

3. McDougall - the ethical considerations

The first point that I should make is that I am expressing a personal view. My view should not be taken as "the Bar View". I trust that none of you will ever have to justify yourselves to the Professional Conduct Committee to which I belong (or to any other professional conduct committee) in relation to the topic of this seminar or otherwise. But if you do, and if the occasion arises out of the topic of this seminar, please do not think that you can excuse yourselves simply by pointing to what I have to say.

There is a strong and readily identifiable public interest in the fair and accurate reporting of criminal proceedings. That interest can be seen to be served by counsel - prosecution or defence - answering questions from the media, to ensure that the media are in possession of facts relating to a trial or issues raised in it. For example, there would be no criticism of counsel who in accordance with the Rules - as to which see later - makes available to the media upon request copies of non-confidential exhibits: cf *Home Office v Harman* [1983] AC 280.

The "old" Bar Rules (Part L - Advertising and Public Appearances) imposed restrictions on the extent to which a barrister could properly communicate with the media. To the extent that those Rules, on a strict interpretation, might have been seen as impeding communications in aid of the fair and unbiased reporting of trials, I think that they should have been read down. In any event, and subject to the intervention of the Attorney General, we are about to be regulated by the "new" Rules. Although those Rules are presently expressed to be in draft form, you should assume that they will soon govern your professional conduct.

Those of the new Rules (as I shall call them) which deal with the subject matter are:

"59. A barrister must not publish, or take steps towards the publication of, any material concerning current proceedings in which the barrister is appearing or has appeared, unless:

- (a) the barrister is merely supplying, with the consent of the instructing solicitor or the client, as the case may be, copies of exhibits admitted without restriction on access or of written submissions given to the court;
- (b) the barrister, with the consent of the instructing solicitor or the client, as the case may be, is answering unsolicited questions from journalists concerning proceedings in which there is no possibility of a jury ever hearing the case or any re-trial and:
 - (i) the answers are limited to information as to the identity of the parties or of any witnesses already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court, the client's position on issues in the case, and the client's intentions as to further steps in the case;
 - (ii) the answers are accurate and uncoloured by comment or unnecessary description; and
 - (iii) the answers do not appear to express the barrister's own opinions on any matters relevant to the case.

60. A barrister will not have breached Rule 59 simply by advising the client about whom there has been published a misleading or coloured report relating to the case that the client may take appropriate steps to present the client's own position for publication."

It will be seen that these Rules do not extend to soliciting publication in the press; the "permission" which may be inferred from Rule 59 arises only when and to the extent that a barrister is answering questions from the media. When this situation arises, the extent of the communications which the barrister may make to the media is clearly limited. The importance of the solicitor's or client's consent should not be overlooked, nor should its non-existence be ignored.

I believe that the position, in relation to communications with the media, varies as between prosecuting and defence counsel. To be sure, the Rules to which I have referred apply to both. But, as the Rules recognise, a prosecutor has a special character. The Rules which indicate this include:

"62. A prosecutor must assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

63. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

64. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

65. A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to carry weight."

This list is by no means exhaustive. However, it indicates (as do the following Rules 66-71, which I shall not set out) the restrictions arising out of the peculiar function which a prosecutor has, appearing not as the representative of a party in adversarial litigation but as the representative of the impartial State; the interests of the State lie as much in securing due process according to the rule of law as they do in securing the conviction of the guilty.

If the prosecutor owes to the court duties of the kind to which I have referred, it would be an extraordinary and intolerable situation if the prosecutor, through communications to the media, were able to subvert those duties or the high purpose which they are intended to serve.

In general terms, it seems to me that the requirements of public policy and of the Rules can be served where:

1. both prosecution and defence counsel, armed with the appropriate consents, respond to requests from the media, and do not solicit contact or volunteer material;
2. both prosecution and defence restrict themselves to facts rather than opinion;

3. both prosecution and defence, bearing in mind that juries read newspapers, listen to radio, and watch television, bear in mind the desirability of fair and even-handed reporting;
4. both prosecution and defence avoid giving "background material" or anything other than factual matter arising from and relevant to the issues at the trial; and
5. prosecutors conduct themselves vis-à-vis the media as though the obligations which bind them in relation to the court bound them equally in relation to the media.

