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Lawyering

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LAWYERING

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What use are lawyers?

There are some short and humorous answers to this. But lawyers are vital in society. They administer the mechanisms of the state. They draft our laws. From their ranks, they provide society's law-makers and judges. They develop our law, by their arguments and reasoning. They make policy, by working out how our values should be expressed in our behaviour. They also represent citizens who are seeking justice, for dealing with the laws often needs expert help. In this sense, lawyers are in public service. They help us recognise and maintain our rights. And by this, they check those who are intent on oppression and tyranny.

'Lawyering is one of the oldest professions. A professional is in a position of privilege and responsibility. A professional is defined as a person who is ethical, highly trained, accredited by a professional body and authoritative in the field. The professional also is governed by codes of ethics and conduct. Also, the professional is characterised by the ideal of service to the public and the virtues of "emotional neutrality":²

Toward the client the professional must assume an emotional neutrality. He must provide service to whoever requests it, irrespective of the requesting client's age, income, kinship, politics, race, religion, sex, and social status ... The ethics governing colleague relationships demand behaviour that is cooperative, equalitarian, and supportive.

Sir John Strange, an eminent English barrister, has the following epitaph on his gravestone: "Here lies an honest lawyer - that is Strange."

"Are you honest, boy?" "Bein' honest ain't got nothin' to do with bein' a lawyer, Grandpa." "Boy, if you ain't honest, you're nothin'."

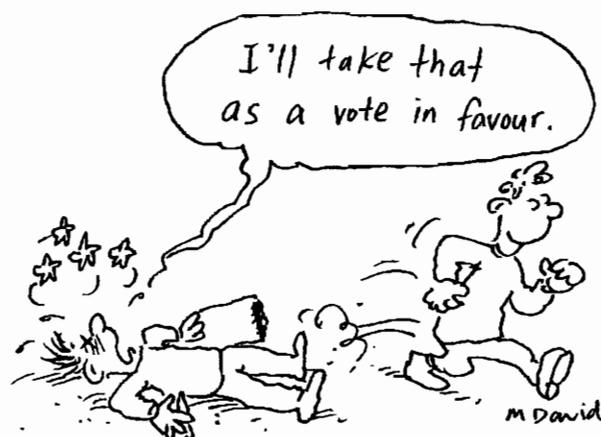
Fred Rodell, Yale law professor: "It is pretty hard to find a group less concerned with serving society and more concerned with serving themselves than the lawyers."

Criticism of lawyers' adversarial role

"A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge." James Boswell

There are many critics of the lawyer's willingness to act in unpopular causes. Ronald Goldfarb in the *Washington Post* questioned whether lawyers were really seeking the truth, as they claim, when they zealously assert their clients' interests:³

When I observe an insurance company lawyer harassing a rape victim in a deposition, or a mob lawyer intimidating a witness, or an attorney aggressively advancing his corporate client's anti-environmental or anti-public health interests, or a white-collar defense lawyer using the media to sell his client's phoney position, I understand why my profession evokes widespread condemnation. Like the medical profession's fiat "do no harm", shouldn't lawyers be ethically bound to do no injustice? ... Lawyers cannot have it both ways, representing plundering companies for a living and not taking on their coloration, or representing scuzzy clients and avoiding public cynicism for doing so. It is not unfair to associate lawyers with their clients.



It is sometimes asserted that truth does not matter to lawyers. They might, some allege, encourage a client to plead innocent when they know she is not. That would undermine the administration of justice. Professional rules try to deal with this. For example, the NSW Barristers' Rule 32 says a barrister must refuse to take any further part in a case, if a client reveals that she has lied and will not allow the barrister to tell the court. Rule 33 says that a barrister

who knows his client is guilty may continue to represent the client. But the lawyer is not permitted to suggest that someone else may have committed the offence, and may only argue that a point of law has not been satisfied, or that the evidence is insufficient to convict the client.

Some criticisms of lawyers spring from a misunderstanding of, or lack of sympathy for, their role in the common law system. How is it, critics ask, that lawyers can fight so hard on both sides of any question? Are they no better than forensic hit men or prostitutes in law, who will provide services if the price is right, regardless of the justice of the issue?

Lawyers in the adversarial common law system present their clients' best possible case to the best of their abilities. But their primary duty is to the court. They cannot distort the truth, suppress evidence or assert the innocence of a person they know to be guilty. A barrister cannot normally turn down clients, no matter how unworthy their claims may be, providing the barrister gets a proper fee. Lord Denning MR summarised in *Rondel v Worsley*:⁴

*[The barrister] must accept the brief and do all he honourably can on behalf of his client. I say "all he honourably can" because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do as he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fated to his case. He must disregard the most specific instructions of his client if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour.*⁵

Samuel Johnson in 1786 made a similar argument. His celebrated biographer, Boswell, asked him what he thought of arguing for a cause he knew was bad. Johnson replied:

*"Sir, you do not know it to be good or bad until the Judge determines it. An argument that does not convince yourself, may convince the Judge to whom you urge it; and if it does convince him, why then, Sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion."*⁶

Seeking justice or a win?

