Tricky demurrers and frivolous pleas: the changing nature of the bar

By Peter Lowe

*An insignificant person until they became King's Counsel? (8 letters)**

The state of the bar and bench have been, at times, somewhat tense. At the extreme end of the spectrum one could do no better than start with Erskine who, apparently, following the acquittal of his client Horne Tooke challenged the lord chief justice to a duel because of some remarks of the latter during his client's trial.[1]

Court proceedings which involved heated exchanges between counsel could, in days past, readily end in a duel. Sir Charles Wetherell had an argument with Edward Sugden, then solicitor-general, where Wetherell alleged a breach of etiquette (involving his court matter being called on when he was not present) and a furious row occurred in the Chancery Court room. A duel was only avoided by both counsel being dragged before a magistrate and being bound to keep the peace. It is noteworthy that Wetherell had previously served as solicitor-general and then as the attorney-general.[2]

Sometimes, court proceedings could end with a finding that both barristers were in contempt of court. In 1846, two prominent Sydney barristers ended up exchanging words in court ending with Richard Windeyer calling John Darvall a liar. Darvall then struck Windeyer forcibly with his brief and before the latter could respond in kind he was stopped by an officer of the court. Darvall received 14 days imprisonment, and Windeyer received 20 days, and both were placed on a two year good behaviour bond.[3]

On another occasion, an outbreak of fisticuffs occurred between two king's counsel, Vesey Knox and Roskill, based on the former making disparaging remarks which, according to Heuston, alluding to the latter's ancestry.[4] Contemporary newspaper reports of the time suggest that the dispute related to precedence and where each counsel should be seated in court.[5] Sir Robert Finlay, later Lord Finlay, had to step in between the two to break up the fight.

At common law a barrister, as advocate, was held not to be accountable for ignorance of the law or any mistake of fact, or for being less eloquent or less astute than he was expected to be. It would appear that no matter how disappointing the barrister was, there was no recourse in law to correct the disappointment. So it is was held in the case of Swinfen v Lord Chelmsford with regard to compromise of law suits – if the barrister acted in good faith and with a view of the interests of the client, notwithstanding instructions form the client not to compromise, such was regarded as a mere indiscretion or error of judgment provided it was done honestly.[6]

The above case is also notable because of the audacious allegation that Sir Frederic Thesiger had colluded with the presiding judge, Mr Justice Creswell, to compromise the action. It was said at the time that the audience in the courtroom during that court action comprised chiefly barristers, perhaps because the subject matter of the proceeding involved an act of compromise by one of the then stellar performers of the bar.[7]

There was a fairly remarkable corollary to that case. When Sir Frederic Thesiger compromised the action (relating to which property fell within the testator's estate) Patricia Swinfen was outraged as she had not been consulted. She engaged the services of a then unknown barrister, Charles Kennedy, to secure the return of the estates. Being impecunious, all she could promise was the payment of the then princely sum of £20,000 to be paid as a contingency fee. Kennedy acted for her and succeeded in the hearing of the cause of action. Kennedy then sued his former client (who had since remarried and was now Mrs Broun) on her promise to pay, and in the case Kennedy v Broun it was held that the relationship between client and barrister was not a contract and that 'a promise to pay money to counsel for his advocacy, whether made before, or during, or after the litigation has no binding effect'.[8]

In days gone by, transcript of trial proceedings was non-existent and the evidence of what transpired at trial was based on handwritten notation of what had occurred. Media coverage played an essential role, not only in preserving the atmosphere of the trial, but also the accuracy of the oral evidence that was given. But not all trials were so covered. It was the duty of all present in court in a professional capacity to take notes, judges as well as counsel.[9] Those notes could be used in making application for a new trial, or as evidence of the grounds of judgment in order to lay them before the court on appeal. Notes taken by counsel on the back of his brief at trial were also admitted as evidence in subsequent proceedings of what took place at the trial.[10] Of course the matters which were recorded were an issue for counsel: in one notable case HS Giffard (later the earl of Halsbury) returned a brief still ribboned which, when examined, revealed that the only thing written down were the train times to London. Where objection was taken to the admissibility of the notes being relied on, then counsel could be examined. Where the same counsel were involved from a previous trial or hearing then a question arose as to the manner in which they should give evidence. On at least one occasion their evidence having been objected to when given from the bar table in an unsworn manner, the counsel were duly sworn and were examined and cross-examined standing up in their robes in their places at the bar.[11] On a different

note, in 1851 Lord Justice Campbell referred to an earlier occasion when a trial judge, Lord Cottenham, was called to give evidence regarding the extent to which he had been influenced by a 'nod from counsel'.[12]

Many barristers spend many of their waking hours preparing advices. There is a certain knack to brevity. F E Smith, the legendary advocate (later Earl of Birkenhead LC) gave probably was one of the briefest advices. He received a telegram calling on him to attend the Savoy Hotel in London. Upon his arrival, there awaited him a huge stack of papers. An opinion was required of him first thing in the morning. He ordered a bottle of champagne and two dozen oysters, and began to read the papers. They were of great length and complexity, and he worked on them for eleven hours, all through the night. At 8.30 next morning he wrote the following terse advice, 'There is no answer to this action for libel, and the damages must be enormous. F E Smith'. His view was warranted and the defendant settled by paying £50,000 which was at the time the largest sum paid in damages for defamation.[13]

In a similar vein Lord Erksine once provided this advice to the Duke of Queensberry regarding an action he wanted to take against a tradesman for breach of contract for the painting of his house: 'I am of the opinion that this action will not lie unless the witnesses do.'[14]

