LAWYERS AND UNPOPULAR CLIENTS

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I. INTRODUCTION

A few months ago I received a copy of the American Bar Association's litigation newsletter and was interested to read an article about recent criticism of lawyers who have worked for Guantanamo detainees. The article focussed on Liz Cheney, who is a lawyer and the daughter of former Vice President Dick Cheney. She leads a group called "Keep America Safe" which has questioned the "values" of several lawyers who represented detainees and are now working in the Obama Justice Department. She has suggested that those lawyers cannot be trusted to work for the Government.

United States Attorney-General Eric Holder delivered a forceful and accurate rebuttal of Ms Cheney's assertions. He said:[1]

> Lawyers who accept… professional responsibility to protect the rule of law, the right to counsel, and access to our courts – even when this requires defending unpopular positions or clients – deserve… the praise and gratitude of all Americans. They also deserve respect.

He continued:

> Those who reaffirm our nation's most central and enduring values do not deserve to have their own values questioned… [L]awyers who provide counsel for the unpopular are and should be treated as what they are: patriots.

Mr Holder is right. All this got me thinking that it would be a good idea to set out today what I see as an important duty of any counsel in New Zealand: the duty to be independent. Some recent media coverage of certain criminal trials in New Zealand has convinced me that there is some misunderstanding amongst the public about the role of barrister or solicitor. It is time that role was clarified.

II. LAWYERS AND UNPOPULAR CLIENTS

Lawyers must be independent. This is stated specifically in Chapter 5 of the Lawyers Conduct and Client Care Rules. Those rules also say that a lawyer must be free from compromising influences or loyalties when providing services to his or her clients. So a lawyer's role is to serve a client rather than his or her own popularity or profile. It is about the client and his or her case, not about whether you can get into the media at every possible moment to comment on the legal issues of the day.

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* Attorney-General for New Zealand. Minister for Arts, Culture and Heritage and Minister for Treaty of Waitangi Negotiations. Speech given at the University of Waikato Law Faculty, 7 May 2010.

1 Eric Holder "Address to the Pro Bono Institute" (Washington DC, 19 March 2010) <www.justice.gov/ag/speeches/2010/ag-speech-100319.html>.

Lawyers serve their clients, the courts and, more broadly, the rule of law. A lawyer's independence is reflected in the fact that he or she will be available (and in some cases obligated) to represent anyone who is able to pay their fees. This is the cab rank rule.

The modern incantation of the cab rank rule in New Zealand is stated in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Those say that a lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice.

The New Zealand cab rank rule places a high demand on lawyers. Unlike in some other jurisdictions, it applies both to barristers and solicitors. It is not part of the American Bar Association's Model Rules of Professional Conduct, which do not require a lawyer to undertake any particular retainer. Rule 1.16(b)(3) expressly permits withdrawal from a case where the lawyer considers a client's objectives repugnant or imprudent.

In New Zealand, good cause to refuse includes:

> Lack of available time;
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> The instructions falling outside the lawyer's normal field of practice;
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> Instructions that could require the lawyer to breach any professional obligation;
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> The unwillingness or inability of the prospective client to pay the normal fee of the lawyer.
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> Further, in New Zealand, a lawyer who declines instructions must give reasonable assistance to the person concerned to find another lawyer.

The existence of the cab rank rule has contributed in common law countries to a tradition of representing unpopular clients and sometimes unpopular causes. This is a tradition we must uphold. It is a tradition extending as far back as Cicero who in 56 BC gave an entertaining and successful defence of his former pupil, Marcus Caelius Rufus, against Clodia's charge of attempted murder. Cicero would often represent defendants in the courts on charges ranging from bribery to murder.

We can take the example of John Cooke, the first Solicitor-General of the English Commonwealth, who led the prosecution of King Charles. This was a prosecution rather than a defence, but I think we can say it was subsequently considered to be unpopular, at least by King Charles II. For his efforts, Cooke was convicted of regicide and hanged, drawn and quartered. Incidentally, Cooke is often credited with the creation of the cab rank rule.[2]

John Adams was the second President of the United States. I recommend David McCullough's biography of Adams, which is a fine piece of writing and has been instrumental in a reassessment of Adams' contribution to his country.[3] Adams was, among other things, a fine advocate. One of the most famous trials in which he was involved was the trial of five British soldiers accused of murder after opening fire on a crowd in Boston.

Some of you may have seen the recent HBO series called John Adams. It depicted the Boston Massacre trial at some length but, in reality, Adams' defence of the British soldiers took place quite differently.