The lawyer is, theoretically, first a servant of the court and of justice and not of the client. In the adversarial system, this is sometimes forgotten, or derided as academic fare. The barrister, in particular, is in combat for his client. Lord Brougham provides a flinty rationale for the sharks in the pool:

"An advocate, by the sacred duty which he owes his

client, knows in the discharge of his office but one person in the world, that client and none other. To save that client by all expedient means - to protect that client at all hazards and costs to all others, including himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other".

While lawyers' image suffers under the adversarial style of our legal system, trial lawyers are admired as modern day gladiators. We teach the craft of advocacy in our law schools. Mostly the instruction is about presenting a case competently and giving the client a fair hearing. But the craft is also dipped in deception and tricks. It includes teaching what questions not to ask, how to present a witness, how to dress and speak, body language that is persuasive, how to exclude unfavourable evidence, how to play up to the judge and jury, what techniques to use in tough negotiations, how to "win". Texts and anecdotes laud cleverness in seizing a loophole, excluding damning evidence, beating the "system", humiliating a witness and getting a client off. Aggression and confrontation are a part of the process. Truth, not being the lawyer's first duty, is sometimes obscured.

There are grim jokes and tales about lawyer's high fees. There are some instances of lawyers charging in excess of their client's entire award, or misappropriating clients' money. Harried practitioners, aimed by their firms at target budgets of "billable hours",⁷ charge too handsomely by the minute. Some will be tempted to overservice their clients or keep hopeless cases alive. While advertising enables greater access to legal services and possibly reduces costs through competition,⁸ TV advertisements and leaflet drops that smack of "ambulance-chasing" add to the firm's client list, at some cost to the profession, its professionalism and its authority.

Yet many members of the profession respect the high values of the craft. They do free or discounted work for the disadvantaged or for charities (called "pro bono" work). They see some public service as a vital part of a lawyer's function.⁹ They recognise the ethical limitations to their activities, do not advertise their services crassly or otherwise act as members of a privileged group aggressively protecting its monopoly.

Client: What do you charge? Lawyer: \$200 for three questions. Client: Don't you think that's expensive? Lawyer: Yes. Now, what's your third question?

"My daddy is a movie actor, and sometimes he plays the good guy, and sometimes he plays the lawyer."
Malcolm Ford of his actor father, Harrison Ford.

Barristers and solicitors

The term "lawyer" embraces a variety of roles - private practitioners, courtroom advocates, lawyers employed as business executives, lawyers who work for the Crown Solicitor, or in the Attorney-General's department, (or in the Taxation Office) and lawyers who teach law. There are also judges, magistrates, parliamentary counsel (who help draft our laws) and lawyers in legal aid and law reform work. Australian and other parliaments are full of lawyers.

Solicitors' work includes giving advice to clients, drafting documents, writing legal letters, gathering evidence and preparing cases for court. They might prepare your will, draft your partnership agreement for you, write your lease, help settle your matrimonial issues, complete your land purchases, or write a letter to your neighbour about paying for a fence. They sometimes go along to court, too, to inform ("brief") the barristers, to prepare witnesses, draft and file documents and otherwise support the barristers.

Solicitors usually form into partnerships (called "firms"). They can be large concerns, with dozens of partners and many associate partners and employee solicitors. Lawyers practising only as barristers cannot do this - they practise alone, although they do form "chambers" with other barristers and share meeting rooms, libraries, and secretarial and computer resources.

Barristers are the specialist advocates, the gladiators of the courtroom. They run the litigation in court, especially on complex matters before higher courts. Being specialists, they can become expert in the ways of the courtroom and the laws of evidence and procedure. Some jurisdictions require barristers to have an honours degree in law and to train in courtroom advocacy. In jurisdictions where the profession is separate and not fused, trainee barristers seek an experienced barrister as their "master" and complete "pupillage" with them.

Not all barristers' work is in the courtroom. Barristers can write "opinions" on any legal matter - tax planning, interpretation of a will, corporate structures, conveyancing problems. Some solicitors habitually seek a barrister's opinion on complex issues. Barristers do not usually deal with the clients directly, but through the instructing solicitors. The solicitors "instruct" the barristers and arrange for their fees to be paid. Getting started as a barrister can be tough. Lord Denning said so in *The Family Story*.

In those days it was usual for the young barristers in chambers to spend the first few years "briefless". Many gave up and turned to other occupations: but, even then, the experience in chambers stood them in good stead. I, too, was briefless for a time. I used to "devil" for the busy juniors - in our chambers and outside. That is, I used to look up cases, to draft pleadings or opinions - all without payment ... Another way to get started was to write a text-book of some kind or other.

Lawyers can be "barristers" or "solicitors" or both, depending on the jurisdiction. In most Australian states and in other jurisdictions, such as New Zealand, the one practitioner can be both barrister and solicitor. Only in Queensland do we still have what is called a "separate bar" for barristers. NSW requires a separate "practising certificate" for barristers. The other States and the two Territories have a "fused" profession. They still have an "independent bar" comprising lawyers who have chosen to practise only as barristers, even though technically they can fulfil both roles.