There is today a view of the bar which is extremely prevalent; namely that changed circumstances mean that it has far too many members who are all chasing a deplorable lack of work.[15] Complaint is made that there are too many barristers joining the profession at a time when change of a legislative and procedural nature mean that the work traditionally the preserve of the bar is done by solicitors or, worse still, administrators. Developments regarding mediation and arbitration are a further coup de grâce. This idea that the bar must somehow diminish in size in order to survive is a recurring leitmotiv when looked at from a historical perspective. In 1853, one commentator was moved to write that, 'this is a time when the prospects of the bar are not such as to afford any justification for the abundant supply which seems to be pouring into its ranks, or any ground for hope that one half of those who are coming in will ever find anything to do.'[16] Previously, in 1845, another commentator in response to an advertisement placed in a journal by a member of the bar, 'offering his services à tout venant, as conveyancer, or equity draftsman, or to make himself in any way useful (!) to any overladen barrister', complained that the 'ranks of the bar are overfilled – crowded to suffocation', and that there was 'at least three times as many barristers as would suffice, with moderate exertion, to do all the business that there is to be done'.[17]

While complaint is also made regarding lack of work as a continual problem for those who join the bar, for some it continues unabated for their remaining time at it. A story is told which illustrates this problem. A barrister, who we will call 'Briefless', was walking through the corridors when his clerk approached him, 'Oh, sir!,' said the clerk, 'there is a man at chambers who has a brief, sir!'. 'What?, a brief! Great Heavens!' And the young barrister started running back as fast as his feet would carry him. 'Stop, sir, stop' cried out the clerk who was trying to keep apace, 'You needn't hurry, sir; I've locked him in!'[18]

There has been a steady decline over the years in the number of scandalous practices which used to prevail at the bar. For instance, the practice of accepting brief with fees thereon, and not attending upon such briefs. Such was the busy life for some at the bar in past years that when a member got jammed with two briefs on the same day, one brief would be flicked to a less occupied member of the bar. Long gone are the days when such a practice was extolled on the basis that '[the] public may have mediocrity with certainty, or pre-eminence with uncertainty'.[19] Of the practice of accepting more briefs than can be attended to on the one day the same justification was advanced, namely the 'present habits of clients, of preferring the uncertain attendance of the most eminent men, to the certain attendance of men of inferior degree of reputation, the evil is unavoidable'.[20]

Solicitors were singularly in the forefront agitating for change of restrictive work practices of silks. While it is difficult to pinpoint the first complaint made by a solicitor about the practice of devilling, in 1845 a solicitor, who wished to remain anonymous, complained of the increasing professional practice of QCs where juniors read all the briefs and prepared an epitome of facts and evidence – 'it strikes me it would be desirable that the junior… so engaged should be known'.[21] It is regrettable, though perhaps inevitable, that the precedence at the bar table previously afforded to silks has all but disappeared. Fairly early on in the modern history of the New South Wales Bar the lack of respect for precedence was adverted to as a matter warranting censure when, in 1953, the Bar Council noted that junior counsel occupied the seats at the bar table to the exclusion of senior counsel and, worse still, solicitors had also been observed sitting at the bar table to the exclusion of all counsel.[22]

The duties owed by counsel to the court were recognised and, it must be said, on occasion, strictly enforced. For instance the duty of a barrister to communicate to the court his knowledge that he possessed upon the law of the case (that is, not to

conceal from the court a decision which he or she believed would influence the judgment of the court against him) was not one in which the court lacked redress. In one case, a Mr Phillips of counsel, moved before Sir C Hatton, LC, to set aside a decree previously entered. He asserted that the decree was made without precedent. Unfortunately, he only made the assertion because of something the plaintiff had told him. He was committed to the prison of the Fleet for his rash motion.[23] In another case, the court imposed a sentence in relation to a barrister who had tampered with a witness in the Popish Plot which required, as part of that sentence, to have his gown pulled over his ears by the tipstaff in court.[24]

Tricky demurrers and frivolous pleas

Justice Coleridge once remarked: 'I do marvel that gentlemen who would kick an attorney out of their chambers if he desired anything wrong in an ordinary way, will, nevertheless, consent to draw tricky demurrers and frivolous pleas. The practice degrades the counsel and special pleader, and makes them ministers of gross injustice, and parties to the frauds of other persons.'[25] A well drafted demurrer, on the other thing, apparently had therapeutic properties – Baron Parke was on one occasion reported to have taken a 'beautiful demurrer' to the bedside of a sick friend to cheer him up in his illness.

Sledging

Sledging, as much as it is frowned upon, when practised well, forms part of the natural armoury of an advocate.[26] Strangely, sledging has a long lineage at the bar table, and probably always did. That this was so was exemplified by Guillame Durand who, in his influential book of ecclesiastical and Roman law, Speculum Judiciale, written in 1271 indicated that where one counsel 'have made a noise or a tittering, you may do the like'.[27] Though, with the potency of current microphones which records anything and everything within range at the bar table, those who practise the art should be wary. To assert that an opponent in making submissions before a court is telling an 'untruth' does not necessarily encompass the proposition that your opponent is lying or acting improperly and, as such, may not fall within the definition of 'unsatisfactory conduct', though accepted as a form of sledging.[28] John Starke, who apparently had a reputation for perpetual rudeness, once bellowed down the bar table to an opponent of a witness, in response to being asked why he had failed to disclose in evidence that he had been awarded two conspicuous gallantry awards, stated that he didn't think it relevant, 'Cross-examine him if you fucking well dare'.[29]

Restrictive practices of the bar

The recent upheaval at the New South Wales Bar has ended the push, at least for now, for incorporated practice for those who wished to practise that way.[30] Sixty years ago a very similar thing happened. Dr J M Bennett, the eminent legal historian, wrote of that dispute in terms quite prescient about the current issue that vexed members of the New South Wales Bar:[31]

> Even the idea of barristers practising in partnership was thought to undermine the principle of independence and was rejected when proposed in 1951. Seven years later a Council committee on the subject reported that there was no real demand at the bar for such partnerships, the majority of members senior and junior were opposed to them, junior men in particular feeling that in the course of time they might be left little alternative for advancement save by the lowest rung of a partnership ladder.