The British soldiers' cause was an unpopular one. In fact, the soldiers had great trouble finding a lawyer to represent them. Many lawyers would not do it for fear of harming their own reputa-

2 See Geoffrey Robertson *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (Pantheon, 2006).

3 David McCullough *John Adams* (Simon & Schuster, 2001).

tions, such was the public animosity towards the men. Nonetheless, in the interests of justice, and perhaps because he knew what the role of a lawyer should be, John Adams agreed to represent the men.

Adams later wrote in his diary that he only earned a very small fee: [4]

> in the most exhausting and fatiguing causes I ever tried: for hazarding a popularity very general and very hardly earned: and for incurring a clamour and popular suspicions and prejudices, which are not yet worn out and never will be forgotten as long as history of this period is read.

He continued, however, that: [5]

> the part I took in defence of Captain Preston and the soldiers, procured me anxiety, and obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country.

Closer to home there are plenty of instances in New Zealand where lawyers have had to defend unpopular clients. Take PJ O'Regan, who defended Bishop Liston in his 1922 trial for sedition. Liston had given a speech at the Auckland Town Hall where he called the Easter Rising "glorious" and praised the Irish Revolution. Both Liston and O'Regan were pursued by the New Zealand Herald, despite the not guilty verdict.[6]

In more recent times, one can think of Wellington QC George Barton, who acted for Roy Parsons in 1970 when he applied for a writ to stop the All Blacks' tour of South Africa. Barton is the same person who acted for Fitzgerald in the landmark case against Sir Robert Muldoon and in numerous other cases where people were challenging the establishment.

Another client of Barton's was that very unpopular litigant, the Victoria University Students' Association.[7] In 1973, Dr Barton was the lecturer in civil procedure at Victoria University. The Government Printer refused to make copies of the old code of civil procedure (the forerunner of the High Court Rules) available, so Dr Barton commenced proceedings in the name of the VUWSA against the Government printer and sent them a writ of mandamus.

These are a few cases that come to mind. I can also think of several recent examples of criminal trials where criticism has been levelled by the media against counsel for the defendant, although I don't want to discuss them in my remarks today.

III. The Independent Lawyer

The point of this historical excursus is to illustrate the point that lawyers have a duty to be independent and fearlessly represent their clients. It helps explain why Ms Cheney's attack on the Guantanamo lawyers was unprincipled, crude, and just plain wrong.

People sometimes use the term "hired gun" (and I have heard worse terms) to explain the lawyer-client relationship. The "hired gun" metaphor has been described as characterising the lawyer as entirely professionally committed to the client's cause without any moral commitment.

I was talking to a colleague in Washington last week who told me about a case where a lawyer was required to defend a man described as a Satanist – a prospect which made her slightly uncom-

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4 See John Adams *Diary and Autobiography of John Adams* (LH Butterfield (ed), Harvard University Press, 1961) at 79.

5 Ibid.

6 A very good account of Liston's life is Nicholas Reid *James Michael Liston: A Life* (Victoria University Press, 2006).

7 *VUWSA v Government Printer* [1973] 2 NZLR 21.

fortable. As was her duty, she nonetheless represented him and was relieved to find out from him afterwards that he was not actually a Satanist but instead only a warlock.

The idea of the "hired gun" approach has been criticised as promoting the conception that lawyers are not morally responsible for their own conduct in furthering their client's case and that, "even if they engage in deception or bullying, they are absolved from any wrongdoing provided no rules are broken".[8]

I think the "hired gun" approach can be taken too far, but I think it at least serves to illustrate that a lawyer does not assume the morals or beliefs of a client when he or she agrees to represent that client. The lawyer may or may not privately share those beliefs: that is immaterial.

I think we must be extra careful not to criticise lawyers unfairly just because a case or client may be unpopular. This is not to say a case may not be untenable or that lawyers do not have a duty to the Court. Nor does it excuse a lawyer from taking care in the presentation of arguments, or from their professional obligations in respect of meritless or untenable claims.

Politicians and the courts must respect and protect the independence of lawyers as they carry out their functions. The independence of lawyers needs to be protected zealously. I have a very special responsibility to ensure that happens because I am the head of the profession.

Unfortunately, many people do not understand the responsibilities of the advocate. They cannot accept, or are ignorant of, the responsibility of the lawyer to be independent. A lawyer does not condone or endorse the actions of a client simply through representing them.

Being a lawyer is not about choosing sides. You can be on the same side as a lawyer in one case and then work with the same lawyer on a different case. You can be friends with someone and yet be opposing counsel.

Our system of law, both in theory and in practice, rests on the professionalism and independence of counsel. Everyone has the right to representation, even if they or their cases are unpopular.

Lawyering is a profession, and with that profession comes obligations. One of those obligations is to ensure the duty to be independent, impartial and available for instructions. This principle must sit of the heart of the justice system if we are to ensure access to justice for everyone.

8 Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (Butterworths, 2000) at 33.