Idealism in lawyers

William Pitt, the great English politician, said; "Where law ends, there tyranny begins". The rule of law is a bastion against tyranny. Law and the legal system can, of course, be usurped and misused by tyrants and manipulators. For that reason a legal profession steeped in traditions of honour, integrity and independence from politics is vital. It must be a noble profession. If that nobility or integrity is attacked

from within or without, the attacks must be resisted. That does not mean that judges and their judgments should not be criticised. They, too, must be answerable and capable of answering criticism. Said Lord Atkin:¹⁰ "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

Successful counsel carry their integrity as their hallmark. It is a badge of their abilities and a recognition of the dignity of their profession. Counsel must not mislead the court. The prosecution must be frank but fair to the accused. The prosecution must call any worthwhile witness, whether the witness is useful for the prosecution or the defence, "or at any rate he must give [the witness's] name to the defence so that the defence can call him."¹¹

Most young people who take up law value justice. And experienced barristers and judges are still idealistic people - worldly-wise, cynical even, but pleased by a just result and angered by unfairness. Lord Hailsham thinks so:

"The advocate who has seen many cases has had his sense of justice acutely developed. He is slow to condemn the sinner. But he has come to love righteousness and hate iniquity".¹²

Justice Michael Kirby of the Australian High Court talks of his motives:

"I approach a life in law today as I did when I first entered it nearly three decades ago. With idealism - for the pursuit of justice, the assertion of fairness, the defence of human rights and obedience to laws worth respecting are ideals worthy of civilised people."

The clever advocate

South African statesman, Nelson Mandela was a skilled advocate. He could be flamboyant in the courtroom.

"I recall once defending an African woman employed as a domestic worker in town. She was accused of stealing her 'madam's' clothes. The clothing that was allegedly stolen was displayed on a table in court. After the 'madam' had testified, I began my cross-examination by walking over to the table of evidence. I perused the clothing and then, with the tip of my pencil, I picked up an item of ladies' underwear. I slowly turned to the witness box brandishing the panties and simply asked, 'Madam, are these ... yours?' 'No,' she replied quickly, too embarrassed to admit that they were hers. Because of this response, and other discrepancies in her evidence, the magistrate dismissed the case." Nelson Mandela, Long Walk to Freedom (Little, Brown 1994) at 133.

The unprepared advocate

"Sir Francis [the barrister] had a passion for music, and not infrequently warbled a few notes in Court. I can remember an occasion when he was conducting a prosecution before Lord Justice Fitzgibbon Sir Francis, debonair and heedless of all around him, opened his brief, possibly for the first time, as the witness was sworn, and the following somewhat unusual

scene occurred. 'Your name is Marmaduke Fitzroy?' 'It is not.' 'And you live at Rocksavage, on the Douglas Road?' 'I do not.' 'And you are a retired Army officer?' 'I am not.' [Lord Justice] Fitzgibbon had by this time recovered from his laughter at the first answer, which was hardly a surprise from the somewhat rough lips that had spoken it. 'Sir Francis, Sir Francis!' he cried, 'the witness doesn't agree with a word that you are putting to him!' Sir Francis lowered his brief, and for the first time caught sight of the coal-heaver who had been answering his questions, if questions they might be called. He looked at the ceiling, whistled a few bars of 'Let Erin remember,' looked at the witness again and said blandly: 'Then who the deuce are you? And what are you here to swear?' "

From Maurice Healy, *The Old Munster Circuit* (Michael Joseph 1939) 56-57.

¹ See E Greenwood, (1957) 2 *Social Work* 44.

² "The Client One Keeps" *The Washington Post National Weekly Edition* 14 April 1997 at 22.

³ [1967] 1 QB 443 at 502.

⁴ See similar comments by the great Australian Chief Justice, Sir Owen Dixon, in *Jesting Pilate*, Dixon's papers collected by Judge Woinarski (Law Book 1965) at 134.

⁵ See, generally, Rice, "Samuel Johnson, LLD, on Law, Lawyers, and Judges" (1977) 63 *American Bar Association Journal* 1217.

⁶ Mary Ann Glendon reports that, "The well-paid associates in many top [US] law firms are expected to bill a whopping 2,200 hours a year (7 hours a day, 6 days a week, 52 weeks a year) ... it often takes 9 to 12 hours in the office to yield 7 hours of billable time." *A Nation Under Lawyers* (Harvard UP 1996) at 30.

⁷ The admirable *Sackville Report of 1994* on "Access to Justice" paras 4.22ff favours advertising by lawyers except, of course, false, misleading or deceptive advertising.

⁸ The Association of American Law Schools issued *Learning to Serve*, the final report of its Commission on Pro Bono and Public Service Opportunities, in October 1999. It asserts that public service is an essential part of every lawyer's "partnership" with the community and should be at the core of the lawyer's practice in law.

⁹ *Ambard v Attorney-General for Trinidad & Tobago* [1936] AC 322 at 335 per Lord Atkin.

¹⁰ Lord Denning, *Landmarks in the Law* (1984 Butterworths) 16, citing *Dallison v Caffery* [1964] 1 QB 348 at 369: "If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish."

¹¹ *The Door Wherein I Went* (Collins 1975) at 100.