

New South Wales Young Lawyers' Association State Of The Profession Address

25 OCTOBER 2010

Justice PA Bergin

I see that my predecessor Patrons in their addresses on the same topic posed a number of interesting questions for the profession, including the very important practical matter of how to deal with the rising rate of practitioners' suffering from depression to the rather lofty task of achieving intergenerational equity¹.

As the Patron for 2010 I have had the privilege of observing first hand, some of the fine work of the New South Wales Young Lawyers Association. From the programs of continuing legal education to the fun of the Golden Gavel to the hard work of the Committees and the Annual Assembly, the message has been clear - commitment to keeping the profession strong and responsive to the needs of the community that it serves. Does this reflect the state of the profession generally?

The provision of legal services in the 21st Century is a far more regulated profession in which the statutory concepts of "unsatisfactory professional conduct" and "professional misconduct" introduced in the late 1980s², are now entrenched in legal education and thinking³. That is not to say that the profession of earlier years was not acutely aware of the ethical standards required of it nor is it to say that the profession of earlier years was not "regulated"⁴. However since the late 1980s, at least in New South Wales, an independent statutory body has controlled that regulation⁵. These developments were driven by community expectations reflected in the political policy of the government of the day that self-regulation, that is, without the interposition of an independent entity, was no longer acceptable⁶.

As the legal profession in Australia strives for the removal of cross border barriers and national admission, it seems that the question of who should control the regulatory process impeded progress towards national modernity. However it appears that this impediment will be removed and the members of the legal profession will be able to practise throughout the nation under consistent standards of professional conduct and regulation⁷.

On admission to practice, all practitioners solemnly promise, by oath or affirmation, to honestly conduct themselves in the practice as a lawyer to the best of their knowledge, skill and ability. Intrinsicly intertwined with this promise is every practitioner's duty to the Court, some aspects of which are now reflected in the Civil Procedure Act 2005⁸. This is a complex aspect to the provision of legal services that is pivotal to its qualification as a profession rather than merely a business and is also pivotal to the proper administration of justice. It is an aspect that appears not to be well understood in the wider community. This may be attributable, in part, to the preference of some to refer to the perception that the majority of members of the community are unable to afford lawyers fees. If this perception is an accurate reflection of reality then the profession is in serious difficulty. It is tragic to contemplate that the services of this honourable profession would be beyond the reach of the community it was established to serve.

In the early years of New South Wales as a Colony there were no Court fees and because there was no lawyers, litigants did not have to pay any professional fees. "Justice, such as it was, was free"⁹. Much of what occurred in those early years is a reflection of some of the attributes of the profession of today. The first lawyer in the Colony thought that he had a right to fees as part of his emoluments of office. He also expressed the view that his fees would prevent vexatious and frivolous actions. In those early years magistrates heard civil claims on a Saturday and it was notable that no charge was made if the plaintiff was "a poor

man". When a general order was issued terminating the Saturday hearings it referred to the civil magistrates using their:

Utmost endeavours, as far as their influence can be effectual in recommending the settling of trifling debts by arbitration, and thereby prevent such vexatious litigation.¹⁰

It seems nothing is new. Two hundred years later lawyers claim that their fees are reasonable; that they are entitled to be paid such reasonable fees for the services they provide; and that "poor" people have the benefit of pro bono arrangements within firms and/or through the Bar Association/Law Society and through the courts. The ubiquity of arbitration has endured the centuries however it is now becoming very fashionable at all levels of the law mercantile and unlike in those early years it is certainly not limited to matters that are "trifling".

It was just two months ago that the Attorney General for Australia, the Honourable Robert McClelland MP said:

Access to justice is central to the rule of law and integral to the enjoyment of basic human rights. It is an essential precondition to social inclusion and a critical element of a well functioning democracy.

In looking at how the justice system can be improved, the critical test is whether our justice system is fair, simple, affordable and accessible.¹¹

The justice system is not simply the courts and other tribunals. Legal practitioners are a pivotal part of the justice system. The "cost" of the justice system is not merely the budgetary provisions for courts and judges. The cost of the justice system includes the fees charged by lawyers to represent clients in that system. Chief Justice Spigelman has addressed the issue of lawyers' fees over a number of years. In 2004 he referred to the "tyranny of the billable hour" and the lack of justification for a time costing system that rewards inefficiencies¹². In

2007 the Chief Justice focused on commercial litigators with the anecdotal statement that the “flag fall for discovery” in any significant commercial dispute “is often \$2 million”¹³. Things escalated in 2009 when the Chief Justice issued the following warning:

I have over a number of years emphasised the need to control legal costs. As I have said on previous occasions, the legal profession is in danger of killing the goose.