Both the issue of incorporated practice as well as partnership, if they are ever to be addressed, would now potentially require a national approach, due to the commencement of the National Rules of which the New South Wales Barristers' Rules form part.[32] Those who call for change will no doubt hearken back to the report released in 1994 by the Trade Practices Commission which called for bar councils in all jurisdictions to remove rules which required bar members to operate as sole practitioners and to not share profits from practice with others, to ensure that all barristers were free to exercise their own commercial judgment as to the ownership and business structure of their practices.[33] As a sign that change is in the wind, a recent report released in Ireland recommended that the sole trader rule be relaxed so as to permit barristers who wished to do so to practise as a partnership.[34]

The bar is constantly changing and has been throughout its long history. A number of restrictive trade practices have come and are now long gone. The following are just a few of those.

Historical reform of bar practice

Women and admission to the bar

It was not until 1905 that women were first admitted to the bar. Before that date they were precluded from being admitted as barristers, and in that year Flos Greig was admitted to legal practice in Victoria. This was only able to take place upon passing of legislation by the Victorian Parliament specifically allowing women to practise.[35] Her admission ceremony was presided over by the Chief Justice Sir John Madden. She made her first professional appearance in an application made that same day on behalf of the Australian Women's Association. It has to be

said that the chief justice held some views about admission of female barristers which could only be called antiquated today. When interviewed about Ms Craig's admission he stated that women 'were certainly handicapped by nature and sex. Women were naturally more sympathetic than judicial, more emotional than logical.' That being said, he also said that he could not see why a woman would be denied a right to go to the bench as that was a 'logical outcome of their admission to the bar'.[36]

The position in New South Wales was that women had to wait until 1921 before Ms Ada Evans was admitted by the full court[37], and it was not till June 1924 that Mrs Carlisle Morrison was admitted as the first female practising barrister at the New South Wales Bar.[38]

The first woman to practise as a barrister in England was Helena Normanton in 1922. She appeared in the Divorce and Chancery courts, and she was the first female to practise as counsel at the Old Bailey. The last was apparently due to a chance event. She was sitting in court, dressed with a wig and gown, during the hearing of a case in which three men were charged with fraud. One of them appealed for the services of a lawyer, and being told to select counsel among the members of the bar present, hit upon Ms Normanton, without apparently noticing she was a woman, due to the rule laid down by the Benchers that a woman barrister's wig must completely cover her hair.[39] Ms Normanton had the distinction of being one of the first women to be appointed a silk, when she became king's counsel in 1949.[40]

The first female silk to be appointed in Australia was Dame Roma Mitchell in 1962. Joan Rosanove was appointed queen's counsel in 1964, some 46 years after she had been admitted to the Victorian Bar. She is noted for having the first 'speaking part' before the High Court when, in 1938, she appeared as junior counsel in *Briginshaw v Briginshaw* (1938) 60 CLR 336, and was recorded as having addressed the High Court, albeit briefly.[41]

Motion days.

There was a historic practice where counsel had the right to move the court on motion days which was based on their order of seniority. This was the case save on the last motion day of term, when juniors were rewarded with priority.[42] This was not a form of precedence with regard to all motions, just unopposed motions.[43] That practice was apparently terminated by the provisions of the *Judicature Act 1873* which came into force on November 1, 1875 when the division of legal year into 'terms' was abolished and replaced with 'sittings'.[44]

Keeping terms

There was a time when barristers were required to attend dinner on numerous occasions before they could be 'called to the bar'. Having sat a preliminary examination conducted by the selected Inns of Court, a student was required to 'keep terms' by dining three times if a member of a university, or six times if not, during each of the yearly four legal 'terms'.[45] This requirement was apparently imposed to secure his (the profession being exclusively male at the time) attendance at the moots, exercises, and lectures, which were held after dinner, the door having been locked after grace. Keeping of twelve terms was usually required.[46]

Serjeants-at-law.

Serjeants (identified with the post nominal SL) were an ancient order of barristers who existed from 1278 until 1866 when the last holder of the office of king's sergeant lapsed with the death of James Manning.[47] At common law no-one could be appointed a judge of the superior courts who had not been made a serjeant (that is, attained the degree of the coif) though judicial appointments were made who were not of that order, but prior to taking up judicial office, the person would 'take the coif' and be made a serjeant.[48] The most valuable privileges enjoyed by the serjeants was an exclusive right of audience before the Court of Common Pleas and monopoly of the then highly profitable art of pleading. An attempt was made in 1755 to curtail that privilege relating to exclusive right of audience, but the legislation was defeated. It wasn't until 1846 that legislation was passed which extended to all barristers the privileges enjoyed exclusively by serjeants in the Court of Common Pleas.[49] The final undoing of the serjeants was the passing of legislation in 1873 which provided that no person appointed a judge was henceforth required to take, or have taken, the degree of serjeant-at-law.[50]

