BRIEFING BARRISTERS:
TEN WAYS TO MAKE THE EXPERIENCE A HAPPIER ONE

The relationship between the Bar, and the solicitors' branch of the legal profession, is a symbiotic one - barristers and solicitors live off one another. It is obvious that barristers live off solicitors, since almost all of our work comes to us from solicitors. What may not be so immediately obvious is that solicitors are also very dependent on the Bar, particularly - but not solely - in the case of solicitors who practise as litigators.

It is, of course, possible for solicitors to survive in practice without briefing the Bar. Solicitors who practise exclusively in areas like conveyancing have little need of the Bar's services. Solicitors have a right of audience in all Queensland courts, and many solicitors appear as advocates, especially in the Magistrates Courts and in less complex matters (such as chamber applications) in higher courts. However, attempts by some firms, in recent years, to establish their own in-house advocacy services, have not been conspicuously successful.

In many parts of the Common Law world, the work of barristers and solicitors is performed by a single profession, such as in the United States and Canada. But in Australia, separate Bars have survived and prospered. Even in those parts of the country where the profession is legally "fused" - where legal practitioners are admitted as both barristers and solicitors - the great majority of complex litigation is still conducted by members of independent Bars. That this has occurred is a recognition of the fact that, by briefing members of an independent Bar, solicitors can add value to the services which they render to their clients.

Barristers do this in four ways:

(1) First, by providing expertise which the solicitor's firm does not possess. This expertise may relate to a specialised area of the law, such as intellectual property, or trade practices, or tax, or town planning. More generally, however, the Bar consists of specialist advocates, and very few solicitors have the opportunity to develop the level of advocacy skills and experience possessed by most barristers. One of the incidental advantages of our divided profession is that it allows smaller firms, including suburban and provincial firms, to access specialist knowledge and skills which allow them to compete on an equal footing with big City firms.

(2) Secondly, many solicitors find it advantageous to be able to obtain a "second opinion" from an independent legal practitioner. As a practical matter, few if any solicitors will refer a client to another firm unless they can feel complete confidence that the client will eventually come back. Since barristers do not deal directly with members of the public, a solicitor can retain a barrister to provide a client with specialist advice, without any fear that the client will be "poached".

(3) Thirdly, barristers can provide a very cost-effective service. The nature of practise as a solicitor demands a fairly high level of infrastructure - I understand that, for many firms, 75 or 80 cents out of every dollar billed to clients goes in staff wages and other overheads. Barristers, by contrast, operate with

reasonably low overhead and infrastructure costs. This means that barristers, and especially more junior barristers, can provide their services at a much cheaper daily or hourly rate than solicitors of equivalent standing.

(4) Fourthly, even if a case does not involve a particular area of legal specialisation, very few solicitors can obtain the amount of experience which most barristers have as in-court advocates. Of course, this is particularly relevant where a barrister is briefed to appear in court. But it is also relevant in other ways - for example, where a barrister is briefed to provide an opinion. The ultimate test of the correctness of any legal proposition is whether it will stand up in court. And it is difficult to assess whether a legal proposition will stand up in court, unless one has "hands on" experience of conducting cases in court.

The object of this morning's paper is to identify a number of considerations which will assist in making the experience of briefing counsel a happier one on both sides. I will say, immediately, that my motives are not entirely altruistic. It is as much for the Bar's benefit, as for the benefit of solicitors, that the relationship is a mutually satisfactory one.

More detailed guidance on this subject can be obtained from my paper, "Preparing Briefs Made Simple", which was published in the *Queensland Law Society Journal*, June 1991, volume 21, No.3, commencing at p.261. What appears here is really only a summary of what is contained in that article, updated in a few minor respects.

1. Select Counsel Appropriate for the Task

Many firms have a regular "stable" of counsel whom they usually brief. You may find that your firm ordinarily uses a particular barrister for personal injuries matters, a particular barrister for criminal matters, or a particular barrister for commercial matters. If your firm has a good working relationship with a particular barrister, that is a very good reason to use the barrister in any matter falling within the range of the barrister's experience or expertise.

