The bar needs to fight for its future

By Anthony Cheshire SC

The practice of a barrister has always involved different aspects, such as Court advocacy and chamber work. Although the former probably does not change much over time, the latter continues to change out of all recognition.

When I began at the bar in the early 1990s, a brief was delivered for a specific task and not 'to advise and appear' generally. Thus, I might be asked to provide an initial advice on liability and evidence and I would then return the brief. A further brief might then follow a few months later with additional material incorporated into it for the drafting of proceedings; and so on.

Now briefs tend to be delivered at the outset for an entire matter; and additional material follows on an ongoing basis, to be 'filed' as we see fit (and often accompanied by the unanswerable question: 'Have I given you everything that you need?'). Further documents are often provided as large and multiple email attachments or by way of links to mysterious website locations. A brief held by counsel is now far more similar to the solicitor's file (although no doubt in a completely different order) than was ever the case.

As a result, barristers are often now involved in every aspect of the litigation, including matters such as drafting solicitors' correspondence. There are advantages to this, both for the lawyers and for the client. For instance, trial counsel are now often involved from the outset, identifying relevant issues and assisting with strategic calls; and litigation is now more of a collaborative effort between the lawyers.

It must be accepted, however, that there is scope in such arrangements for duplication of costs or at least an increase in costs.

I was struck then by the recent announcement in *InBrief* that the Workers Compensation Commission online system:

> … envisages that many solicitors will not send a traditional brief to counsel and that instead barristers will read most of their brief by accessing the filed documents through the WCC 'portal'.

That seemed to me to be consistent with a worrying trend in debate about the costs of litigation. There is an apparent underlying

assumption that litigation is expensive because of the involvement of barristers. Approached in that way, the obvious solution is to keep barristers out of litigation. If that is the best solution, then we have a real problem.

As Penny Thew has written elsewhere in this edition, Court filings in the State Courts over the last 13 years are down by nearly 45%. Solicitors appear to be reacting to this downturn by doing more themselves that they previously sent to counsel; and many cases are now not briefed until shortly before trial.

I have not heard any suggestion, however, that the costs of litigation have been decreasing as a result. Keeping barristers out of litigation may allow solicitors to charge for the work that barristers previously did, but it does not seem to reduce the costs.

This also ignores the fact that the value that barristers can bring to litigation can actually reduce costs. For instance, barristers can assist in identifying the real legal issues and thus avoiding costs of pursuing irrelevant or unnecessary issues; and they can provide advice on prospects and tactics that can lead to early settlements.

It seems to me that the problem lies in approaching the issue of costs in absolutes; and in attempting to identify single across-the-board solutions.

Technology provides a good example of this: the fact that technology makes a solution available that may save some costs does not mean that it is one that should be promoted across the board or indeed at all.

For instance, pushing directions hearings into online Courts may save the costs of briefing counsel to attend a hearing and indeed the costs of briefing counsel at that stage at all, but any overall saving may be illusory. Many cases would benefit from the early involvement of counsel; and solicitors may spend more time (and therefore costs) in engaging in correspondence and argument about online Court matters than would be associated with a brief Court hearing.

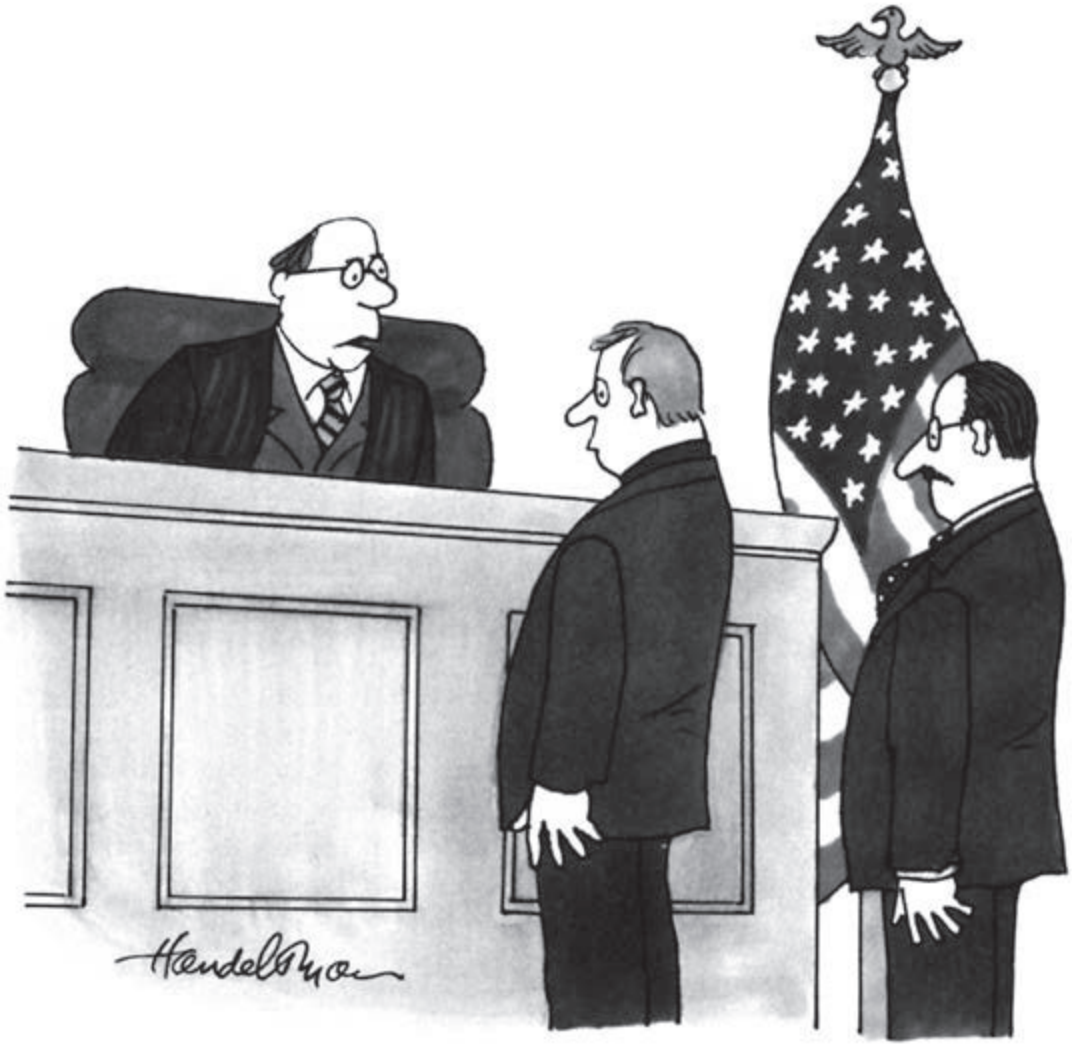
Similar comments could be made about a system whereby counsel only receive a brief through a Court portal after the filing of the relevant documents; and this is even before considering what happens when the 'portal' is 'unavailable…for scheduled [or indeed unscheduled] maintenance'.

