

CONDUCT RULE 58 – STATEMENTS TO THE MEDIA

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On 15 February 2006, the WABA in a general meeting approved an amended Bar Conduct Rule 58. The purpose of this article is to explain the rule, outline reasons for its introduction and (hopefully) dispel some misconceptions about the effect of rule 58.

Three common misconceptions are:

- (1) That the rule will hinder proper media coverage of Court proceedings, because the media will not be able to seek explanation from barristers about what has occurred in Court.
- (2) That the rule operates as a “gag” on barristers, preventing them from ever speaking to the media.
- (3) The rule is ultra restrictive and puts WA barristers out of line with the rest of the nation on this issue.

A cursory glance at amended rule 58 demonstrates that these are indeed misconceptions readily dispelled.

Terms of the Rule

Amended conduct rule 58 is in the following terms:

“58. A barrister must not make any statement to or communicate in any way with, the printed or electronic media or any representative thereof in relation to or touching in any way upon any matter in respect of which the barrister has provided, is providing or expects in future to provide professional services unless:

- (a) *the statement or communication is expressly stated by the barrister to be “off the record” or “background” (that is – provided on the basis that it is not to be republished or publicly attributed to the barrister) and is restricted to a fair and balanced explanation or recapitulation of proceedings that took place in a public hearing or the correction of errors in a published report of such a hearing and*

does not include the expression of the barrister's personal views or opinions; or

- (b) 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 the Vice President) is satisfied that the grant of consent:

 - (i) is in the interest of the barrister's client and in the interests of justice; or*
 - (ii) is necessary to enable the barrister to respond appropriately to public criticism of the barrister's conduct".**

Rule 58 formerly provided prior to the February 2006 amendment:

"58. 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:

 - (i) copies of pleadings or court process in their current form, which have been filed, and which have been served in accordance with the court's requirements;*
 - (ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;*
 - (iii) copies of the transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court;*
 - (iv) copies of exhibits admitted in open court and without restriction on access; or*
 - (v) copies of written submissions, which have been given to the court, and which have been served on all other parties; or**
- (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 witness already called, the nature of the issues in the case and the nature of the orders made or judgment given including any reasons given by the court;**

- (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."*

Rule 58 must also be read with existing rules 58A and 59 which are in the following terms:

"58A. Notwithstanding Rule 58 a barrister must not publish or take any step towards the publication of any material concerning any proceeding that:

- (a) is misleading; or*
- (b) would amount to a breach of confidence.*

59. A barrister will not have breached Rule 58 simply by advising the client about whom there has been published a report relating to the case, and who has sought the barrister's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication."

As will be seen from the terms of amended rule 58:

- A barrister by an "off the record" or "background" communication, may provide a journalist with such assistance as may be reasonably necessary to explain or recapitulate events that took place in a public hearing.
- A barrister remains able to provide to the media material that may be published, so long as the material is not to be publicly attributed to the barrister.
- Further, there is also an option in an appropriate case of the barrister seeking the consent of the President of the WABA to make a comment on the record and/or for attribution to the barrister.

In February 2006, Glenn Martin SC, President of the ABA said of the amended WA conduct rule 58:

"As far as I am aware it has always been a rule of practice that barristers may not express their personal opinions about the case in which they are involved or might be involved. This new rule does not depart from that. The principle underlying this new rule and its predecessors is that a barrister's role is to present

his or her client's case to the court and not to the public through the media. It is the client's case which is important, not the barrister's opinion of it. The WA Bar's new rule still sensibly permits the provision of information to assist the media in the reporting of matters before the courts.

Many people, not just barristers, are concerned to ensure that we are not confronted with what occurs in some American jurisdictions where the merits of a prosecution or civil case are fought out in the media. All lawyers have to be careful to ensure that the role of the courts is not demeaned by side shows developing in which the issues are presented in 'soundbites'."

Rationale for the Rule

The touchstones underlying amended rule 58 (and its predecessor) are these:

- (A) Barristers are independent, impartial professionals who, once engaged, do their utmost for the party whose interests they have been engaged to assist, irrespective of the barrister's personal position about issues in the case.
- (B) Inherent in the role of a barrister is the need for a dispassionate professional lawyer whose cold objectivity when injected into a case, is capable of correcting misapprehensions or assessments made to that point as a result of (sometimes unwitting) partiality of the client or its advisers. The function of a barrister is to provide dispassionate and reliable legal advice.
- (C) Inherent in the role of a barrister is an acceptance of the principle that the barrister's overriding duty is to the Court. If the client's instructions are inconsistent with that overriding duty, they are not to be followed.
- (D) Also inherent in a barrister's function is the principle that normally a barrister will be engaged by a competent solicitor and that functions performed by a barrister and a solicitor, are distinct.
- (E) Frequently it is the independence, legal skill and cold objectivity of a barrister when injected into a case that is of the greatest assistance to a client, in that client obtaining a

reliable view as to the true client's position and exposures in the litigation or in potential conflict.