But what happens when your firm's preferred barrister is not available, or a matter arises which falls outside that barrister's experience or expertise ? Or it may simply be the case that, because your firm does not do a lot of litigation, the firm does not have an established relationship with any member of the Bar. When choosing barristers, three factors should be taken into account: seniority, specialisation and experience.

It is as much a mistake to brief a counsel who is too senior, as it is to brief a counsel who is too junior. On the one hand, the barrister whom you normally use for "crash and bash" cases in the Magistrates Court may be somewhat out of his or her depth in a High Court appeal. The barrister may be flattered by the offer of such a brief, but you will not be doing any favours, either to the barrister concerned, or (more importantly) to your client.

On the other hand, seniority normally carries with it a higher price tag. Fee structures within the Bar are probably more variable than those of any other profession, ranging

from junior barristers who may charge as little as a few hundred dollars per day, up to the top QCs at the Sydney bar who reportedly charge as much as $12,000.00 per day. Your client will not thank you for briefing even a Brisbane QC - whose fees are much more reasonable than their Sydney counterparts - to do a case which could easily be handled by an experienced junior.

Specialisation and experience are separate but related concepts. A barrister may specialise in a particular branch of the law - say, personal injuries matters, or family court matters, or criminal matters, or local government matters - or perhaps something more esoteric, like intellectual property matters, or tax matters. This usually means that the barrister is very familiar with the statute and case-law relevant to the area of specialisation. This makes it particularly appropriate to brief such a barrister in matters involving an issue of law within the barrister's area of specialisation, whether it is a brief to provide an opinion, or a brief to argue the issue at first instance or on appeal.

However, even in matters not involving a specialist area of legal knowledge, it may be helpful to engage a counsel who has relevant experience. If, say, you are acting for the plaintiff in a medical malpractice action against a cosmetic surgeon, it may be appropriate to brief a counsel who has appeared in similar cases - not because the counsel necessarily has any specialist legal knowledge applicable to such a case, but simply because the counsel has experience in similar cases, and may be familiar with the factual issues likely to arise.

Choosing appropriate counsel should not be a matter of guesswork. In some cases, it may be appropriate to brief someone you know socially, or someone that you were at school or university with. But, in order to choose counsel best qualified for the task at hand, you may need to seek advice - from other lawyers in your firm, or from friends with other firms. If you have a good working relationship with a particular barrister - or if your firm has such a relationship - you should not hesitate to ask that barrister for a recommendation, if he or she is unavailable, or if the particular matter falls outside his or her area of practice.

2. Discuss the Matter with Counsel Before Sending the Brief

From time to time, all barristers receive briefs which simply arrive without any warning. Often this is fine. But sometimes, it is a problem - for example, because the barrister:

- Is not available at the times required;
- Is too busy to attend to the matter with reasonable promptness;
- Feels that the matter falls outside his or her area of experience and specialisation, or requires a more senior or more junior barrister;
- Has a possible conflict; or
- Is unwilling to accept the brief for reasons related to fees.

Commonsense will tell you that there are three situations where you must contact counsel before sending the brief. The first is where the brief requires an appearance on a particular day, so you need to ascertain counsel's availability for that day. The second is where paperwork is required urgently or within a limited period of time - for example, because a limitations period is about to expire - and you need to know whether counsel will be able to complete the task in sufficient time. The third is where a special arrangement is proposed in relation to fees: for example, if it is proposed that counsel be briefed on a "speculative" basis, or if only limited funds are available to pay counsel's fees.

However, it is a good idea always to contact counsel before sending a brief. Otherwise, various risks are involved: that counsel's fees may be higher than you anticipated; that counsel may take longer than you expect to attend to the matter; or that counsel may have to return the brief because of a conflict.

3. Specify on the Brief Precisely What Counsel is Instructed to Do

It is amazing how often briefs are sent to counsel, which do not state specifically what counsel is required or expected to do. Each brief should have, either on the front page or on the back sheet, a clear and succinct statement of counsel's instructions.