...

The judiciary and the profession have to co-operate to ensure that all of the areas in which costs can escalate unreasonably, areas that have been well identified over the years, are controlled even more strictly than we have come to do in the past. That is not only in the public interest, it is in the enlightened self-interest of all legal practitioners. If the profession is too greedy it will end up with less and, in some fields, with nothing.¹⁴

The Chief Justice did not express the view that the profession was greedy, rather he warned against it. However, sadly the expression “greedy” has at times been applied to the profession as a whole because of individuals who have unfortunately earned such a reputation. This is compounded when politicians refer to lawyers as “greedy” without appropriate particulars or justification.¹⁵

The expression “greed” or “greedy” in this context is taken to mean the intense and selfish desire for wealth, with the emphasis on “selfish”. There is nothing to be said against a desire for wealth. The expression “greedy” as it is applied to lawyers means that they compromise their duty to the client by charging the client too much. In other words, putting it bluntly, they are overcharging the client (or over servicing the client). I have not seen any evidence either in this state or nationally that lawyers, as a profession, are overcharging their clients. There have been individual instances of overcharging which have sullied the reputation of the profession¹⁶. However, if it is true, as some would have you

believe, that lawyers generally, are guilty of overcharging their clients, the law and the legal processes are available to prove just that.

The Office of the Legal Services Commissioner of New South Wales publishes an annual report that includes statistics in relation to both phone enquiries and written complaints¹⁷. In the three years, 2006-2007, 2007-2008 and 2008-2009, the percentages of phone enquiries relating to “overcharging” were 7.8%, 8.5% and 9.8% respectively and the percentages of written complaints in respect of “overcharging” were 9.1%, 10.3% and 10.9% respectively. In the year 2008-2009 the Commissioner received a total of 2,851 complaints of which 310 related to allegations of overcharging. These are most interesting statistics. As we know raw statistics need to be used cautiously, however it is not unreasonable to conclude that there are millions of clients represented in any one year in New South Wales. May I suggest that these statistics demonstrate that lawyers in New South Wales are not appropriately described as “greedy”.

However, there is a perception that time-costing (the billable hour) is an unreasonable burden on the justice system. The reasons for the introduction of the billable hour were described as follows:

The dominance of hourly billing rests on interlocking and reinforcing pressures: simplicity, familiarity, profitability, efficiency, and amiability. Of these forces, simplicity and profitability are most prominent, followed by psychological issues of amiability and efficiency. These forces have led to the ubiquity of hourly billing and its embedded familiarity, and the difficulty of implementing alternative arrangements¹⁸.

The introduction of the billable hour was justified in part by reference to the clients’ desire for a more transparent billing process. Many in the profession saw the billable hour as a means of greater profitability and a way in which to bridge the perceived remunerative gulf that then existed between the legal profession and other professions, such as medicine. It takes into account the overheads and costs of running a practice, the profit needs of the practice and competition¹⁹.

One recently appointed Victorian judge has suggested extra curially that so long as hourly billing is the main form of remuneration for lawyers, the courts can only be partially successful in managing litigation because lawyers and courts will be at cross purposes²⁰.

It is important to keep in mind the observation made fifteen years ago that:

The court must recognise that the organisation of the legal profession has changed, the nature and extent of the legal services now provided extend over a wide spectrum, and fees may be fair and reasonable notwithstanding that they are at the opposite ends of a correspondingly wide spectrum.²¹

No one is expecting lawyers to work for no fee. No one is expecting lawyers to accept that is appropriate to charge less than the costs of running a practice. It is obvious that the costs of providing a service can only be paid for out of the fees earned for the provision of that service.

Sydney is a very expensive city in which to lease commercial premises. The overheads of a legal practice are extremely high. Indeed the overheads of a sole practitioner, for instance a silk or a barrister, are very high. However it is clear that competition between professional firms is now very healthy and cost effectiveness is a feature to attracting clients.