Swearing of oaths as part of admission to the bar

For many centuries until comparatively recent times it was necessary for barristers to swear an oath of allegiance to the Crown upon being admitted to the bar. Serjeants-at-Law were required to swear an oath to 'serve the king's people' to truly counsel them 'after your cunning'.[51] The purpose of the oath was to bind the serjeant to plead for all within the kingdom, however humble their condition. King's counsel swore an oath upon being appointed to 'serve the king as one of his counsel learned in the law, and truly counsel the king'. The letters patent are in the same terms. This was the essential difference between that office and the latter day office of king's counsel – where if

someone wanted to engage their services to appear against the interest of the king (usually in criminal proceedings), counsel had first to obtain a licence for which a fee had to be paid. Hence the connection of that latter office with being a servant of the Crown. When permission was sought it was rarely refused.[52] King's counsel were appointed by letters patent under the Great Seal. Until 1868 barristers were required in England to take the oath of allegiance to the Crown in the Court of King's Bench. King's counsel also took an oath before the lord chancellor.[53] After 1868 when the Promissory Oaths Act came into effect, no oath or declaration was required to be taken in court by a person upon being called to the bar.[54]

Oath in denunciation of the pope

Up until 1791 Roman Catholics were not permitted to be barristers because they were required to take an oath in denunciation of the pope. When a barrister advanced to be a silk, he had again to take a further oath to forswear transubstantiation, and also to produce a certificate that he had received the sacrament according to the rites of the Church of England within three months of taking the oath. The recognised venue for this performance was St Martin-in-the-Fields, where churchwardens had a settled fee of a guinea for the issue of their certificate of the rites being administered.[55]

Peculiar rules of etiquette

Barristers from mid-nineteenth century England were required to comply with a number of peculiar rules of etiquette considered infra dig – all relating to restricting access to solicitors and attorneys, particularly when they were on circuit. For instance, a barrister was compelled to travel by post chaise and not by coach.[56] He was not to enter the circuit town until the opening of the assizes there.[57] He was to take lodgings in a circuit town, and not stay at a hotel.[58] A barrister was forbidden to dine or walk during the assizes with an attorney, or to dance at an assize ball with an attorney's daughter.[59] If he did any of these things he would be ostracised by other barristers for breach of etiquette on circuit for the practice of huggery which involved any direct or indirect courting of business, the overt act of which was any action involving over-civility to attorneys, or over-anxiety to meet them. This explains the basis for Lord Campbell's oft-quoted remark that 'there were four, and only four, ways in which a young man could get on at the bar. First, by huggery. Secondly, by writing a law book. Thirdly, by quarter sessions. Fourthly, by a miracle'.[60]

Significant reform of New South Wales Bar practice in the past 50 years

The 'two-thirds' rule

There was a rule of professional practice that where two counsel were briefed junior counsel was not to charge less than two-thirds (sometimes it was expressed as being three fifths) of senior counsel's fees. Where junior counsel charged less than that amount you were in breach of the Barristers' Rules. The rule was well known by the General Council of the Bar of England and Wales by 1900. The rule was rescinded by the New South Wales Bar Council in 1966, ostensibly because the Bar Council considered it contrary to the public interest.[61] The tale has been told many times beforehand, but is still worth telling – particularly when the two-thirds rule is a distant memory save for a select few.[62] Robert Stitt QC from the Sydney Bar was cross-examining a quick witted witness:

> **Stitt QC:** I would like to put a proposition to you.
>
> **Woman Witness:** You would? My luck has changed at last.
>
> **His Honour:** I think you had better wait until you hear what the proposition is!
>
> At the next adjournment the exchange continued when Stitt and the witness met in the lift:
>
> **Woman Witness:** Still interested in that proposition?
>
> **Stitt QC:** Madam, I hope you realise that, under our Bar Rules, whatever I get, my junior must get two-thirds.

Up until 1791 Roman Catholics were not permitted to be barristers because they were required to take an oath in denunciation of the pope. When a barrister advanced to be a silk, he had again to take a further oath to forswear transubstantiation...

The 'two counsel' rule

Closely aligned to the two thirds rule was the two counsel rule. There is very little empirical evidence to support the existence of a two counsel rule until about the mid-nineteenth century, though in 1828 on the Norfolk Circuit it was noted as being an immemorial custom.[63] Contemporaneous with the development of the rule of etiquette was the roar of complaints from solicitors and attorneys regarding the dreadful cost of

the rule. There was a degree of expediency associated with the rule. First, it was widely believed that juniors were not being properly compensated for the work that they did prior to the matter being tried, and that being a junior to the leader was one way of making recompense. But at the same time that the rule was taking shape the courts were becoming quite mercenary in not granting a new trial where leaders did not appear for the hearing (otherwise engaged in another case, or incorrectly believing a matter wouldn't be reached within a set timeframe), in which case the presiding judge directed the junior to carry on the senior's task. The court held that every cause on the list of the day was to be considered by the parties as the first cause, and they were to prepare accordingly.[64]

It would appear that the 'two counsel' rule became entrenched in New South Wales by 1910 when the New South Wales Bar Council issued a ruling in respect of king's counsel which provided that they should not appear for a plaintiff or appellant without a junior, though it provided that the silk could do so, provided he appeared for a defendant or respondent – but only when the conduct of the case did not require the 'reading of pleadings, judge's notes or other documents'.[65] In 1965 the Bar Council varied its rules to render it inappropriate for senior counsel, other than permanent Crown prosecutors and public defenders, to appear without a junior.[66] A year later the Bar Council considered the necessity of the 'two counsel' rule – and did not alter its previous ruling holding that, '[if] the rule were to be revoked, the division of the bar into senior and junior practitioners would disappear and a form of specialisation which has proved its value to the public would be destroyed.'[67]

The first tentative step towards reform took place in 1984 when a new rule was passed which permitted a queen's counsel to accept instructions as an advocate without a junior, though the silk was still entitled to assume a junior would also be briefed unless he was initially instructed otherwise.[68] The 'two counsel' rule was finally abandoned when the *New South Wales Barristers' Rules* were reshaped in 1993 when the unacceptable remnants of the rule were passed.[69] In England and Wales, the rule was only abolished in 1977.[70]

