WESTERN AUSTRALIAN BAR ASSOCIATION (Inc)

CONDUCT RULE 58: COMMUNICATIONS WITH PRINTED OR ELECTRONIC MEDIA

The amended Conduct Rule which was approved 21/16 at the General Meeting on Wednesday 15 February 2006 provides for two exceptions. Relevantly, the second, the subject of sub-rule 58(b) in the following terms:

> *"The barrister has received the prior consent of the President of the Association (or of the Vice President in the event of the unavailability of the President) which consent will only be granted if the President (or in the event of unavailability of the Vice President) is satisfied that the grant of consent:*
>
> *(i) is in the interests of the barrister's client and in the interests of justice; or*
>
> *(ii) it is necessary to enable the barrister to respond appropriately to public criticism of the barrister's conduct."*

Touchstones underlying Conduct Rule 58 (and its predecessors) are:

(A) Barristers are independent, impartial professionals who, once engaged, do their utmost for the party whose interests they have been engaged to assist.

(B) Inherent in the role of a barrister is the need for a dispassionate professional lawyer whose objectivity when injected into a case is capable of correcting misapprehensions or assessments made as a result of (sometimes unwitting) partiality of client or the solicitor. The function of a barrister is to provide dispassionate, reliable legal advice.

(C) Inherent in the role of a barrister is the acceptance of the principle that the barrister's overriding duty is to the court. If the client or solicitor's instructions are inconsistent with that overriding duty, they are not to be followed.

(D) Inherent in a barrister's function is the principle that in the norm a barrister will be engaged by a solicitor and that the functions of barrister and solicitor are separate.

(E) Frequently it is the independence, legal skill and cold objectivity of a barrister when brought to bear in a case that is of the greatest help to the client in ascertaining a reliable view as to the true client's position.

These principles all lead to a time honoured practice that barristers, in the main, confine their advocacy and eloquence on behalf of the party who has engaged them, to the courtroom.

In the context of those fundamental principles, exception (b)(i) to Rule 58 now applies. It is plainly a limited exception to a general position. Two matters are made express, namely the **interests of the client**, secondly the interests of justice. These are dual considerations.

W.A. Bar Association (Inc), 'Conduct Rule 58 Communications with Printed or Electronic Media', Perth, W.A. Bar Association (Inc).

© 2006 W.A. Bar Association (Inc)

Sub-rule 58(b) is framed as it is, in order to provide the needed flexibility in catering for a diverse array of potential circumstances which may arise that require individual assessment and can never be codified in advance.

Without in any way seeking to limit the general ambit of exception circumstances qualifying under conduct in rule 58(b)(i), the following matters do obviously arise, as potentially relevant in circumstances when a barrister seeks the consent of the President (or in the President's absence, the Vice President):

1. Has the client's approval been obtained to the proposed comment? In circumstances where there is a solicitor, a barrister seeking approval would obviously be wise to hear a request to speak to the media directly from the lips of the client, rather than enter a scenario of potential confusion by receiving a conveyed the instruction from a solicitor.

2. **Is the matter finally concluded?** In other words, is there potential for the case to go further by way of appeal. In the face of acquittal before a jury, that question can usually be answered "yes" (that is an acquittal by a jury). Note however, that the Attorney General WA has foreshadowed in 2006, changing the law to allow appeals on questions of law in serious cases! Obviously where a matter is resolved once and for all, capacity for damage is minimised.

3. Although the matter may be resolved in terms of criminal implications, are there potential civil implications in the future? If the answer to this is "yes", then there is a risk that tactical games may be being played in order to influence/advance a potential civil claim or the defence thereto. These scenarios are best avoided by the barrister's participation.

4. Can any perceived need for comment be adequately addressed by the issue of a timely written media statement issued on behalf of the client?

5. Can the need for a communication to the media be better addressed by Rule 58's backgrounding exception ie by an off the record or background statement by the barrister and envisaged as permissible under sub-rule 58(a)? Why is that option an insufficient basis for any factual information to be communicated to the media?

6. If there is legitimate need for some public comment, why should the solicitor not make that comment? In the main, this will suffice. It could be however that there is need to proportionately respond to a comment made by someone of high stature such as a judge or senior prosecutor or another silk that a reply comment by the barrister would then be warranted.

7. Has the barrister given full consideration to their own personal liability exposure issues such as potential contempt of court, defamation, client confidentiality, and to their own insurance position? In this context it is helpful to remember that the WA print media is notorious for errors. Therefore there is potential that an innocuous statement may still be reported wrongly, leading potentially to a defamation suit against the barrister, even though the barrister's actual words were innocuous, and were misreported. A barrister's professional indemnity liability insurance cover may not extend cover this scenario. A barrister's insurer may perceive that a public comment to the media is not a necessary or usual part of a barrister's "business or profession".

8. Is the matter a true pro bono engagement in which the barrister is acting either without a solicitor or with limited solicitor assistance, and in circumstances where

© 2006 W.A. Bar Association (Inc)

they are all acting pro bono. [A pro bono matter, obviously is not a “spec” matter, where the barrister has some potential of getting paid, if the plaintiff or client wins.] Pro bono means, ‘for free’.

9. Lastly (perhaps overridingly), why is the need for this barrister to publicly speak “with attribution” to media, in the public interest? If this can be answered in the affirmative, obviously it will be a consideration of some moment, in the overall assessment.

General

Examples:

Without wishing to be pre-emptive, the following may be circumstances in which a consent would be favourably viewed.

(a) A recent death penalty scenario in 2005 with the execution of Australian citizen Van Nyugen in Singapore. At the point of exhaustion of all appeals, Van Nyugen’s Australian barrister Lex Lasry QC, spoke with moderation and eloquence in advancing the cause of his condemned client. There is no death penalty in Australia. However, the extreme circumstances provide one instance of where the public interest was obviously served by the barrister’s comment.

(b) Secondly, a scenario of a barrister’s memoirs, or a reminiscing article or novel. Here it is important to remember that client confidentiality remains in tact, even after a case is over, and so, must be forever respected. A client retains the benefit of that client’s privilege and to confidentiality in regard to all communications made to solicitors or barristers. Once a client’s consent is given however, then obviously the greater the amount of time that has passed by, concerning past cases that the barrister wishes to write or speak about, the better, and the more likely it is that consent may be granted.

The nature of the comment proposed:

Obviously the public comment that the barrister proposes to make on the record should be mainly factual, rather than opinionated or grandiose rhetoric. Such comments as are proposed to be made should deal with fact or process, and be temperate, rather than inflammatory. The content of sub-rule 58(a) referring to “fair and balanced explanation or recapitulation of proceedings” is also of assistance here.

Where barrister proposes a form of public statement then the President (or Vice President) should be informed as fully as is possible of the content of what is proposed to be said. A barrister who is given approval, should be reminded of an expectation they would speak with temperance and largely as to fact.

Concluding observation:

Where the President is approached and either grants or refuses approval, it would be expected in due course, the President would make a short report to Bar Council at its next ensuing monthly meeting − indicating in brief terms the basis upon which consent was either given or refused, and why. In this way a catalogue of precedent should be established over time in order to assist uniformity of interpretation amongst Presidents concerning the exceptions application.

Ken Martin QC
President

© 2006 W.A. Bar Association (Inc)