A judge explains ...

A judge, seeking at this moment to return to the Bar, explains: "My financial responsibilities have reached such a state that I must now choose between staying on as a judge and face complete financial ruin, or resigning with the hope of improving my situation. I have a large young family. Maintaining them, especially providing for their schooling, takes its toll .... Because they are young, I also need to make adequate provision for them in case I die suddenly .... The sum total of all this is that I am left in a parlous financial situation. I must mention that my situation is not as a result of extravagance on my part. I have taken the decision to resign from the Bench after thinking long and hard and untold agonising. It is with a heavy heart that I announce this decision to the Bar. I feel that I have betrayed the trust they placed in me when they nominated me for the high office of judge."

Letters to the editor

The Bar's litigation against the Competition Commission: a letter from one of your soldiers

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The impression one gains, when reading the Bar's response to the rulings of the Competition Commission, is that we have a cause to fight for, an honour to uphold. *a luta continua*, as you say.

Looks may be deceptive, but I think you are of a generation which was a little sceptical of war. You may remember:

"Generals order their soldiers to kill and to fight for a cause they've long ago forgotten"

Are you sure that the Bar is not fighting for a cause we've long ago forgotten? If not, do we really need to fight this war?

I mean that we should examine (i) which aspects of the Bar could do without the underpinning of a "rule" and (ii) which aspects of it we might as well abandon.

I take as an example, the aspect that reserves our professional expertise to the servicing of the legal requirements of the public only through the offices of an attorney. This is underpinned by the rule that advocates may take instructions only from an attorney.

Presumably, this rule was created out of a practice. The practice became a custom of the Bar, and was then formalised as a rule. Before the practice became a rule, I imagine that any advocate who practised contrary to it would have been considered a little odd at best, but certainly one who had lost his professional bearings. He would, I think, have been considered one who dressed up as an advocate but was not really an advocate at all. There would have been no rule entitling a Bar to prohibit him from acting on instructions of a lay person as no rule would have been necessary. By doing so, he would have given notice that he was no longer practising as an advocate and no longer wished to be associated with the people known as advocates.

Because the choice of becoming an advocate entailed a choice to take instructions only from an attorney, there was no need for a rule.

Why then introduce a rule? The fact that there are certain advantages to the practice does not justify the introduction of a rule. If an advocate wishes to take instructions from a lay person and not from an attorney, why prevent him from doing so? He may not feel so sophisticated when described as a member of a "referral profession." He may be willing to drop the acclaim in favour of a bit of work. The fact that he does so may result in the rest of the advocates shifting a little away from him in the lift, but why force him to follow the rule? If he later discovers that it would have been far better to have insisted on taking instructions only from an attorney, then perhaps he will be less tempted to invent ingenious ways of getting around the rule, which he did as a card-carrying member of the Rolls Royce profession. We all know there are many advocates who do operate according to such ingenious methods, and we all know there are many who formally take instructions from attorneys, but are so beholden to the purses of a few of them that they might as well be considered permanent employees of their firms. In either case, providing solemnly that the advocate may take instructions only from an attorney achieves none of the ends for which the rule is supposed to have been accepted.

I suggest therefore that we allow the total onslaught of the Competition Commission to be an opportunity to go back to the roots of the Bar. Let them lay down conditions, let them insist that we abolish this rule. Those of us who really believe in the practice will then become visible, for we shall follow it out of choice. If the vast majority of advocates take this abolition to be the opportunity they have long been waiting for, then well and good. It may be that from then on, the real members of the Bar will become visible, the better for attorneys to see who among us is serious about our professional vision and to whom they may turn for the `referral' aspects of their work. In time, the closet attorney-advocates who have come out, will no doubt be swallowed up by law firms setting up this or that litigation department replete with hired litigators, and the Bar will be the Bar again!!

What we do not want is litigation with the Competition Commission predicated on some vainglorious goal of maintaining the past, just for the sake of the past. What if the advocates end up snarled in interlocutories with the Competition Commission (of which there are many, as the law reports already show), appeals, reviews, visits to the Constitutional Court and so on? What if this costs a lot of money, and at the end, we have not a victory but a stalemate, and a profession which has forgotten why it is fighting for these rules after all?

Is it not time to do a deal with the devil? Tell the Competition Commission we will accept the intrusive tinkering with our professional rules, such as the rule against advertising (we'll accept the publication of advocates' names with special skills but on good quality paper, and no neon lights), but we'll accept no others. Win a compromise now. Tell the Competition Commission we will do away with the toothless 90-day rule, but tell it that everything else must remain!

Isn't the best line of defence the one which the Competition Commission can have no answer to – that we have no rules, just non-compulsory practices which each member follows out of individual choice? Let them see if they can attack that!