

Advantages of the divided Bar: A view from American experience

Gerald Josman
Judge of the Cape High Court

In the United States where the Bar is not divided law firms have provided for the services offered by advocates in two ways. Either the firms have grown very large (500 person law firms are not uncommon) or small specialist law firms have developed operating in particular fields of law.

Ten or twenty person law firms in general practice are not really viable, the reason being their reluctance to introduce their clients to other lawyers in competition with them. The great advantage of the divided Bar is that advocates do not compete with attorneys since they do not deal directly with the public. Attorneys have an entire range of advocates available to be engaged for their clients not only for litigation but also for legal opinions and advice.

The disadvantage of large law firms is twofold: The first is that their overhead costs are very high and rarely account for less than 50% of the fees charged. This makes the cost of legal services and especially litigation undertaken by them very expensive. However, since large law firms tend to service large corporations or wealthy individuals, the cost of litigation is not usually a disincentive. Large law firms do not generally service the person in the street; apart from the cost issue they are simply not geared to do so. Busy lawyers working on corporate restructuring have little time for the simpler issues confronting the common person.

In the United States where there is no co-ordinated system of legal aid, the person on the street tends to be serviced by small independent law firms with limited range or capacity. Because of the oversupply of lawyers in the United States there is keen competition by such firms to service small clients. Criminal cases may

be dealt with by the office of the Public Defender. We need large law firms in South Africa to deal with our developing economy but it is the small law firms that tend to cater for the needs of the common person. Fortunately the divided Bar makes this possible. Any law firm of whatever size can expand its expertise infinitely, simply because of the availability of the growing number of advocates available to be briefed on a per case basis.

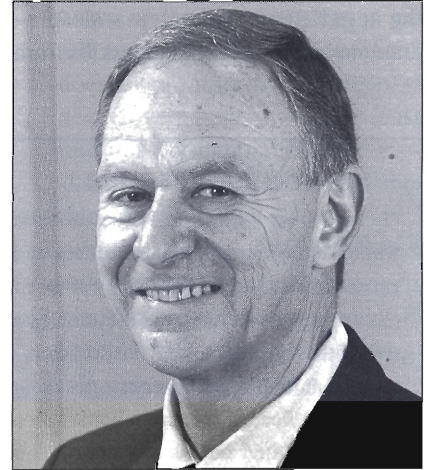
I practised law in Chicago in a 250 person law firm which had a litigation department of thirty five lawyers. Even then the range of practice was quite limited and the firm supply did not take on cases beyond its range of competence. We seldom if ever dealt with the person on the street. The Cape Bar by contrast has approximately three hundred advocates who

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are available to assist all attorneys within the jurisdiction in a wide range of cases.

Overheads and fees

Advocates generally have much lower overheads than do attorneys. For junior advocates their combined rental and group fees can be less than R2 000,00 per month so that they can afford to appear in court at very competitive rates. The junior Bar has recently become very competitive. It can



Gerald Josman SC was a Cape silk and leading member of Advocates for Transformation before his recent appointment to the High Court Bench. He practised law in the United States as a member of one of Chicago's top law firms. He commenced practice at the Johannesburg Bar 40 years ago.

and should be made even more so by encouraging many of the growing number of law graduates to join the Bar. The gender and race component of young graduates should also help to improve the imbalance at the Bar in this respect.

At the same time a campaign needs to be mounted to inform attorneys and the public of the availability of such services as well as their fees and particular area of competence. Many junior advocates are prepared to appear in court for less than R1 000,00 per day (maybe even as little as R500,00) and if delays in court can be avoided, litigation could be made affordable to most people without the aid of a burgeoning legal aid system and its attendant bureaucracy.

With the aid of a roster of advocates prepared to work for competitive fees, attorneys will be able to refer many small or indigent clients to them. Attorneys must be encouraged to avoid any duplication of effort save to be available if the


client is not satisfied with the advocate's services. In the process the attorneys' list of clients will grow and little clients often become bigger ones.

The argument about duplication of costs should simply not be allowed to arise for smaller cases and the rules of practice of both professions should enshrine this. To the extent that there is duplication with regard to larger cases (which I do not accept is necessarily the case), the taxing master should be encouraged and empowered to use his office to deal with the problem. The dual

Bar offers tremendous advantages to developing countries such as South Africa. If there are problems relating to cost structures created by the dual Bar, these can be dealt with by appropriate amendments to the practice rules of the Bar Council and the Law Society. To mandate fusion would be like throwing the baby out with the bath water.

In the end result attorneys are probably the best source of referral because of their personal contact with their clients, but the Legal Aid Board and other referral centres should also be encour-

aged to take advantage of a competitive Bar to enable them to taken on and refer more cases to young advocates. This is the best way to deal with the problem of lack of access to legal services.

We are faced at the moment in with the anomalous situation that there is an over-supply of young lawyers who cannot find work and an unsatisfied demand for legal services by a great many people. Clearly there is a blockage in the system which needs to be cleared. Fusion of the Bar and the attorneys' profession is not the answer. 

A strong legal profession

“Also important for the proper administration of justice is a strong legal profession; i.e. both the attorney's profession and the Bar. To build and sustain a strong and reputable legal profession requires *inter alia* a sound academic background, good ethics and commitment. These requirements are perhaps too obvious to require any mentioning; but what requires special mentioning is the courage to stand up and speak when things go wrong in the administration of justice; such as when the rule of law is undermined or institutions of justice are destroyed; the courage to speak up despite the risk of unpopularity. This is very crucial because our new constitutional jurisprudence is still at its early developmen-

tal stage; we are still laying down the foundations and we cannot therefore allow things to go wrong. If the foundations were to go wrong the whole edifice would collapse.

What is needed is a critical eye on the legislature, the executive and the courts to make sure that justice, as understood and acceptable to the people of this country, is being done; and to protest the loudest when things go wrong.”

Extract from an address to an attorneys' meeting in Mpumalanga by Justice B M Ngoepe, Judge President of the Transvaal Provincial Division.

Cheap at the price

“There was conflicting evidence on the cost of legal services under the two systems. Some felt that in a fused profession, a significant saving of cost would result on the general grounds that one lawyer would in future do the work which is now divided between two or three. The contrary argument, which the Commission found more realistic, was that if the client's interests are to be properly served, two or more lawyers are needed when the issues arising are outside the skill and experience of the solicitor who is first consulted. Fusion would not avoid this, and the cost would tend to be higher, because a solicitor's overheads are higher than those of a barrister... .

It was put to us that even if the fees incurred are sometimes higher than they would be under a fused system, the present system is more cost-effective. The Commission was satisfied that the independent view which is brought to bear by counsel often has the effect of defining and limiting the issues or bringing about a set-

tlement, which represents important savings in time and cost.

It was not possible for us to make an effective comparison of costs of litigation as between Britain and America, where the profession is fused. I make the comment, however, that in my professional experience the cost of employing lawyers in America in commercial matters is high, and a number of lawyers are invariably involved in any one matter.

Having examined the criticisms of the present system, it appeared to the [Royal] Commission [on Legal Services] that none of them indicated that a fused profession would be more efficient and less costly than that now prevailing.”

Lord Benson, FCA “The Future of the Legal Profession in South Africa: Is Fusion the Answer?” (1988) 105 SALJ 421 at 429.