The Chief Justice's warnings (and those of others) have been adopted with the exquisite innovation for which the legal profession is renowned, as a modern marketing tool for the provision of more cost efficient legal services. Take for example the following extract from a web page:

The 2008 economic crisis has taught us all a lot about the perils that befall an industry if it ceases to faithfully adhere to balanced professional standards and practices. Prime Minister, Kevin Rudd, spoke of "extreme capitalism" and stated that "we've seen the triumph of greed over integrity; the triumph of speculation over

value creation; the triumph of the short term over long-term sustainable growth".

Sadly, the legal profession also has cause to pause and consider its direction and structure.

Retired American judge, Justice Macklin Fleming, in his book *Lawyers, Money and Success - The Consequences of Dollar Obsession* argues that the American legal profession's quest for money caused the profession to lose sight of its true tasks and responsibilities. This has resulted in dissatisfied clients, public mistrust and seriously unhappy lawyers.

Australian lawyers may be faring no better

There is then the statement that such lessons should be taken to heart with the aim to provide a "cost-effective service"²². Other firms compare the size of their overheads with those of their competitors to suggest that the fees will be more attractive, without of course setting out the true nature of those fees. Many of the web pages of solicitors will refer to minimising overhead costs and fixed and highly competitive fees.

Some in the profession have embraced a different method of attracting clients advertising that they will accept instructions from clients on a "no win-no fee" basis. What that seems to mean is that the solicitors will not charge a professional fee unless the client receives a judgment or settlement monies. However the client will be required to pay disbursements irrespective of the outcome of litigation.

In many instances where the litigant is attracted to such a retainer, there will be challenges for the profession. It is obvious that clients may wish to have the benefit of a second opinion or indeed to change lawyers prior to a settlement or judgment. This may create difficulties for the original solicitor who has agreed not to charge a fee unless there is a "win", particularly because at the time the clients departs there has been no "win".

These retainers are fraught with difficulties. Conflicts of interest can arise where the solicitors receive what they regard as an excellent offer (which may be the only way that they can see their fees being paid) but the client wishes to litigate (probably at the client's and the solicitors' peril)²³. The usual problem that is seen is that the client departs the original firm on the basis that they are unhappy with the services as provided.

If these retainers are to continue it is imperative that proper consideration be given to including provisions that make it clear what is to happen in relation to any fees if the client does not remain with that firm of solicitors.

The reforms that have been introduced in New South Wales²⁴ have improved the civil justice system. There is no doubt that the reforms have benefited civil litigants. There is a faster and more efficient method of litigating with commitment to the use of alternative dispute resolution mechanisms. As Lord Woolf said last year "it is now time to re-evaluate"²⁵. His Lordship identified the same problem that exists for us:

Our primary objective, however, has not been achieved: to reduce costs generally. Costs other than those that were fixed remained obstinately high but in many instances have risen and remain an impediment to justice.

In a moment of confession his Lordship said:

In his report [Civil Litigation Costs Review] Lord Justice Jackson has masterfully surveyed the current situation. He has identified the causes of disproportionate expense. Part of the explanation is the actions of the Government after the reforms for which I am responsible. The costs that litigants are required to pay to the Government have soared. The almost complete replacement of legal aid by conditional fee agreements, and after-the-event insurance having themselves increased expense, while at the same time enabling those who could not otherwise afford to litigate to do so.

This has been a very retrograde step. Defendants can face huge, disproportionate and unjust costs. If the defendant wins, on the whole he is going to be out of pocket. And if he loses, he will face three sets of costs: his own, the success fee of the lawyers on the other side and the insurance premium.

In Australia litigation funders, otherwise known as “bottom feeders”²⁶, have now seized the commercial opportunities that have hitherto been available only to lawyers. The various challenges to their entitlement to operate in the legal environment have not impeded their commercial success in which they have a competitive edge over lawyers both from the point of view of their structure and their freedom from the professional constraints of a legal practitioner²⁷.

The profession is not only battling with calls for it to restructure its method of billing but it is also having to compete with these commercial operatives who have the financial wherewithal to carry the costs of the litigation. A suggestion has been made that with the advent of multi-disciplinary partnerships and the raising of capital by incorporated practices that have been publicly listed, there is no logical reason why such a law practice, “if properly capitalised and managed, should not provide litigation funding on the same basis as other litigation funders”²⁸. However logic alone is not an appropriate touchstone in this area. The potential conflicts for lawyers with duties to the client and the paramount duty to the court need to be analysed and removed in any such arrangement. Innovation is never wanting in the profession, however in this regard it needs to be combined with large dollops of ethical thinking.