In his paper set out in the last edition of *Bar News*, Chief Justice Bathurst suggested that there might in the future be 'a much more iterative process' of case management involving the parties and the judge posting comments online on an ongoing basis. While technology might make this feasible, it would lead to an extraordinary increase in judicial workload and it might simply result in a greater focus (and therefore greater costs) on arguing about directions.

So what can be done?

One of our traditional advantages has always been that we are self-employed and do not have the overheads of solicitors. The bar (and in particular the junior bar) can undercut solicitors on fees while at the same time adding value to the case. I wrote in the last edition of *Bar News* about disadvantages of online Courts, particularly in terms of issues not being identified and settlement not being discussed at an early stage, but are the solicitors' costs of corresponding about and conducting an online Court necessarily cheaper (and better) than asking a junior barrister to sort it out for, say, one hour of his or her time? There appears to be an assumption that they are, but an affirmative answer is certainly not self-evident.

One of the recurring criticisms of the use of counsel is a fear of duplicating costs. Maybe solicitors should be encouraged to send more briefs for specific tasks rather than to advise and appear generally. Many hearings could be conducted by counsel without a solicitor



CartoonStock.com

"Apparently, you have very little respect for our judicial system, sauntering in here with only one lawyer."

present, especially if the Courts encouraged this practice and were sympathetic in the event of short adjournments being required to take instructions.

Chief Justice Bathurst also wrote about how the modern barrister should be more familiar with, and attuned to, clients' business environments. Barristers need to be marketing themselves to clients, not only as individuals but also in terms of the skills, advantages and costs savings that they can provide (and which we should not be shy about promoting). Increasing commercialisation and corporatisation of barristers' floors, particularly in terms of marketing, will assist in making clients aware of the advantages that barristers as a whole can offer; and this may include agreeing fee structures and instruction protocols with larger frequent litigators.

Fixed fees may be attractive to solicitors or clients, particularly for smaller cases. For many clients, their entire future depends upon the success of the litigation, but they may have only limited means to pay costs. An all-or-nothing conditional fee may be unattractive, but why not a differing rate (or a differing fixed fee) depending upon whether success is achieved? Why not a contingency fee?

If the focus is upon the costs of litigation generally, then the bar must ensure that the debate is not focussed on removing barristers from the process and that the light is also shone on matters such as the costs of solicitors and expert witnesses.

The Courts, encouraged by prompting from the bar, can do their part. Innovations such as the use of online Courts and standardised directions and the determination of matters without a formal hearing all have their part to play, particularly in smaller litigation, but should not be over-used. There need to be strategies in place to identify, at an early stage, cases outside of the standard model. In those cases, the Courts should expect and insist that any advocate who appears should have a detailed knowledge of the case and be able to identify and discuss the real issues at stake (consistent with the Chief Justice's 'more iterative process'). Ideally in those cases, there would be the involvement of trial counsel at an early stage, but at the latest immediately before a matter is set down for trial.

These approaches are already adopted by some judicial officers, particularly in the specialist lists and in the Federal Court docket system. The volume of work (often including as it does matters that could be dealt with under a standardised model), however, often means that they are not enforced. Issues are then often not identified until a much later stage and settlement discussions (whether formal or informal) often do not occur until significant costs have already been incurred.

Duty barrister schemes provide a service to the public (and assistance to the Court) that would otherwise not be available; and provide useful experience to the junior bar. There seems no reason why they should not be extended to every Court and tribunal.

There is undoubtedly increasing pressure and competition in relation to what has traditionally been regarded as barristers' work. We need to shift the debate away from single one-size-fits-all models and towards more nuanced solutions. While this starts with individual barristers, the debate has to involve floors and the Bar Association. BN