The cab-rank rule

The cab-rank rule has also seen substantial change. Currently, the cab-rank rule deems that the barrister is not only permitted, but in fact, required, to act on behalf of any client who calls upon his or her services, subject to limited exceptions.[71] The rule regulates the conduct of barristers as advocates.[72] The cab-rank rule does not apply to furnishing legal advice or any other such chamber work, so any barrister is not required to provide advice regarding a matter that they are not comfortable in.[73]

In 1993, at the same time as reform of the 'two counsel' rule was taking place, significant changes were made to the cab-rank rule which were necessitated by the increased scope of work able to be undertaken by barristers, whether silk of junior. The most significant change was the omission of a rule which permitted a barrister to refuse to accept a brief on the basis that they held a 'conscientious belief' based on reasonable grounds that precluded them from fairly presenting the client's case.[74] It was replaced by a rule which provided that; regardless of the basis of objection, and subject to no other ground of exemption existing, if the instructing solicitor and client wished for the barrister to appear, the barrister was obliged to do so and then use his or her best efforts consistent with a barrister's duties.

In 1997 the cab-rank rule was significantly expanded by the introduction of highly prescriptive rules to define what briefs a barrister must not accept[75] and briefs that a barrister could refuse to accept.[76]

The conference rule

According to this rule solicitors were, generally speaking and with some limited exceptions, required to attend conferences at the barrister's chambers. The rule, as expressed above, didn't find expression in the Barristers' Rules in 1947, though there was reference to a prohibition on barristers interviewing persons at gaol in the absence of an instructing solicitor.[77] By 1980 a rule was promulgated which, in its general effect, forced solicitors to attend on counsel in chambers.[78] By 1988, a number of rules were passed which widened the ambit of attendance requirement and provided for discretionary release from the harshness of the operation of the rule.[79] The conference rule had a scope of operation until 1994 when it was repealed.[80]

Barrister's interviewing witnesses

The practice in NSW, as provided for in the rules in 1947, was that it was not a breach of etiquette for the barrister to interview a witness.[81] This rule was required because of the existence of a significant divergence in practice between barristers from NSW and England as to the propriety of interviewing witnesses either alone or together with an instructing attorney being present.[82] Such witnesses were required to be interviewed in chambers, at home, or in the precincts of the court unless exceptional circumstances existed.[83]

The *New South Wales Barristers' Rules* in 1980 provided for a barrister to interview a witness but not in company with other witnesses and that he or she was prohibited from telling a

witness what particular answer should be given to a question.[84] The Barristers' Rules were expanded in that same year to specifically provide a prohibition on any act of a barrister which would prevent or discourage a witness from being interviewed by an opposing counsel.[85]

Coaching of witnesses

In 1971 the Bar Council expressed the view that it was a serious breach of ethics for counsel to 'coach' a witness (including a client) in order to advise how to deal with a line of cross-examination.[86] The Bar rule relating to interviewing witnesses was redrafted in 1997 so that the new rule, as restated, prohibited any suggestion regarding the content of evidence to be given and prohibited any coaching or encouragement of a witness to give evidence different from what the witness believed to be true.[87] A barrister was however permitted in conference to question and test the witness's evidence by drawing the witness's attention to inconsistencies and other difficulties with the evidence.[88]

Prohibition on advertising

Barristers in NSW were, until comparatively recent times, severely restricted in the form of advertising or soliciting for business that they could do. The situation was initially one that no advertising was permitted as it constituted a breach of etiquette.[89] Direct advertisement was prohibited, but so were the various devices by which counsel could bring his name to the notice of the public. According to Dr Bennett, the New South Wales Bar Council from its was inception concerned with the question of advertising, but those concerns had to be modified by the expansion of radio and the emergence of television, in that comment was sought from barristers regarding the subject matter of particular court cases or to provide an opinion. The rules provided the arcane restriction that it constituted a breach of etiquette for a barrister to use his name as part of a broadcast dealing with a legal matter, but it wasn't a breach for the same barrister on a non-legal matter and for his name to be advertised.[90] Following on from the UK Bar Council's removal in 1990 of the rule which restricted advertising[91], amendments were made to the *Legal Profession Act 1987* which discarded the rule against advertising in the Barristers' Rules in 1994.[92]

By and far the most radical change to befall the profession of barrister at the New South Wales Bar was the passing of the *Legal Profession Reform Act 1993* which commenced on 1 July 1994. Some of these changes wrought by that Act have already been discussed above. The passage of that Act represented the first statutory recognition of the New South Wales Bar Council's right to make rules with respect to practise as a barrister and the rules are binding whether or not a barrister is a member of the Bar Association.[93] It also brought, for the first time, legal practitioners in New South Wales within the chapeau of the competition provisions of the *Competition and Consumer Act 2010* (Cth), previously the *Trade Practices Act 1974*.