I should make it quite clear that the references to the role of the prosecution are not intended to suggest, by silence, that defence counsel have, or should assume, any licence either in relation to the court or in relation to the media. I remind them of their obligations to the court, which are set out in Rules 21 to 35 (and in fact encapsulated in the heading to those Rules - "Frankness in court") and again in Rules 35 to 50 (once again encapsulated in the heading "Responsible use of privilege"). Defence counsel, just as much as prosecution counsel, should ensure that their conduct outside court in connection with a trial is of no lower standard than the conduct which the court justifiably expects and receives from them in relation to that same trial.

The speakers were followed by a "question and answer" session. Many interesting points of view emerged. At the risk of giving credit to some, it is particularly appropriate to note the view expressed by Zahra and others that the Crown enjoyed a significant advantage in relation to the press, first, because the Crown addressed first, secondly, because the press tended to concentrate on and report the "juicy" bits of the Crown case, and third, because the press rarely stayed to hear the exculpatory material elicited or presented by the defence. It is fair to say that Lloyd acknowledged the justice of this approach. One suggested solution - and certainly one which is seen to be emerging in civil trials - was that both sides should open before the evidence was taken. That being so, there would be, if not a fair, at least a balanced presentation of the cases for both sides and at least the opportunity for the press to print both sides.

Molomby, no doubt drawing on his reptilian past, suggested that the media had no interest in the fair and balanced reporting of trials. The interest of the media lay in publishing what would appeal to their audience. Given this, he suggested that it might be desirable to forbid all reporting of trials until they had concluded (and, by extension, of committal proceedings until any resulting trial had concluded) but to allow reporting - fair, balanced, or otherwise - thereafter.

Another oft-expressed view was that the standard of reporting of trials has declined to an abysmal depth. It was pointed out that whereas in the past the press gave considerable attention to trials, and printed lengthy and accurate reports, the position these days - particularly with the electronic media - was for the short article or the quick "grab". Neither of these

approaches is consistent with fair and balanced reporting. (The reticent and discreet nature of the chair was even more apparent whilst these charges and counter-charges were exchanged.)

There was, among some of the participants, a view that the Crown from time to time was seen to go too far, particularly in relation to opening statements, to exploit the advantage which occurred by reason of the not unnatural tendency of the press to report that which is exciting and to report it as soon as possible. Other views were expressed that the press was not particularly interested in the public interest, or in fair and balanced reporting, but was interested only in printing what would sell.

Another view emphasised that a close working relationship between counsel and the press - such as occurs openly in America and, it was said, behind doors in the United Kingdom - could be unhealthy. It could take the trial out of the courtroom and into the media. The view was expressed that if the press could not be compelled to print fair and accurate reports, they certainly should not be used by one side or the other to attempt to engender a more favourable result for the client.

The seminar raised, and discussed, some very important issues. Of its nature, no resolution was reached in relation to those issues. Nonetheless, it was a thought-provoking and interesting discussion of a topic which is of vital importance to all of us. □

Fine Tuning

Mr Bathurst QC: "... If Your Honour pleases. This is the sixth version of the statement of claim."

Mason CJ: "I often heard that you never got a good statement of claim unless it had been amended about seven or eight times. Sir Garfield Barwick used to say that."

Murphy and Allen v Young & Ors, application for special leave to appeal to the High Court, 16 September 1994) □

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Pond Life to Froglike

Pro Bono Bon Mot

Andrew Robins continues to explore the travails of the junior Bar.

We left the elementary pond creature in a state of aspiration, unexpectedly alive after an out of pond Federal Court experience.

How has he travelled the evolutionary inch? What has he learned as he walked the peerless blue corridors of the famous flash floor in his never ending search for space?

He learnt about Pro Bono.

The 58th Annual Report

Just when irrelevance settled in like a comforting fog along came a document of inclusion - the Bar Association 58th Annual Report - a chance to take stock and even vote it.

We can now share ourselves better with our public. Put bluntly we can advertise. We can also publish a directory of our skills (at least those skills professed by those of us who are more than barely in it). This is a result of law reform and is now possible notwithstanding the decision of the House of Lords in *Shaw v DPP* [1962] AC 220 (the "Ladies Directory" case) which clearly applied to us in a darker age.