These principles have led 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.

That is part of a broader principle applicable to all lawyers that the privileges and respect which attach to the practice of the law as a profession, impose a corresponding obligation to use the position of lawyer, only for proper purposes.

In general terms, lawyers are engaged to provide legal advice, to represent clients in communications with opposing parties in contentious matters or in other transactions that require legal services and to represent clients before courts and tribunals.

It is my view that as a general rule, it is no part of the function of a lawyer to speak publicly on record to the media on behalf of a client in litigation or in a dispute that is pending or is unresolved. Making a public statement to the media is something that client may be quite entitled to do on their own behalf either personally, or by the use of some other appropriate spokesperson.

Media appearances and attributed media comment by a lawyer on behalf of a client in current litigation have a distinct tendency to cause that lawyer to be publicly linked with a client, or the client's cause. In some cases (in particular see the American litigation experience for examples) the perception is that a lawyer speaking before cameras is merely a mouthpiece of the client. Such linkage to the client is generally inconsistent in my view with the status of a lawyer as a member of an honoured profession and the overriding need to permanently maintain independence and professional integrity.

Moreover, as a general rule (which may, like most rules, sometimes admit of some sensible exceptions) on-camera media appearances by lawyers (I now include both barristers and

solicitors in that term) in unresolved or pending litigation has, in my view, an unfortunate tendency to be detrimental to the standing and reputation of the legal profession generally.

The circumstances in which the President of the Bar Association could exercise discretion to permit a public comment under rule 58 by a barrister in a matter where the barrister would otherwise be constrained by rule 58, is the subject of a Protocol approved by the Council of the WA Bar that can be found on the WA Bar Association website, see www.wabar.asn.au.

Conflict of Interest

A particular issue of concern that arises in relation to media appearances or attributed public comment by lawyers on behalf of their clients is the potential conflict between the true interests of the client and the lawyer's own interest in seeking to promote his or her own reputation or in generally pursuing favourable publicity for themselves or their practice, in the process.

There can sometimes be a considerable blurring as between the client's personal interests in litigation, with a much looser concept, namely the public's interest in a matter. Addressing the media on record is not an activity in which most lawyers possess any special expertise or training. An issue also arises as to whether the professional indemnity insurance cover that lawyers are obliged to carry extends to cover their possible exposures arising out of an on-camera statement that is later alleged to be defamatory or misleading or deceptive.

Because of the inherent conflict of self-interest I have identified, the client (and, the legal profession generally) are, in my view, far better served by a conduct rule that is prima facie to the effect that a lawyer should not engage in any media appearance or make an attributed public media comment. Clients should not be encouraged to have an expectation that on-camera performances are a part of a lawyer's range of services to be acquired. Lawyers should not be selected by clients based on who performs most effectively or aggressively on-camera, or who has the best media contacts to 'spin' a side of a story in a battle fought on a second front well away from the courtroom.

Other Issues

Public comment by a lawyer in relation to a case, in which the lawyer is or has been professionally engaged, raises other implications, including:

(a) Client confidentiality

Lawyers are obliged to maintain client confidentiality both during and after a case is finalised. Even where express instructions have been provided by a client or permission given by a former client to make a public statement, the occasion of speaking on the record to the media can be difficult to control. There is some risk that a lawyer might unwittingly be drawn into publicly disclosing more than he or she is authorised to say about a matter.

(b) Potential waiver of the client's legal professional privilege as to advice received

Lawyers are obliged to assert and defend their client's privilege, until that privilege is waived by the client. But public statements about what legal advice has been provided to a client, can operate as a global waiver of all professional privilege as to legal advice given. As with client confidentiality, there is also a risk of the lawyer making statements going further about a matter than originally planned. Moreover, all clients require very careful advice in relation to any course of action that might lead to that client waiving their legal professional privilege in their legal advice received beforehand.

(c) Exposure of the lawyer to civil liability for defamation

Whilst a lawyer enjoys absolute privilege protection at common law against a claim in defamation for utterances publicly made in a Court, that same protection does not extend to utterances made out of Court. A lawyer making public statements to the media is liable to be pursued not only for their first original defamatory statement but also for damage arising from a mass re-publication of the lawyer's statement by a media

organisation(s). It should be remembered that defamation proceedings may need to be defended for some time and at some expense, even if, ultimately they are successfully resisted.