To the above can be added another significant prohibition on the bar, namely the blocking of interstate practitioners from practising in a different state from which they held a practising certificate. This practice was finally declared unconstitutional by the High Court in 1989.[94]

Sometimes changes are embraced more at the bar than by the bench. In 1822 Humphrey Ravenscroft developed a patent for the tie-wig, which revolutionised the wearing of wigs which alleviated the need for daily maintenance hitherto which treatment of the wig with a thick, scented ointment (pomatum) and powder had been required. It wasn't an immediate success as some judges, such as Sir James Park, a judge of Common Pleas, resisted the change as an innovation precluded by the common law, so much so that he actually refused to recognise his own son when he appeared before him wearing one of the 'newfangled wigs'.[95]

It is perhaps right and fitting that in this article the final word should be that of a judge. During his swearing out ceremony as a senior puisne, judge stable in the Supreme Court of Queensland recalled an occasion when, as an associate during a full court appeal hearing, a barrister, who's case was less than impressive had a pigeon who was resting on a wooden beam above him deliver its own opinion over his brief, wig and gown. Upon that instant the presiding appeal judge stated 'I concur'. Thereby ended any prospect of success of the appeal.[96]

Endnotes

* *The Times* Crossword 5,972 (May 6, 1949), A: Silkworm.

1. J Barrell, *Imagining the King's Death*, (OUP 2000) p 387. 'My Lord, I am willing to give your lordship such an answer as an aggrieved man of honour like myself is willing to give the man who has repeatedly insulted him, and I am ready and willing to meet your lordship, at any time and place that you may choose to appoint'. Eyre refused the challenge. Referred by R. Walker, 'Security, Freedom of Speech and Criminal Justice in the age of Pitt, Burke and Fox' (speech delivered at the Bentham Club on 5 March 2008, at footnote 31).
2. *The Times*, 12, 15 December, 1829.
3. K Mason, *Lawyers Then and Now*, (Federation Press, 2012) p 43. Mason wryly adds as a footnote to the incident that Darvall was later made a silk and served as attorney general for NSW.
4. R F V Heuston, *Lives of the Lord Chancellors 1885–1940* (OUP, 1987) p333.
5. *The Evening Telegraph* (27 February, 1908) p 2.
6. *Swinfen v Lord Chelmsford* (1860) 5 H. & N. 890; 29 LJ Ex 382; 2 L.T. 406; 6 Jur. N.S. 1035; 157 ER 1436. That case related to the actions of the testator's daughter-in-law, Patricia Swinfen's former barrister Sir Frederic Thesiger (subsequently Lord Chelmsford).

