Fusion

A Findlay SC, Durban Bar

Historical background

In Roman times the functions of the present-day advocate and attorney were separate, and those of the former were performed by persons (described variously as *patroni, oratores* and *advocatos*) who undertook to assist litigants in court by speaking on their behalf. Attorneys fell into two categories, those who were employed by a litigant to assist in the conduct of the law suit (*atturnatus judicialis* or *procurator ad causas*) and those who acted as an agent or adviser to assist in the transaction of business (*atturnatus extra-judicialis* or *procurator ad negotia*). The distinction was also observed between the *advocatos* who spoke for the client in court and the *atturnatus judicialis* who merely represented the client.[1]

This distinction persisted, and in the days of Charlemagne the functions of the advocate were performed by a person known as a *causidicus.* The title *advocatos* apparently applied only to persons who were defenders or patrons of the church.[1]

This distinction continued and was recognised in Holland in the days of Roman-Dutch law, when persons who practised as advocates were required to have the qualification of *doctor utriusque juris* from any Dutch university; they had duties and privileges similar to those of an English barrister. Likewise, the function of attorneys from the 16th century onward in Holland was similar to that of the modern-day attorney with regard to the preparation of the client's case.[1]

It is not without interest that in Roman times advocates performed their services gratuitously, although monies were paid to them disguised as loans. During the reign of Claudius, the charges of advocates had become so excessive that the Consul Silius proposed that the provisions of the *lex Cincia* be renewed to compel advocates to render their services free of charge. Attorneys, too, were accused of encouraging useless litigation and at the time of Charlemagne a *capitulare* of 802 AD prohibited litigants from pleading through the agency of an attorney except in such cases as the judge thought fit; this prohibition lasted for some considerable time. In Flanders during the Middle Ages attorneys were only permitted to represent "unmarried women, priests, clerks, children and persons so old that they have no sense left to them".[1]

Huber[2] mentions that the profession was fused in Friesland in order that legal rights should be more cheaply obtained, but goes on to say that although this system prevailed in the inferior tribunals and before the courts, such practitioners could only enjoy the status of attorneys. They were regarded as being without learning and given the name postulants since those learning were known as *postuleeren,* being those who had the necessary qualification and who practised before the superior court. Postulants had been admitted to practise before the inferior tribunals, but did not actually have the right to practise before the superior courts.

The Natal experience

Before Union a divided Bar and Side Bar was to be found in all the colonies as well as initially in Natal, although from 1845 a system of dual practice was adopted as a temporary expedient to meet the difficulties caused by the dearth of professional men.[3] A resolution was passed at the Judges' Conference held in Cape Town in January 1932 that it was desirable that the dual practice system prevailing in Natal be terminated as soon as might be reasonably possible, subject to due provision being made for the interests of existing practitioners.[4] This was followed by a new rule of court made by the Natal Bench in 1932 permitting the continuation of dual practice until 30 June 1937, when practitioners would be called upon to elect which branch of the profession they would abandon.[4] The actual division of the Bar took place on 30 June 1937 without there being any saving in relation to the rights of dual practitioners. That led to the investigation of the issue by a Parliamentary Select Committee chaired by the Honourable Jan H Hofmeyr, before whom the evidence of interested persons was led.

When I had occasion to speak at the recent National Bar Conference on 7 April, I quoted extracts from the report of this Committee.[5] The principal problems put before the Select Committee included:

(a) that of the "dummy junior" (i.e. the attorney who appeared and claimed a fee as junior counsel to a leader and who did little or no preparation);[4a]
(b) that of young advocates who would be deprived of the opportunity of getting enough work to enable them to make a living or gain the experience they needed;[4b]
(c) the judges' finding that dual practitioners were not really qualified because they did not do sufficient court work to gain the necessary experience, or for other reasons;[4c]
(d) the resolution of the Judges' Conference in 1932 that it was not in the public interest for the system of dual practice to continue;[4d]
(e) the fact that attorneys were able to indulge in speculative litigation because they could act as counsel without having to get

money from the client for counsel's fee.[4e]

The rights of dual practitioners in Natal were preserved by Act 27 of 1939, which provided that those who were entitled to practise as at 29 June 1932 as advocates and as attorneys, or who became so entitled on any subsequent date not later than 30 June 1937, were permitted to continue to exercise the right of dual practice. This right was one conferred on the practitioners for life, and when I did my articles of clerkship with my father I worked in the family practice of which my grandfather and father were the sole partners. Each of them enjoyed this right, my grandfather as falling into the first category and my father into the second category, being one of a group of candidate attorneys who were known colloquially as "the 40 thieves". Both their respective rights were challenged but upheld in the series of cases which culminated in the decision of the Appellate Division.[6]