While our publication has its own natural comedy it is, nonetheless, lawful.

We can also draw public attention to all the work that is done for no charge at all of which we are all proud.

Pro Bono Publico

Did we see the list in the 58th Annual Report of the 23 episodes of work done for no fee?

All that work - for no fee. Work for no money. Imagine.

But wait, grateful public, there's more. We know you want more. And we know you get more.

There are many other Pro Bonos, that I know, that go far beyond Pro Bono Publico.

They are the unsung Bonos, the other order Bonos discovered in the passage from elementary pond life to froglike while floating in the peerless blue.

They are the half year's great discovery.

Pro Bono O N O

This is a common situation where a mistake is made by asking a solicitor what to charge.

You start with a figure and are bargained. If you fall for this you are not paid. So instead you do this.

Send a bill that the flicker would send. Remember we emergents are not flickers, we are flickees and our motto is "no flicks no fees, no dog no fleas". Then add

"I was just speaking to Bob the other day and we agreed it's an interesting point."

Poor form no doubt but it has these consequences

1. the solicitor will think you are so flash that you actually do move in Bruiser and Banana circles (one's Burgfuhrers carefully name coded so no-one could possibly identify them)

2. he/she/it has never heard of you as a reflection is his/hers/its lack of importance and because you have just arrived from Hong Kong where, you infer, you were known as the "Sheik of the Peak"

3. by "Bob" you mean Ellicott QC or Lord Alexander QC, "Many thanks, Maggie". In fact you mean Bob the man who handles the recycling who's been having problems meeting the maintenance for his 7 children in Dunedin since the wife tracked him through The Astra "Lost and Found"

4. you will be paid promptly and with thanks.

Pro Bono Oh No

This is where you do work, send a bill, and promptly receive a cheque and it all seems too easy. That's because it is too easy. This happened very recently to a fellow emerging creature. Cheque received, 13,000 bucks. Bounce, bounce, bounce. Oh no. Pro Bono.

Pro Bono Promisso

This is the situation where while the work done is, well, free, it is just "a tip of an iceberg", you are told. In fact it is a tip without an iceberg or the iceberg is also free.

Pro Bono Ho Ho

Similar to Pro Bono Oh No. Only this time the recipient of the bill falls about laughing when reminded that he took eminent Queen's Counsel to offshore documents showing he could pay his bill 1,773 times over. He is a clever person, otherwise describable, who knows the great secret of Pond Life.

Those who can't pay - don't.
Those who can pay - don't have to.

Pro Bono Yoko

You have to laugh. Pro Bono Ho Ho.

Trapped on a social occasion against the wall by a person who in 1968 recorded a song which peaked at number 12 and now anchors a greying cabaret act your advice about the perils of hunter gathering hallucinogenic weeds, which you are happy to confirm on the meter, is met by the observation that all material things represent a false consciousness and that all the world's problems could be healed by hugging.

Pro Bono God No

You are briefed on a panic basis and work like a lunatic. In fact you may work for a lunatic. Eminent Queen's Counsel is briefed as well. Furiously you draft an affidavit, writing on your knee. You fax to the solicitors as you go because you lack a typist of your own. Unfortunately, you also fax the first chapter of a pulp novel you are writing in case the "Bar Thing" doesn't work out. After a while your writing only barely resembles English, the pages fall on the floor and are scrambled. At 6 pm you receive back the coagulant of the day's exertions and begin to rewrite it.

Pro Bono Ro- Ro

It begins

"Samantha the Australasian Supermodel sat exhausted in the Mascot First Class departure lounge reading the prospectus for the launch of her pret a porter collection. Bored, she thumbed the section on 'Subordinated Participation in the Cozzie Line'. Hayman Island, as she knew it would be, was far too hot this time of year. She couldn't wait to get back to the Winter cool of Cap D'Antibes which her major financial backer had recently purchased as their European Headquarters. It was January and she looked laconically at the other first class passengers. 'Bloody barristers going to Tuscany' she mouthed in the shadow of her Ray Bans as she avoided their eager faces.

