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# BRIEFING COUNSEL EARLY IN LITIGATION
# A JUDGE'S PERSPECTIVE

By

**His Honour Judge Josh Wilson**

LLM, PhD, QC, Professor of Law Deakin University

Judge of the Federal Circuit Court of Australia

## INTRODUCTION

1. Little sends a colder chill down the judge's spine than learning at an important juncture in the case (for example, at an early directions hearing or on the return of an important application) that the legal representative then appearing has no understanding of the case, or worse, is turning a good case into soup.

2. Not only is that court event likely to be wasted, but it foretells of the way ahead in the conduct of the case. Not a good start, you may think.

3. *"If only counsel had been briefed early"*, the judge sighs.

## A CONTEMPORARY PROBLEM

4. More and more in court I see the emergence of a phenomenon that did not exist 40 years ago – the solicitor who does his or her own appearance. Granted, that is better than a litigant in person but it is a long way short of having the benefit of counsel. Of course, I am speaking in generalities here because not every solicitor advocate is necessarily poor nor is every barrister good. But barristers are, in very large measure, trained to know what judges want. Usually they have instant, succinct answers to the questions that judges need answered such as –

   a) "what is this application about?";

   b) "how long will this application take?";

   c) "how many witnesses are you actually calling?";

   d) "what is the value of the pool?";

   e) "what is your attitude towards a private mediation being ordered?"; and

   f) "what are the issues which I as the judge must determine in this litigation"?

5. In my experience, rarely does the solicitor advocate come to court prepared with the answers to those questions.

6. No one in the law in the year 2017 is oblivious to the fact that litigation is exquisitely expensive. In commercial cases, most clients see expensive litigation as being disproportionate to the gain to be derived from it. So, wherever possible, they settle thereby containing the costs within manageable proportions. In other jurisdictions clients allocate a fixed sum for the whole of their litigation and leave it to the legal practitioners to apportion that sum. In that model, barristers are often frozen out altogether.

7. It is false economy of the highest order to cut barristers out altogether or to only include them when it is too late.

8. Barrister should, and must, be briefed early in litigation.

## WHAT A BARRISTER BRINGS TO LITIGATION

9. It seems to me that a barrister brings at least four elements to all litigation –

   a) knowledge of the law;

   b) independence;

   c) court craft; and

   d) long-term economy.

10. Let me take each in turn.

### *Knowledge of the law*

11. As to knowledge of the law, of course, very many solicitors have a deeper understanding of the law. In some fields such as competition law or takeovers, the better operators have become market leaders and in large measure they come from the ranks of solicitors. But their knowledge of the law in their field will not, of itself, equip them to present a case in court. If asked, they would probably agree.

### *Independence*

12. Independence is a characteristic that members of the Bar enjoy over other legal practitioners. Among other things, it allows barristers to make the hard decisions without fear that the client relationship will be

compromised. It enables the barrister to conduct the case without dictation from the client. That independence enables barristers to advise their clients of the most legally advantageous tactic or outcome, to tell their clients when the case is hopeless and to do so without fearing the wrath of the client (mainly in the form of taking ongoing highly remunerative work elsewhere). Except with institutional clients, unlike solicitors barristers rarely enjoy long-term relationships with their clients.

13. In court, that independence enables the barrister to formulate the most effective, timely and cost efficient strategy.

14. That is to the obvious benefit of the client.

15. With direct briefs, the client receives a one-stop-shop for his or her needs, invariably supremely cost effectively. The client gets advice then a court appearance from a specialist advocate. However, current rules of practice limit direct briefing mainly to criminal matters, to specialist professional bodies and to some instances of family law.

### *Court craft*

16. Since the early 1980s in the State of Victoria, Australia, barristers are accredited specialists in advocacy. They are required to submit themselves to specialist training, specifically in the art of advocacy. Solicitors, even solicitor advocates, are not so trained nor are they required to complete a period of specialist training in court craft. In more recent years, prospective barristers are required to sit an entrance exam before being accepted by the Victorian Bar and thereafter, graduates from that examination are trained to become specialist barristers.

17. Barristers are trained in all aspects of court craft from interlocutory applications (contested and uncontested), undefended hearings, pleas, trials, appeals, directions, mentions and so on.