It is desirable that this should be informative, rather than cryptic. If the brief is a brief to appear, the notation should specify where counsel is required to appear, and when. If it is a brief to advise, counsel should be told what kind of advice is sought - is it advice on evidence, or advice on prospects of success, or advice on some specific legal issue.

4. Include "Instructions" or "Observations" as the First Item in the Brief

It is traditional for a brief to begin with the Instructing Solicitor's comments on the case, referred to as "Instructions to Counsel", "Memorandum to Counsel", or "Observations".

There is no set form which this document must take, and its contents will depend on the nature of the particular case.

However, matters which should generally be included are:

- A brief summary of the facts and issues, not descending to details (which should generally appear from witness statements and documentary evidence), but by way of a broad "over-view" of the case.

- Observations highlighting specific issues which are potentially problematic, including cross-references to witness statements and items of documentary evidence which are regarded as critically important.

- The results of any legal research which has already been undertaken, including reference to any statutes, regulations, by-laws, etc., which may be relevant; to any case-law which may be relevant; and to any legal arguments which may not be immediately apparent from the pleadings or other material in the brief.

Instructions are not intended to take the place of proper witness statements or "proofs of evidence". If the Instructing Solicitors are aware of relevant facts which may not emerge from witness statements, it may be convenient to mention these. But, except in the very simplest cases, it is unacceptable merely to summarise the client's instructions without furnishing a proper statement.

The instructions should also elaborate on precisely what counsel is instructed to do. In the case of a brief to provide an opinion, it is often useful for the solicitors to specify precisely the questions and issues which counsel is required to address. For example, in a brief to advise in connection with a "restraint of trade" clause in a contract for the sale of business, the instructions might conclude by asking specific questions, such as:

1. Is the "restraint of trade" clause void for uncertainty ?

2. If not, does the clause offend -

    (a) Any provision of the *Trade Practices Act* ?

    (b) The common law "restraint of trade" doctrine ?

3. If "yes" to any of the above questions -

    (a) Is that clause "severable" from the other provisions of the contract ?

    (b) Can the clause be "read down" to give it a more narrow operation ?

4. What are the consequences for our client if the clause is held either to be void for uncertainty, or to offend the *Trade Practices Act*, or the common law "restraint of trade" doctrine ?

5. What proceedings (if any) are available to our client, and if in which Court should those proceedings be brought ?

A list of the other matters which might be included in Instructions to Counsel is set out in the article previously mentioned, (1991) 21 Q.L.S.J. at pp.264-65.

5. Ensure that the Brief Includes Everything that Counsel will Need

This remark may seem self-evident, but again it is astonishing how often counsel are sent briefs from which critical documents are missing. In litigious matters, for example, there is simply no excuse for failing to include all of the pleadings, any relevant Affidavits, interrogatories and answers thereto, discovered documents, witness statements, and relevant correspondence.

One of the difficulties in preparing a brief is that you may not feel confident in judging whether or not a particular document is relevant. This is not a situation for applying the old adage, "if in doubt, leave it out". Unless you are completely satisfied that a particular item has no relevance whatsoever to the task which counsel has been briefed to

perform, you should include it. In the long run, it is much better to waste a few minutes of counsel's time reading a document which is only marginally relevant, than to take the risk that counsel's advice may be worthless because counsel did not have the opportunity to consider a document which he or she might regard as critically important.

6. Do Not "Load" the Brief with Material that is Entirely Irrelevant

At the other extreme, it is unfortunately very common for briefs to take the form of a photocopy of the entire solicitor's file. Providing counsel with too much material is almost as bad as providing counsel with insufficient material.

Some particular matters to look out for are these:

- In a litigious matter, there may be a number of chamber applications before the case is ready for trial. Some times, the documents relating to these chamber applications will be very relevant at trial: for example, if there has been an application for summary judgment, and the defendant has filed an Affidavit setting out the facts relied on in defending the case, this may be of great assistance to counsel in preparing to meet those grounds of defence at trial, and in cross-examining the defendant if the defendant's trial testimony conflicts with the contents of the affidavit. But documents relating to procedural chamber applications, such as an application to dispense with the signing of a Certificate of Readiness, are very unlikely to contain anything which will be useful for counsel at trial.