Cost of litigation

One of the main arguments advanced in favour of fusion is the contention that this will result in considerable cost savings. As a bald statement it sounds attractive but does not really bear closer scrutiny. Having regard to the different functions of the two branches of the profession in litigation, an examination of the tariff of attorneys' fees to be found in Rule 70 of the Uniform Rules of the Supreme Court reflects that many items are not purely time-related but are intended to be remuneration for a particular function (regardless of how long it may take) or the end product of the work (Chapters B - attendance and perusal, C - attendance (formal), and D - drafting and drawing). Part of the difficulty experienced when comparing fees charged by counsel with those for what might be said to be similar or comparable work by an attorney is occasioned by this difference in emphasis. From my experience (albeit somewhat outdated) of drawing and taxing bills whilst still at the Side Bar and where the services of either my father or grandfather were employed as counsel, I found no appreciable saving at all. An extra copy of the papers was made as a brief to counsel, in any event, and I would attend court in place of the attorney, with the end result that the only measure of saving, since I was an articled clerk, was the lower fee for my time whilst in attendance (i.e. had counsel at the Bar been conducting the matter and had I attended in place of a qualified attorney - which did happen on occasion - the cost was the same). The position is not markedly different today since counsel (normally junior) often find that an attorney is himself unable to attend the hearing personally and will send a suitably experienced articled clerk.

The rate charged, for example, from time spent in conference or consultation is not markedly different, since senior counsel at the Durban Bar charge a fee in the range of R120,00 to R150,00 per half hour, which compares with the fee charged by senior and experienced commercial attorneys for their time when dealing with non-litigious commercial matters. I do not see the latter as unwarranted at all, since a senior and experienced commercial attorney working in the field of his expertise is fully entitled to require the client to pay what he considers an adequate fee for his time. Although the client may pay a higher rate for a more experienced or specialist practitioner in a particular field, this does not mean necessarily that the client is paying more for the service; an expert may, within one or two hours, arrive at the correct conclusion and advise the client accordingly, whereas a less experienced or skilled practitioner in the field might require considerably more time to do so.

The notion of in-house counsel being less expensive than independent members of the Bar is also not one, I think, which bears closer examination. Firstly, those skilled practitioners who have developed considerable ability will continue to command what they consider to be reasonable remuneration and, if employed in a partnership, will not necessarily be prepared to take any appreciable drop in that remuneration. Secondly, once such a specialist is so employed, the volume available in that firm may or may not be sufficient to keep him active full-time, which may result in pressure being brought to bear from his fellow partners when discussing turnover at partners' meetings in order to measure whether or not each partner is paying his way.

The specialist, too, will not necessarily perform less remunerative or menial functions and will require assistants to do so. This, I think, is aptly illustrated by a story recounted to me by a member of the Johannesburg Bar and which has the ring of truth: A large multi-national corporation required specialist legal advice on the tax implications of certain transactions, both in South Africa and in the United States of America. A leading senior Silk was briefed to give an opinion on the South African implications and charged a fee, so it is said, of probably R3 000,00 but not more than R5 000,00, for a written opinion. An American firm of attorneys handed the instructions to the head of their tax division who convened a meeting of the various practitioners in his department, at which meeting tasks were assigned. The tax department met once or even twice thereafter to discuss and assemble what had been gathered and to prepare a draft and edit it so that a final opinion could be submitted to the client. The cost to the client for the provision of this opinion (comparable to the Silk's opinion) was about US $25 000,00. There is nothing to suggest that the latter fee was excessive in the circumstances, but it was clearly computed with regard to the nature of the services performed by the various persons involved.

As a member of a large partnership, the specialist must also relate his earnings in the partnership to the cost of overheads, since he cannot necessarily divorce himself therefrom and operate in a manner similar to the members of the Bar to limit his costs.

In a recent article,[7] David Biart (an English solicitor) pointed out that people in the free world tend to take their freedom for granted and, whereas they will pay enormous sums of money for commodities or new motor cars, they are prepared to pay little or nothing for the quality of life that enables them to enjoy these things, i.e. freedom of expression and from oppression.

Independence

The Bar exposes its members to causes of whatever nature. Although, to some extent, certain members of the Bar may develop an expertise which results in their being briefed to do work principally for one side, examples of which may be found in industrial law where certain counsel are briefed either for management or for unions, or for or against Government in political cases, this is by no means representative of the Bar as a whole. The Bar provides a service available to all and enables persons to secure suitable representation from a wide choice.