7. *The Monthly Law Reporter*, v 22, 409 at 411.
8. *Kennedy v Broun* (1863) 33 LJ Ch 71
9. *Malins v Price* (1845) 1 Ph 590; 5 L.T.O.S. 385; 9 Jur. 955; 41 E.R. 757, L.C.; *De La Warr (Earl) v Miles* (1881) 19 Ch. D. 80; 45 L.T. 424; Ex p. Skerratt (1884) 28 Sol. Jo. 376.
10. *Cattell v Corrall* (1839) 3 Y. & C. Ex. 413; 160 E.R. 763.
11. *Wilding v Sanderson* [1897] 76 L.T. 346.
12. *Florence v Lawson* (1851) 17 Law Times 260.
13. E Kahn, 'The Shortest Opinion' (1979) 96 S. African L.J. 664 at 665.
14. G A Morton and D. Macleod Mallock, *Law and Laughter* (1913), p 29.
15. In contrast, silks attract a measure of work which is directly attributable to 'attorney scarcity', *Mafanya v Sehleka* [2011] LSHC 126 at [21] per Peete J.
16. *The Jurist*, June 11, 1853, p 206.
17. *The Jurist*, March 29, 1845, p 81. The commentator, who was referring to an advertisement placed the previous week's edition – thought it a joke, a jest placed in the journal as a sad reflection on the state of the bar, but unsure of whether it was really a joke, begged the unknown barrister to 'retract, ere it be too late' (p 82). It was a matter of comment at that time that the bar was 'notoriously' divided into two classes, 'the real' and the 'nominal' barristers: *The Legal Observer*, v. 14, 1837, pp 1-2.
18. T E Crispe, *Reminiscences of a KC* (Boston, 1910), p 201.
19. *The Jurist*, February 13, 1847, p 38.
20. *The Jurist*, May 26, 1849, p 193.
21. *The Legal Observer*, v. 29, 1845, p 409.
22. *NSW Bar Association Annual Report* (1953), pp.5-6; and mentioned again (1958) p.7.
23. *The Jurist*, July 25, 1846, p.285. It would appear that the court accepted his plea that he didn't intend to mislead the court but nonetheless punished him for his ignorance.
24. *Redding's case* (1680) 83 E.R. 196.
25. *Rowbottom v Bull* (1846) 7 *Law Times* 117 at 118.
26. R Burbidge QC, 'Some Thoughts on Courtesy', *Bar News* (Spring 1999, p.65) referred to sledging as involving 'interjection, snorts or facial and bodily movements'. Bickering between counsel may itself found the basis for an unfair trial, as was recognised in *R v Keech* (Unrep, Vic CCA, 5 October 1989).
27. Of the significance of this work on court etiquette of common law courts, see T F Gaffney, 'Borrowed manners: Court etiquette and the Modern Lawyer' (2012) 86 ALJ 842 at 845-6.
28. *The Victorian Bar Inc v Sandbach* [2003] VLPT 11 at [109]-[110].
29. Oral History of SEK Hulme AM QC - http://oralhistory.vicbar.com.au/hulme_trans_ed10.asp
30. The NSW Bar Association held a general meeting in September 2013 to vote on a motion proposing to permit the incorporation of barristers' practices and that motion was overwhelmingly defeated by ballot (745 no; 375 yes). The motion had sought an indication of support for changes that would allow barristers to choose to practise through single member, sole director companies. The ballot was lost, perhaps, because there was no taste as would have been required for a rewriting of the sole practice rules. In England and Wales, barristers have been permitted to incorporate and the first incorporated practice commenced in 2013.
31. J M Bennett (ed.), *A History of the New South Wales Bar* (Law Book Co., 1969), p.135, see also *NSW Bar Association Annual Report* (1958), p 6.
32. New South Wales Barristers' Rules, implementing those National Rules, took effect on 14 January, 2014, r 16(a) and (d). In England, it was held that an agreement between barristers to practise in partnership was improper and contrary to the rules of etiquette: Home v Douglas (1912), The Times, 15 November. The New South Wales Law Reform Commission recommended a relaxation of the bar rule and suggested that partnerships of no more than three barristers be permitted: First Report on the Legal Profession: General Regulation and Structure, NSWLRC, R 31 (April 1982), ¶7.23-7.26.
33. Trade Practices Commission, Study of the Professions – Legal, Final report, March 1994, p 107.
34. The Competition Authority, Competition in Professional Services: Solicitors and Barristers (Dublin, 2006).
35. *Women's Disabilities Removal Act 1903* (Vic), nicknamed the 'Flos Greig Enabling Act'.
36. *St John Daily Sun*, November 20, 1905.
37. She had tried to be admitted earlier but failed and she left for the United Kingdom. Her admission was only able to take place upon the passing of the *Women's Legal Status Act 1918* (NSW) which permitted women to be appointed a judge or magistrate, or to practise as a barrister, among other things. The Act did not entitle women to act as jurors though, and it was 31 years later that they would be so entitled by passage of the *Jury (Amendment) Act 1947* (NSW).
38. The nod she gave upon her admission was the subject of comment in the press and, perhaps, was a portent of things to come with the new NSW Supreme Court social media policy: *The Daily Guardian*, 3 June 1924, p 4, 'Nervous Nod Makes Mrs Morrison a Barrister. CJ in a Twitter'. See G Lindsay (ed.), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002), pp.121-125; Bennett (op. cit.), p.127.
39. *Northern Advocate,* 18 April 1925. She was also the first female to secure a British passport in her maiden name.
40. The other female who was made a king's counsel was Rose Heibron who was the second woman to be appointed a High Court judge, after Elizabeth Lane. Significantly Rose Heibron was appointed at 34 years of age, and was the youngest KC since Thomas Erskine in 1783 when he was aged 33.
41. See Blackshield, Coper and Williams, *The Oxford Companion to the High Court of Australia*, (2001) at 722.
42. R E M, 'Juniors and the last motion day of term', 89 LQR 347.
43. *The Jurist*, February 7, 1852, p 29.
44. *Supreme Court of Judicature (Commencement) Act 1874*, s 2.
45. Hence the reference in legal journals of the day that, 'A man may become a barrister merely by eating a given number of dinners', *Solicitors' Journal*, 17 October, 1868, p.1012.
46. A Wood Renton, *Encyclopaedia of the Laws of England* (1897), v 2, p.7.
47. J Sainty, *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (Selden Society, 1987), p.3.
48. G A Morton and D. Macleod Malloch, *Law and Laughter*, (T N Foulis, 1913), p.67. When serjeants appeared before chief justices from Lord Guilford onwards the latter wore the coif and addressed serjeants as 'brother': J H Baker, *The Order of Serjeants at Law* (Selden Society, 1984), p.51.
49. *Practitioners in Common Pleas Act 1846*; G. Sharswood, *An Essay on Professional Ethics* (2nd edn. 1860) pp.155-158.
50. *Judicature Act 1873*, s 8.
51. In its original sense the word 'cunning' referred to in the oath meant possessing erudition or skill and had no implication of deceit.
52. The practice of obtaining a licence was abandoned in NSW in 1930 following a meeting of king's counsel where they resolved that such special licences were no longer required. The governor-in-council agreed to that recommendation, Bennett (op. cit.), pp 239-40.
53. J Sainty, *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (Selden Society, 1987), p.84.
54. J R V Marchant, *Barrister-at-Law*, (London, 1905), p.12
55. *Johnson's England, An Account of the Life and Manners of his Age* (Clarendon Press, 1933), ed. A S Turberville, vol. 2, p.289. The oath was introduced by the *Test Act 1673* which obligated all persons filling any office, civil or military, to take oaths of supremacy and allegiance, to subscribe to a declaration against transubstantiation, and required that the sacrament be taken in an Anglican church. It wasn't until the passage of the *Roman Catholic Relief Act 1791* (31 Geo. 3 c.32, s 22) that the oath in denunciation was abandoned, although the oath of allegiance was still required to be sworn. After that date Roman Catholics were permitted to practise as counsellors and barristers, attorneys, solicitors and notaries – whereas previously they had been restricted to being conveyancers (op. cit. at p.287).
56. *Solicitors' Journal*, 29 August, 1857, p.767.
57. D Dunman, *The English and Colonial Bars in the Nineteenth Century* (1983), p.46.

