocacy. Your audience, the jury or judge, is all seeing. It will notice if the solicitor is not dressed to the standard required for court or slouches back at the bar table, treating court like a lounge room. The solicitor should look and behave as if genuinely interested in what is occurring, as the judge or jury would expect of a legal professional. Thus, making notes, turning up documents or looking at the witness under examination is all unremarkable and undistracting professional behaviour. On the other hand, constantly tapping away at the screen of a mobile phone will almost certainly distract the attention of the audience which the barrister is seeking to persuade.

Maintaining a poker face is also important, particularly when a witness's answers are unhelpful to the defence case. Slouched shoulders and a defeated expression will almost certainly be noticed by your audience and interpreted as a sign that the defence case has just been damaged by the answer of the witness. On the other hand, if the solicitor's body language and facial expressions give nothing away, the audience is much less likely to think that the witness's answer was as devastating as it at first blush seemed.

When the solicitor is communicating with the barrister at the bar table it is important the timing and nature of those communications is not distracting. Thus, the solicitor should attempt to minimise interruptions, noting the points the solicitor wishes to raise with the barrister, and accumulating them, unless urgent, until a convenient point when there is a natural pause in what the barrister is saying. If the communication is oral, then it should be done quietly and without facial expressions or audible tones that may be noticed and misinterpreted by your audience. Preferably the communication should be in writing. The very act of handing a note to the barrister looks professional and the theatre of counsel then flourishing the passed note may also enhance the audience's perception of the importance of the point being made. A written note also avoids the risk of misunderstanding as between solicitor and counsel and provides an aide-memoir to counsel if multiple points or a complex point is involved.

The solicitor's aura of professionalism at the bar table is not confined to the solicitor's interaction with counsel or other conduct at the bar table. It should also extend to communicating with the client from time to time while the court is in session. That may be necessary to obtain instructions on a particular point, in which case it should be done as unobtrusively and quietly as possible. But in any event it is prudent for the solicitor to interact with the client at least occasionally while court is in session, to double-check whether the client has any concerns. Such interaction, done quietly, has the beneficial subliminal effect, in the theatre of the courtroom, of lending an air of quiet professional gravitas to the defence team.

The solicitor should also endeavour to control the appearance and conduct of the client in the dock. The solicitor should ensure the client properly understands how to dress for court and that dressing properly for court requires the client to continue dressing properly throughout the court day, including the way to and from court, where jurors or media cameras may sight the client.

To aid the client to maintain a poker face and to appear genuinely interested in the proceeding, a useful tip is to provide the client with a pen and pad so that the client can take notes from time to time as the evidence unfolds. This serves three other useful purposes. Firstly, it tends to mitigate against the client engaging in other distracting behaviours. Secondly, it will convey the appearance that the client is genuinely focussed upon the case. Thirdly, it may just be that

the client makes a note of a good point which neither the solicitor nor barrister have thought of.

The client should be told to avoid looking back from the dock to the defence entourage in the gallery repeatedly – activity which will inevitably distract the jury or judge. The jury or judge will soon work out which people in the public gallery are part of the client's supporting entourage. The more closely allied those people appear to be with the client, the more important it is that they also dress in a manner which marks their respect for the court. They should also be warned against loud guffaws in reaction to what a prosecution witness says and talking between each other while court is in session. Such conduct can be visible even if the detail cannot always be heard and distracts the attention of the jury who look to the gallery rather than at your barrister.

Finally, remember that you are your barrister's eyes in the courtroom. The barrister will rarely turn around and survey how your client and your client's cohort are behaving. Further, the barrister may not be able to observe the jury's reaction in the midst of cross-examining a witness, whereas you can. You should contribute to the effective advocacy of your case by alerting your counsel to how it is apparently being received by the audience judging it.

Conclusion

I note in conclusion that the relationship between solicitor and barrister has been described as "a symbiotic relationship in the interests of the client"[12]. It is symbiotic because it is a relationship of two professionals working together, each value adding to the singular goal of acting in the best interests of the solicitor's client. Nonetheless it remains that each has a different professional responsibility and the solicitor, as the lawyer engaged by the client, does not contract out of that responsibility by briefing a barrister. As I trust our discussion of poor and proper professional practices has exposed, it is a responsibility which goes beyond merely making it desirable that the solicitor continue to participate as a lawyer once a barrister is briefed. It positively requires that participation in order for the solicitor to meet the obligation to the client of safeguarding the effective advocacy of the briefed barrister.

[12] Justice Margaret Wilson *Barrister and Solicitor: A symbiotic relationship in the interests of the client, paper presented to Bar Practice Course 20 February 2014.*