- Similarly, correspondence relating to purely procedural matters is unlikely to be of any help to counsel. A letter from a provincial firm to their town agents, merely asking the town agents to attend to the filing of the Writ of Summons, is a good example of what should <u>not</u> be included in a brief.

- Ordinarily, superseded documents - such as pleadings which have been amended - are likely to be more confusing than helpful. But this is not always the case. If amendments involve a radical change in the nature of a party's case, that may become relevant in cross-examination as to the party's credit. By contrast, if the amendments are merely a matter of "tidying up", counsel need not be bothered with the earlier version.

- It is extremely desirable to avoid the inclusion of multiple copies of the same document. In the course of interlocutory steps, a number of Affidavits may be filed each of which exhibits copies of the pleadings: if the pleadings appear at their proper place in the brief, it is unnecessary and wasteful to include additional copies as exhibits to various affidavits. It is worth remembering that the public - and especially sophisticated commercial clients - are becoming increasingly conscious of the way that some firms treat photocopying charges as an important "cost centre" in charging their clients. On a taxation of costs, a firm is unlikely to be renumerated for providing counsel with more than one copy of relevant documents.

You should have the courage to be ruthless in omitting material from the brief which is clearly irrelevant. The inclusion of unnecessary documents wastes time and money, and can contribute to confusion and delay on the part of counsel. This does not, however, detract from what I said earlier: if you have any doubt as to the possible relevance of a particular document, you should include it in the brief. Often, it turns out that a document which appears at first sight to be of only tangential relevance can take on added significance during the course of a trial.

7. Arrange the Brief in a Logical Order

The two golden rules for preparing a brief are these:

(1) First, except in the very simplest of cases, the brief should be divided into separate sections, each containing documents of a like kind: for example, one section containing instructions to counsel; another section containing the pleadings; a third section containing other court documents; a fourth section containing witness statements; a fifth section containing expert reports; a sixth section containing discovered documents; and a seventh section containing correspondence. Other categories which may be relevant in appropriate cases include previous instructions to counsel, and counsel's previous advices; loss adjusters' reports; documents obtained by third party discovery; documents pertaining to related litigation; and so on.

It may also be appropriate, in some cases, to have sub-divisions within the divisions that I have mentioned. For example, in the "pleadings" section of the brief, you might have a sub-division for the current pleadings, and a separate sub-division for superseded pleadings. If expert's reports have been exchanged, you might have a separate sub-division for the reports of experts retained by each of the parties; and if different areas of expertise are involved, you might have a sub-division for the reports of medical experts, another for the reports of engineering experts, and another for the reports of accounting experts.

(2) The second golden rule is that, except in the most unusual circumstances, "the only logical order is chronological order".

Some other considerations relevant to the physical format of a brief are these:

- It is <u>vital</u> that the brief be sufficiently secure to prevent pages coming adrift.

- The form of binding should be such as to allow the brief to be opened, and left open, at a particular page.

- Especially where it is anticipated that there may be further documents to be added to the brief, it is helpful if the brief is in a form (such as "ring binder") which allows pages to be inserted and removed easily.

- It is more convenient for a brief to comprise a number of small volumes, than one large volume, as smaller volumes are easier to manage, and facilitate cross-

referencing between various sections of the brief.

- Where a brief is divisionalised, and if the brief is not big enough for each division to occupy a separate volume, cardboard “dividers” or the like should be used to separate the divisions.

- Where a ring-binder or lever-arch file is used, documents are more manageable if each separate item is stapled together.

- Except for the very smallest briefs, all briefs must be indexed and paginated. If the brief is divisionalised, it is sometimes convenient for each section of the brief to be separately indexed and paginated.

- It is essential to ensure that all documents incorporated in the brief are copied as legibly as possible. Often, by the time that a document finds its way into a brief, it is a third or fourth generation photocopy. Sometimes this can’t be avoided; but where possible, the effort should be made to ensure that all copies contained in the brief can be read.