58. Ibid.
59. *Solicitors' Journal*, 8 December, 1860, p.91.
60. Lord Campbell, *Lives of Lord Lyndhurst and Lord Brougham* (London, 1869), Chapter 2. Sometimes, the third way is misquoted as: 'by marrying a respectable solicitor's daughter'. Serjeants were prohibited from hugging solicitors for that same reason: J H Baker, *The Order of Serjeants at Law* (Selden Society, 1984), p. 377.
61. *NSW Bar Association Annual Report* (1966), p.13. See also *First Report on the Legal Profession: General Regulation and Structure*, NSWLRC, R 31 (April 1982), ¶ 9.5. The two-thirds rule as an ethical rule was also abolished in England in 1966: W W Boulton, *Conduct and Etiquette of the Bar* (6th edn, 1975), p.53.
62. The anecdote was quoted by the then Hon Justice M H McHugh AC speaking at a June 1995 NSW Barristers Association dinner: *Bar News* 1995, p.17.
63. R Cock, 'The Old Two Counsel Rule' (1978) 94 LQR 505.
64. *Cottam v Banks* (1847) 8 *Law Times* 347, also *Earl v Dowling* (1852) 10 *Law Times* 115.
65. New South Wales Bar Association: Rules and Rulings (1947 Reprint), L F Osborne (former registrar of the NSW Bar Association) notation of date in his personal copy held by NSW Bar Library.
66. *NSW Bar Association Annual Report* (1965) p.30.
67. *NSW Bar Association Annual Report* (1966), p.13. See also Bennett, op. cit., pp.241-242
68. New South Wales Bar Association: Rules and Rulings (Reprint 1990), r 60, commenced July 12, 1984. See The redrafted 'two counsel' rule had been recommended as part of a report prepared by the New South Wales Law Reform Commission in 1982: *First Report on the Legal Profession: General Regulation and Structure*, NSWLRC, R 31 (April 1982), ¶ 9.28.
69. Bar Council amendment to Barristers' Rules March 1993, see also Circular 13/93 of the NSW Bar Association.
70. The 'two counsel' rule was abolished at the English bar in that year, following a recommendation from the Monopolies and Mergers Commission: see *First Report on the Legal Profession: General Regulation and Structure*, NSWLRC, R 31 (April 1982), ¶ 9.14.
71. New South Wales Barristers' Rules, implementing those National Rules, rr 21 to 24B, commencement 6 January 2014.
72. Hon. G. Samuel, 'No More Cabs on the Rank? Some Reflections About the Future of Legal Practice' (1998-9) 3 Newcastle L Rev 1, p 2. In that article, a serious question is raised as to whether current and future practice at the bar requires the retention of the cab-rank rule.
73. NSW Bar Association Annual Report (1983), p.11. See also NSW Bar Association Circular 13/93 of the NSW Bar Association.
74. Rule 2(o) omitted, see Bar Council amendment to Barristers' Rules March 1993, and see also Circular 13/93 of the NSW Bar Association.
75. *Gazette* No. 66 of 20 June 1997, pp 4559-61 (rr 87-88) and *Gazette* No.67 or 12 April 2001, p.1880. See now New South Wales Barristers' Rules (2014), rr 24, 95 to 99.
76. *Gazette* No. 66 of 20 June 1997, pp 4561-62 (r 91). See now New South Wales Barristers' Rules (2014), rr 99-103.
77. New South Wales Bar Association: Rules and Rulings (1947 Reprint), p.21. See also NSW Bar Association Annual Report (1974), p.13.
78. *New South Wales Barristers' Rules* (1980 Reprint), r 34.
79. *New South Wales Barristers' Rules* (1980 Reprint), see rr 33, 33A and 33B (commenced on 6 September 1988).
80. *Legal Profession Act 1987*, s 38N, was introduced as part of amendments to that Act which came into effect on 1 July 1994, and provided that no rule or practice prevented a barrister attending on a solicitor, or vice versa. See also, Trade Practices Commission, *Study of the Professions – Legal*, Final report, March 1994, p. 107– where such a change was the subject of a formal recommendation.
81. New South Wales Bar Association: Rules and Rulings (1947 Reprint), p.23.
82. R C Teece, *The Law and Conduct of the Legal Profession in New South Wales* (Law Book, 1963), pp.76-77. The 'recognised practice' in England was for barristers not to interview witnesses either before or during a trial: W W Boulton, *Conduct and Etiquette of the Bar* (1st edn, 1953), p.12. That practice still prevails today in England in contested criminal cases for all witnesses save in relation to the client, character and expert witnesses (but only in relation to defence barristers), but the rule was relaxed in civil matters: Code of Conduct of the Bar of England & Wales (8th ed.), ¶ 6.2.2, 6.3.1.
83. New South Wales Bar Association: Rules and Rulings (1947 Reprint), p.23.
84. *New South Wales Barristers' Rules* (February 1980 Reprint), r 32.
85. New South Wales Barristers' Rules (February 1980 Reprint), r 37.3 (commenced 30 October 1980).
86. NSW Bar Association Annual Report (1971), p 13.
87. *Gazette* No. 66 of 20 June 1997, pp.4555-56, rr 43-44 (commenced 20 July 1997).
88. Ibid. See now *New South Wales Barristers' Rules*, implementing the National Rules, which took effect on 6 January, 2014, rr 73 and 74.
89. New South Wales Bar Association: Rules and Rulings (1947 Reprint), p 24.
90. Bennett (op. cit.), p 170-171. The prohibition on advertising was reaffirmed: NSW Bar Association Annual Report (1972), pp 10-11.
91. L L Hill, 'Publicity Rules of the legal Professions within the United Kingdom' (2003) 20 *Arizona Journal of International and Comparative Law* 323 at 338.
92. *Legal Profession Act 1987*, ss 38J and 38K. Pursuant to the Barristers' Rules that came into effect in 1994, it was specifically declared that they were not to be read by reference to any former rules made by the Bar Association prior to that date. The changed Barristers' Rules were the subject of an article in the *Bar News* (Summer 1994), pp 15-16. For the current provision governing advertising, see *Legal Profession Act 2004* (NSW), s 84.
93. Barristers' Practising Certificates, NSWLRC, R 72 (1994), ¶1.32, *Legal Profession Act 1987*, ss 57A and 57D.
94. *Street v Queensland Bar Association* (1989) 168 CLR 461.
95. J Croake, *Curiosities of Law and Lawyers* (1899), p 593. Previously, human hair was used but the patent involved the use of horsehair in the proportion of five white strands to one black.
96. 'Valediction to the Hon Mr Justice Stable S.P.J.' (1979) 5 Qd L 127 at 132.