Developments in the legal profession in the United States of America are sometimes adopted in this country a short time thereafter. A good example of this is the introduction of electronic discovery within six months of its introduction in the United States of America. The developments in the United States of America in relation to lawyers fees are therefore of some interest. One large, multi-national law firm²⁹ has changed the manner in which partners are

appointed. It has implemented what is called the "innovative talent model" to allow for merit-based promotion and customised professional development. On analysis it appears that this model is something akin to the traditional days of articles as they were known in New South Wales. There is a specially developed training curriculum, one-on-one mentoring and clearer articulation of expectations and performance reviews.

Many firms in New York are developing more cost-efficient ways to serve the needs of their clients by what has been described as the "unbundling" of some of the services that accompany complex commercial litigation and "moving away from the hourly billing model"³⁰. Some firms are reported as having implemented a system of "fixed fees".

The unbundling of services is an interesting concept. I have spoken previously about the outsourcing of discovery and the use of cheaper labour for the provision of administrative services in a law practice³¹. However those steps alone will not remove the perception that the community cannot afford lawyers services. The profession needs to return to its roots. It needs to prove that it is affordable.

I should say I do not accept that the perception that the majority of the members of the community are unable to afford lawyers fees is justified. It is clear that there will always be some in the community who will not be able to afford lawyers fees. That was the premise upon which the legal aid schemes were founded. Unfortunately those schemes are no longer properly funded and the legal profession now pays for the services of many of the indigent through the wide-ranging pro bono schemes in so many firms. I do not see media headlines praising the work of the profession in this regard. Apparently honesty, integrity, high professional standards delivered pro bono does not attract interest. There is no intrigue to such a story and thus no editorial support.

Shaking off a negative perception is an extraordinary challenge. No amount of words will do it. It needs actions. It seems to me that this is probably the greatest challenge for the profession at the moment and more focus and pressure will be placed upon it as both federal and state governments seek to limit costs that lawyers may charge. If the profession moves first, it would appear to be unnecessary for government intrusion. May I recommend it moves.

1 *The Current State of the Profession* The Hon Justice R McColl, 18 September 2008; *2009 State of*
2 *the Profession Address* The Hon Justice N Perram 27 August 2009.
3 *Legal Profession Act 1987* (NSW) s 127(1) and (2).
4 R Collins, “Guilty of unsatisfactory professional conduct or of professional misconduct” (2003)
41(1) *Law Society Journal* 42; J Briton, “Unsatisfactory professional conduct – Should it be
5 handled differently?” (2007) 27(9) *Proctor* 37; L Pierotti, “Personal Conduct distinguished from
6 professional misconduct” (2004) 42(3) *Law Society Journal* 83.
7 *Re Davis* (1947) 75 CLR 409; *Ex parte Lenehan* (1948) 77 CLR 403; *Re Foster* (1950) 50
8 SR(NSW) 149; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97
9 CLR 279.
10 Office of the Legal Services Commissioner of New South Wales.
11 This was a little after the establishment of the New South Wales Judicial Commission which deals
12 with complaints in relation to allegations of judicial misconduct.
13 The Honourable RS French AC Chief Justice of the High Court of Australia Letter to the National
14 Legal Profession Reform Taskforce 6 November 2009; The Honourable JJ Spigelman AC Chief
15 Justice of the Supreme Court of New South Wales *Towards a National Judiciary and Profession*”
16 Opening of Law Term Dinner 1 February 2010; the Honourable John Doyle Chief Justice of the
17 Supreme Court of South Australia Opening Address Law Society of South Australia Criminal Law
18 Conference 26 May 2010; The Honourable Paul de Jersey AC Chief Justice of the Supreme Court
19 of Queensland Opening Address Queensland Law Society Vincent’s Symposium 2010, 27 March
20 2010.
21 s 56(4).
22 JM Bennett, *A History of the New South Wales Bar* The Law Book Company Limited, 1969 at 9.
23 JM Bennett, *A History of the New South Wales Bar* The Law Book Company Limited, 1969 at 7.
24 Welcome address to the 2010 National Access to Justice and Pro Bono Conference, Brisbane 27-
25 28 August, 2010.
26 Opening of Law Term Address 2 February 2004.
27 *Access to Justice and Access to Lawyers* The Hon JJ Spigelman AC 35th Australian Legal
28 Convention Sydney 24 March 2007; *Litigation and Globalisation* The Hon Justice PA Bergin New
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31 Spigelman AC, February 2009.
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