Commonly concurrent with Pro Bono Ho Ho. Takes its name from the Roll On Roll Over Cross Channel Ferry. One renders or is about to render a bill and is invited out on Sydney Harbour. Large power boat pumps fumes while consuming a day's output of a Bass Strait joint venture. You green at the stern while host describes the features of his mobile phone. He points out Poon Tang Point and tells you why he didn't buy it (not quite the right kind of North facing). The better Premier Crus are discussed, indeed poured, and the day ends with yourself poured onto the wharf least convenient for your travels with the question of your fees undiscussed.

Pro Bono Blotto

Similar to Pro Bono Ro-Ro with a liquid lunch and no boat.

'Didn't I once act for you in a matter with...'

You seek, upon an oath of blood, the assurance that no one important will see it until it is put into order and translated into English.

You are then told that Eminent Queen's Counsel has just received his copy.

Oh God no.

You consider travelling one stop past Watson's Bay on the 325 Bus but resolve to deny and dissemble in the morning. With luck you will outlive the impression.

Then the client doesn't pay - see Pro Bono Ho Ho.

Pro Bono Polo

Less common here but takes its name from the Windsor Smith's Lawn phenomenon where, on the pretext of watching people on horses, other people are met that "could advance your career".

They don't.

They analyse what they read about themselves in the newspapers that week and the problem of obtaining decent industry assistance when the bloody politicians expect commerce to compete.

Pro Bono Loco

A seized upon offer by you to do work for a relative for free.

You find yourself agreeing with the statement that at least Mussolini made the trains run on time and what the world needs is more monopoly and less of the wrong type of government interference especially from those itty bitty countries who don't know when they are on a good thing. You also learn that if the government stopped paying girlies to get pregnant there'd be far fewer bastards. You are left to wonder if the phenomenon has another origin.

Then it rains.

Pro Bono Tally-Ho

Different use of horses, extreme physical danger, same motive, same effect.

Pro Bono Bozo

A solicitor you know extremely well who has never briefed you asks a favour. You think its Pro Bono Promisso but in fact his party clown cancels and his children think you are really funny.

Pro Bono Disgusto

Similar to Pro Bono Oh No save that client and/or solicitor have a personal freshness problem. They still don't pay.

Pro Bono Pinnocchio

This is a rare form of pro bono practised by those who seek political pre selection on the basis of all their pro bono publico. It's a rare affectation, at emergent level, but it can happen.

Pro Bono Oleo

An acute form of self conscious pro bono unfairly ascribed to a Continental origin. It is similar to Pro Bono Pinnocchio in that the self advertisement and self congratulation of good doings is coating thickly in smarm. It is considered an unsuccessful strategy in these parts for cultural reasons although that attitude is changing.

Pro Bono Solo

Named after a lolly.

Free appearance as a junior for the benefits of exposure. Client is often an institution. Opponent may act in the interests of someone who belonged in one. Senior person does the work while you look thoughtful and concerned. Senior person gets the white bit with the peppermint in it, you get the middle. Only fair.

Pro Bono Cameo

Similar to Pro Bono Solo. You go along to something that will be reported in the newspapers and, of course, the law

reports and will eventually run for months - without you. The Bar table bristles with tres chic junior counsel comfortable among the Gods, many of whom are present.

Eventually Someone Important QC will be quoted on the Television News complete with photograph (and caption) saying

Mr Someone Important QC

"You will agree, will you not, Mr Captain of Industry, that transferring \$20,000,000 of Tranggalacto funds into your secretary's number 2 shopping account was very, very naughty?"

Mr Captain of Industry

"It was standard practice in the industry at the time and with the benefit of 20/20 hindsight I admit I may have been unwise. But I deny categorically any wrongdoing on my part."