Finally, but most importantly, it is extremely imprudent to include original documents - such as title deeds, mortgages, signed contracts, and the like - in a brief to counsel. There is always a risk that such documents may go astray, and it must be understood that barristers simply do not have the facilities to keep such documents in safe custody.

If a document is unsuitable for photocopying - such as a colour photograph, or a blueprint of a building plan - proper reproductions should be obtained and included with the brief, rather than providing counsel with originals.

8. Prominently Highlight Matters which Counsel Should Note

Solicitors like to brief what are termed “fashionable” counsel - that is to say, barristers who are good at their job, or at least have a reputation for being good at their job. This means that “fashionable” counsel become busy, and are often juggling briefs while they try to finish opinions and other paper-work between court appearances.

If there is something that counsel should know about as soon as he or she receives the brief, it should be marked on the outside of the brief, preferably in large red lettering. Otherwise, there is a risk that the brief will wait in the barrister’s queue of pending briefs, until he or she gets to it - by which time it may be too late.

This is particularly important if there is some finite time-limit, such as a limitations period due to expire in the near future. But there are other things which should also be highlighted, where appropriate. This includes:

- Any “out of the ordinary” arrangement concerning fees: for example, if the brief is delivered on a “speculative” basis, or it if is a “Legal Aid” brief for which a scale fee applies, or if limited funding is available.

- It is also desirable to identify, on the outside of the brief, trial dates or dates of other forthcoming court appearances. This enables the barrister, or the barrister's secretary, to ensure that the correct dates are in the barrister's diary, and conflicting engagements are not accepted.

- It is extremely helpful to identify, either on the cover of the brief or at a prominent point within the brief, the individual within the briefing firm whom the barrister should contact if it is necessary to discuss the matter. This should include, where possible, that individual's direct telephone number, and email address.

- If more than one barrister is briefed in the same case, the brief should also identify (preferably on the outer cover) the name of the leader or junior, and contact details.

Other matters which should be readily apparent on the face of the brief include the name of the barrister who is being briefed (this may seem silly, but it helps to avoid confusion when the brief is delivered to chambers occupied by several barristers); the name and contact details (including postal and/or DX address, telephone and facsimile numbers, and email address) of the briefing firm; and the name of the matter, so as to identify both the briefing firm's client and any other party, in such a way that the barrister can immediately identify if he or she has a possible conflict.

I understand that both Law Society and Bar Association statistics confirm that most disputes between counsel and solicitors fall into two categories: disputes over fees, and complaints about delay on the part of barristers. The risk of any such disagreement is greatly reduced, if any special requirements are clearly identified by the briefing firm to the barrister. If there is a "deadline" applying to the task for which counsel is briefed, or if any "out of the ordinary" arrangement applies in respect of fees, the solicitor is on very firm ground if these arrangements are immediately apparent on the face of the brief.

I should add that the risk of unfortunate misunderstandings can also be reduced, by the instructing solicitor maintaining contact with counsel. If you deliver a brief clearly identifying the date on which a limitation period will expire, you may be justified in arguing that it is counsel's fault if counsel does not return the brief in sufficient time to issue proceedings before that date. But this will not be of much comfort to your client, nor will it necessarily protect your firm from an action for professional negligence. The barrister will not be offended if you ring up, a few days before the due date, and enquire as to progress - or even leave a message with the barrister's secretary to remind him or her of the due date. This may save a lot of embarrassment for yourself, your firm, and the client - not to mention the barrister.

9. Arrange Conferences where Necessary or Appropriate

Conferences are of two kinds.

First, there are pre-trial conferences where the barrister meets the client and other witnesses, discusses their evidence, and - without "coaching" them as to what they

should say - offers them advice as to the manner in which they may give their evidence. Such conferences are essential in almost every case where witnesses are going to give oral testimony.

Sometimes, conferences are also arranged so that counsel can be briefed, and give advice, in conference. Generally, this is not a particularly satisfactory arrangement, and it would be my recommendation that it not be attempted except in cases of urgency, or where advice is sought on a very narrow issue.