If specialists practised as in-house counsel in large firms, they would

tend to take on the character of that firm rather than retain an independent nature enabling them to act for all sectors in their speciality. One has only to think of those firms that have large and lucrative practices in the fields of conveyancing or representing large corporate clients. If the litigation partner is asked to act against such a client in a specialist case, he will soon find that his other partners in different branches of the firm will point out that this will jeopardise the relationship with a large and valued client. This will have serious implications for the firm as a whole and would, in all probability, result in the litigant being asked to go elsewhere. If there are not similar specialists available to the litigant, he will have to suffer.

Although it is suggested that there may be occasions where a specialist in a large firm will have time to be available to other firms that do not have such a specialist and whose clients may require such services, I do not see that this would assist a litigant such as the one I have mentioned. Clearly, if the firm in which the specialist practises is a firm whose clientele or interest may be adversely affected by the litigant, the firm will not permit the specialist in effect to practise outside and against such interests. He will only be made available to outsider firms where there is no danger of harm or prejudice to the firm itself.

Examples are probably legion, but one that comes to mind is the criminal defence of a rural person charged with the rape and murder of a wealthy farmer's wife in a particular district where the trial is to be heard in a circuit court in the district. If all the practitioners in that district are dependent upon the goodwill of the local farming community for their existence and probably for lucrative areas of their respective practices, it cannot be expected of them willingly to undertake such a defence. Equally, the large firms at bigger centres, which might depend upon the goodwill of their country practitioners for referred work such as conveyancing, might find it difficult to undertake such defence.

The future

Clearly there are areas for improvement, and self-criticism is a necessary and healthy tool to be applied from time to time. It may be that the Bar should reconsider its fee structure, particularly the area of charging a fee on brief where matters are settled well before the hearing and no preparatory work has actually been done. Perhaps the answer lies in some provision for a lesser fee for the booking of the time only, to serve as compensation for other lucrative work turned away during the period. Perhaps, too, the computation of a fee on brief should be more detailed so that both the client and the attorney realise that it is not an enormous sum exacted for a one-day appearance in court but includes several hours or even days of prior preparation for which counsel is entitled to be remunerated.

David Biart[7] sees the future role of lawyers generally as one in which a division is recognised between those whom he calls "the contentious lawyer" and "the business lawyer". The functions of the former are, in essence, those presently performed by an advocate, whereas the functions of the latter embrace many of the aspects of a modern-day attorney's practice. In principle, the training and ethics in the method of practice of the contentious lawyer continue to be along the lines of the Bar, whereas the business lawyer is more a commercial man who should not necessarily be subjected to the same strict constraints imposed upon the profession. He points out that in a modern world lawyers are required to run their practices on commercial lines and therefore the rules of conduct, particularly of the latter class, need greater liberalisation. I can recommend to the reader a study of his article, which gives much food for thought.

Footnotes

[1]Wessels - *History of the Roman-Dutch law* 191 - 197

[2]*Jurisprudence of my time* 4.19.1 (Gane's translation, Vol 2, page 89)

[3]Ex Parte: Stuart and Geerdts 1936 NPD 57 at 75

[4]*Report of the Select Committee on the subject of Natal Advocates and Attorneys Preservation of Rights Bill* - Cape Times Limited 1939 - (at p 2), being the report quoted from in the extract referred to in note 5 and the evidence of:
- (a) (i) G N Holmes (later Mr Justice Holmes) at pp 45, 52;
  - (ii) Mr Justice Feetham at p 133;
  - (iii) Mr Justice Hathorn at pp 153-4, 156-7, 160;
- (b) (i) G N Holmes at p 52;
  - (ii) Mr Justice Feetham at p 68;
  - (iii) Mr Justice Hathorn at p 156;
- (c) Mr Justice Feetham at p 136;
- (d) Mr Justice Hathorn at p 152;
- (e) Mr Justice Hathorn at pp 154-5.

[5]Record of the proceedings of the National Bar Conference, Vol 1, pp 57-61.

[6]*Sub nom Cooper v Findlay and Others* 1954(4) SA (AD)

[7]"Role & function of the lawyer in the modern world" - *International Legal Practitioner* - Vol 12, No 3, p 63. ■

LAW LIBRARY AVAILABLE

apply

The Law Shop

5th Floor, Hollandia House
127 President Street (between Kruis and Smal Streets)
JOHANNESBURG 2001
or
Telephone: (011) 29-9687