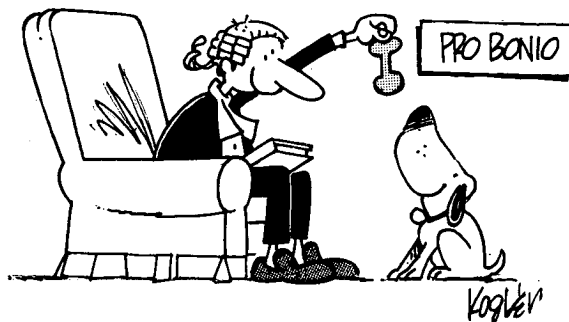
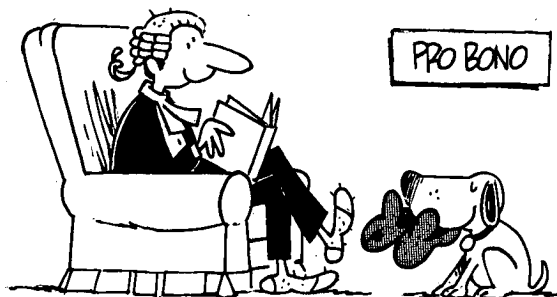
With luck, all those solicitors who have to sit around those funny little tables that wouldn't hold up a desk corner in Chifley Square, will confuse you with the company you keep and, to your benefit, maybe give you a run in the Big One.

They are not so easily fooled.

Pro Bono Talk Show

You ask yourself - if you joined the self-unemployed for the freedom it involves, why can't you "work at home" on a hot sunny day?

To whom after all are you answerable?



You find yourself considering the historical origins of the privilege against self exposure to a pecuniary penalty in the light of the decision in *Environmental Protection Authority v Caltex Refining Co Pty Limited* (1993) 118 ALR 392 when talkback radio catches your ear. They are talking about

1. immigration
2. fecundity induced by welfare (that again)
3. the application of Mabo (No 2) to Bondi Junction

You whip in a fax and it is read over the air. You do this Pro Bono. You reassure the listeners on a matter (number 3) "of very great concern to ordinary Australians".

Unfortunately there are many who want to hear that Bondi Junction is now recognised native title land and it's the fault of all those pinkos in Canberra. There are now several people with counter rotating eyeballs who wish to kill you.

With luck they will not become your clients.

With more luck they will. Some of them can pay.

Then there are forms which are not pro bono, strictly speaking, but which have pro bono aspects.

Pro Bono Reducto

Legal Aid work. One sends a bill thought to be the smallest bill capable of independent survival on a fee note without collapse through embarrassment.

However humble it is reduced by 20%.

Pro Bono Choko

Payment in vegetables (that you do not particularly like).

Then there are the miscellaneous no go bonos and so so bonos.

Among these -

Pro Bono Groucho

You grumpily agree to give advice for free but the advice you give is that "you get what you pay for". Very poor form indeed. Take an Aspro.

Pro Bono No Go

When called up for Pro Bono Publico one finds oneself unable to come to the phone. This is also known as the Pro Bono Go Slow or the Pro Bono No Show.

No Pros Contra Bonos

This is an historical reference only and a reflection of the subject matter of *Shaw v DPP*. It is also a contraction of "conspiracy contra bonos mores" which, fortunately, no longer applies to our Barristers Directory.

Pro Sonny Bono

Client appears in flared trousers and is worth avoiding for that reason alone. Client remembers the words to "I got you, Babe" and proves it. Still doesn't pay, although you do.

Then there are the anti bonos or rare benevolent forms of bonos.

Pro Bono My Go

This is a common form of pro bono practised unselfconsciously by most emergents. Leaving aside Fortress Wentworth and the Open Portcullis Policy occasionally the amazingly important can be trapped with a question their training forces them to freely answer and answer for free. They answer because they know. People are like that. The answer can be repackaged and sold as recombinant advice for which, intoxicatingly, you take all the credit.

But then you don't get paid.

Nevertheless, the principle is sound.

Pro Bono Whacko

Not really a matter of madness, although it may lead to it. This occurs when someone sends you money for no reason you can identify. The money, not the work, is free. You may have done work, of course, but you forget. It was probably a very long time ago. Your records, that you can find, only go back one week. You just say "whacko" and bank it. You'll work out your accounts one day.

After all, as everyone will keep telling you -

"It's early days yet. Things can get better."

Then again, it's early days yet. As anyone can tell you - things can get worse. □

Registrar, Court of Appeal v Craven

(Coram: Kirby P, Meagher JA and Powell JA)

On 2 August 1994 on the first day of hearing the following exchange took place during the opening of counsel for the opponent, charged with contempt:

Mr Gruzman: The question is what "without lawful excuse" means. Your Honour the President in a recent case dealt with the meaning of "without reasonable excuse". So what is the difference? Your Honours, I looked up the dictionary.

Meagher JA: No need to go overboard! □