A Victorian case, *Smith v Harris* (1996) 2 VR 335 arose from high profile solicitors causing a widespread publication of a copy of a Magistrate's Court Complaint (ie originating process) on the day the Complaint was filed in Court. The Complaint was issued against Ian Winston-Smith, then Minister for Finance in the Kennett Government. The solicitors' defence to Mr Smith's defamation action brought against them, asserted that the widespread publication of the content of the Complaint as filed to the media, was a privileged occasion as a faithful and accurate report of the Magistrate Court's proceedings. The qualified privilege defence to the defamation issue was heard as a preliminary point. The Court ultimately rejected that defence contention and held that there was no qualified privilege against defamation in respect of documents that had been filed, but not yet used at a hearing later to be conducted in public.

(d) Contempt of court, in particular, infringement of the sub judice rule

There are certain obvious utterances which should never be publicly made by anyone, let alone a lawyer. For instance, declarations as to a client's innocence before trial, after conviction, or upon the ordering of a new trial, see in this respect *Director of Public Prosecutions v Wran* (1987) 86 FLR 92 where the Court of Appeal of the Supreme Court of New South Wales (Street CJ, Hope, Glass, Samuels and Priestley JJA) imposed a fine of \$25,000 upon Mr Neville Wran QC. Mr Wran, at the time of his comment was Premier of New South Wales and President of the Australian Labor Party. Mr Wran's comment was made as an unsolicited remark in response to a question posed to him by a journalist in a media scrum upon the occasion of the New South Wales Court of Appeal having just quashed Justice Lionel Murphy's conviction and ordering a fresh trial. The particular offending remark made by Mr Wran was: "*I have a very deep conviction that Mr Justice Murphy is innocent of any wrongdoing.*" These remarks were held to

constitute a contempt of Court, since they had a tendency, as a matter of practical reality, to interfere with a pending retrial of Justice Murphy before a jury. Thus, they met the contempt test of establishing a tendency to interfere with the due administration of justice. The newspaper which published Mr Wran's remarks was also fined \$200,000.

- (e) Contempt through breach of an implied undertaking arising from the nature of the discovery process obliging a person obtaining access to a discovered document in proceedings, not to use the document (or an answer to interrogatory) for any purpose other than in relation to the litigation in which it has been discovered. See generally *Harman v Home Office* [1983] 1 AC 280, *Esso Australia Resources Ltd v Plowman* (1994-95) 183 CLR 10 and *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316.
- (f) What if the case is finished?

Most lawyers I have spoken to, understand the rationale behind a rule about not speaking to the media during pending litigation which of course includes the appeals process (indeed even a Mr Robertson QC of the English Bar it would seem, if reported accurately, see West Australian Newspaper report 3 April 2006). But the usual question asked is what about when a case really is finally over and the client is happy for the barrister to talk about the case, and it is also in the public interest to speak?

The real problem now (once client confidence is not an issue) is a new one of a barrister knowing quickly and reliably where to draw an ascertainable but workable line, in a notoriously grey area. When is a case ever over? Are there future civil implications, retrials, Royal Commissions, related defamation actions, compensation claims to follow? Some very high profile public disputes can span decades or more. If a matter truly is resolved beyond all argument once and for all, and there does exist some element of public interest involved, then a public attributed comment by a barrister is easier to justify, especially if there is no element of grandstanding or self-promotion involved by the barrister. But real practical difficulties involved in drawing a line in this situation,

render the overall assessment best made under the permission exemption allowed under rule 58 to the President of the Bar, once some attributed public comment can be justified in the public interest.

Conclusion

Overall, there is in my view, often very little to be gained for a client by a public media statement made by the client's lawyer during pending litigation, and potentially much risk involved for both the client and the lawyer. Even where there is perceived to be some tactical advantage in a public statement, there is generally no reason why either the client personally should not be the 'talking head' to speak to the media direct, or for the client engage some other suitably trained (and well insured) media spokesperson ('spin doctor') to do so on their behalf. For a lawyer, public media comment on behalf of a client during current proceedings, is attendant with very considerable risks, and as a general rule, should not come to be regarded by the media or the public as part of the true professional role or skill set of their chosen lawyer.

Moreover, there rarely arises a true and justifiable need for public comment by a lawyer in current litigation, in my experience. The media are or should be capable of providing adequate coverage of the content of Court proceedings, without unduly relying on lawyers as their 'talking heads' for 'spicy' five second grabs, that can rarely ever do justice to the complexities of a case. In my view, there is no detriment to the public interest overall by lawyers and especially barristers, declining to perform such tasks, even if that is their client's expectation or wish.

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