18. For the client, that translates to an immediate, efficient analysis of the problem to hand and the presentation of the client's case properly modified to reflect the nature of the hearing. In monetary terms, that saves the client enormous sums because it avoids wasteful, ill-directed preparation and unstructured presentation.

### *Long term economy*

19. For reasons developed below, long term, clients are much better served in consulting the barrister early. Effective strategic advice and a time and cost efficient strategy can thereby be devised.

## BREIFING EARLY – FROM THE COURT'S PERSPECTIVE

20. From the court's perspective, the biggest advantages in briefing a barrister early are –

    a) early identification of the real issues that need to be determined;

    b) an understanding of the evidence that needs to be adduced so as to obtain the relief the client seeks in his, her or its case;

    c) an understanding of court procedures that enables the case to be heard and determined quickly so that the legal spend (as it has come to be known) is kept within reasonable bounds;

    d) a detailed understanding of the relief achievable;

    e) a detailed understanding of legal principles relevant to monetary amounts in issue; and

    f) where expert evidence is involved, the extent to which the expert purports to give evidence beyond the scope of his or her expertise, in accordance with *Desreef Pty Ltd v Hawchar* (2011) 243 CLR 588.

21. Counsel will tell the judge in realistic terms –

    a) how many witnesses will be giving evidence and on what issues;

    b) whether complex pleadings will accelerate the case or bog it down;

    c) whether evidence in chief should be *viva voce* in preference to witness statements or affidavits;

    d) the likely duration of cross examination of the main witnesses; and

e) whether any aspect of the case calls for separate attention such as an expert hot tub, referral of a point to a special referee and so on.

22. Briefing counsel early also reduces an all-too-common phenomenon nowadays of the case being conducted throughout the whole of its interlocutory phases by the solicitor then when counsel is briefed for the trial, the real issue to be run is exposed for the first time.

23. Sadly, it is no exaggeration to say that in my early days on the bench, I used to see that with such frequency that I converted the first directions hearing into a case management conference. Some of the questions I needed answered were not in fact answered so I probed very deeply into the point with solicitors who then appeared. Counsel then began appearing and nowadays, cases are set on the right course from day one. That has had the advantage of reducing, if not eliminating, costs thrown away orders as well as applications to vacate trial dates.

## BREIFING EARLY … BUT TO DO WHAT?

24. In addition to briefing counsel to appear at an early directions hearing or case management conference, counsel should be retained early to provide –

a) advice on evidence;

b) advice on liability; and

c) advice on quantum.

### *Advice on evidence*

25. The advice on evidence will shape the evidentiary approach to the case, usually preventing every rabbit from being chased down every burrow. Instead, only the evidence on the real issues that fall for determination will be pursued. This is a critical matter.

### *Advice on liability*

26. The advice on liability will enable an informed decision to be made on the threshold point of whether to run the case to judgement or whether to settle and if the latter, on what terms. This too is a critical matter.

### *Advice on quantum*

27. The advice on quantum is essential, no matter for which party counsel is retained. For the plaintiff, the advice will indicate the likely range of recoverable damages. For the defendant it will indicate the likely range of exposure. Parties need to have realistic figures in order to advance their cases, whether as plaintiffs or defendants, applicants or respondents.

28. Solicitors are usually too close to their clients to objectively advise on those issues. Barristers' objectivity through their independence enables them to advise their clients on all those issues and to do so in a way that will not compromise the solicitor-client relationship.

29. Very often, clients need to be told what they may not want to hear. Barristers have no problem delivering that news.

## WRAP UP

30. In all the jurisdictions in which I sit, the grim reality nowadays is that solicitors are doing more and more appearances. In my court, at any given time each judge has about 500 cases under management. On any view, that caseload is enormous. Each day, most judges deal with up to six cases for mentions or directions. On top, they deal with up to four cases for trial. That is each and every day. They simply do not have time for wasteful, ill-directed, off-topic, indulgent, unfocused, meandering antics by legal practitioners in the case. Judges in my court, as in every court around the world expect – dare I say require – anyone and everyone who appears before them to have a developed understanding of the case. Without that, those practitioners add no value whatsoever to the client's cause.

31. A case in which counsel is briefed early is a case more easily tried.