Some points should be noted in relation to both kinds of conferences:

- It is inappropriate for counsel to confer with a lay client, or witnesses, without the instructing solicitor's firm being represented at the conference.

- A conference is <u>never</u> a substitute for a proper witness statement, or proof of evidence. For a barrister to meet with a client or witness, without a proper statement, in order to ascertain what (if any) relevant evidence the client or witness can give, is a time-consuming and expensive process, the results of which are generally unsatisfactory.

- Conferences with witnesses should be arranged at different times, so there can be no suggestion that one witness has been "coached" by over-hearing another witness's potential testimony.

- Conference times should, of course, be arranged with counsel well in advance. In particular, pre-trial conferences should be arranged well prior to trial. The idea of having counsel meet the client and other witnesses, for the first time, on the morning of trial, is unsatisfactory for everyone concerned.

10. Ensure that the Situation Regarding Fees for Counsel is Clearly Understood

As previously mentioned, disputes relating to fees are one of the two main sources of disagreement between solicitors and members of the Bar. Such disputes can be minimised, if not totally avoided, by ensuring that the situation is clearly explained and understood.

If counsel is being asked to accept instructions on a "speculative" basis, this should be discussed before the brief is delivered, and clearly stated on the brief. If counsel agrees to accept a brief on such a basis, it is prudent to enter into a "speculative fee agreement" in writing, which should be signed by the client.

If the fee is a fixed one - such as a Legal Aid "scale" fee - or has been negotiated in advance, this should be clearly confirmed with the brief.

The responsibility of paying counsel's fees rests with the instructing solicitor. If you have any doubts about the client's ability to pay, or indeed about the client's willingness to pay, you should ensure that you have funds "in trust" before counsel is briefed.

It is also the ethical responsibility of solicitors to remit funds to counsel, as soon as counsel has performed the work for which he or she was briefed, and the money has been provided by the client. There have been cases in which a solicitor has been held to be guilty of unprofessional conduct, by retaining money in the solicitor's general account which was intended to pay counsel's fees.

From time to time, problems arise in relation to paying counsel's fees, either because the client is not forthcoming with funds, or because funds held from the client prove to be insufficient. In such a case, it remains the professional responsibility of the solicitor to pay counsel's fees, even if the firm has to pay those fees from its own resources. But if it is clear that the problem is not the fault of the instructing solicitor, and if the instructing solicitor is taking appropriate steps to recover money from the client, most barristers will be willing to wait so long as the situation is clearly explained to them. If you have such a problem, the first step is to discuss it with the counsel involved, and ascertain whether he or she is prepared to extend an indulgence. Unless you can come to some satisfactory arrangement with counsel, there is a risk that your firm's name may be placed on the "Private List" maintained by the Bar Association.

If, on the other hand, there is a genuine dispute about counsel's fees - if you consider that counsel has charged too much, or charged for work which was not properly performed - a "protocol" exists between the Law Society and the Bar Association to deal with such matters. It is important that you articulate your concerns, in writing, promptly after receiving counsel's Memorandum of Fees. If you do not do so, you may not be able to take advantage of the "protocol".

Conclusion

I concluded my 1991 article in the *Queensland Law Society Journal* by saying this:

> "If in any doubt as to what should be included in a brief, the obvious course is to ask the barrister for whom the brief is intended. It takes only a five-minute phone call to enquire (for example) whether counsel wants to be briefed with copies of each of the 3,000 invoices upon which a creditor relies in an action against a debtor. Articled Clerks and young solicitors might well profit from occasionally asking barristers whether the briefs which they prepare are satisfactory, and whether there is anything which can be done in the future to improve their usefulness: I think that I can speak for the great majority of the Bar, in saying that we would be more than happy to assist in that way. In my experience, the standard of briefs prepared by my solicitors in Queensland is generally very high, but it is in the interests of both branches of the profession, and our clients, to improve those standards, or at least to ensure that they are consistently achieved."

Those remarks are as true, today, as they were eight years ago.