

# Transforming expectations

Ellen Fitz-Patrick, Cape Bar

A low but insistent background grumbling can be detected among various members (of all hues) at the Cape Bar on the issue of transformation, especially since the Johannesburg Bar announced its policy of sanctioning senior counsel who do not appoint black advocates as juniors (*Advocate* December 2015 at 20). There certainly seems to be a more militant mood about, perhaps encouraged by the success of the Rhodes Must Fall and Fees Must Fall movements, and this is causing some discomfort among the previously advantaged.

Any members who might be feeling a bit back-footed and defensive about transformation are hardly helped when a white attorney is reported as declaring that he briefs only junior counsel who have graduated *summa cum laude*. As if academic excellence has ever been a reliable predictor of success in any profession (even in academia), and especially so in the practice of law, which often boils down to common sense and practical application, qualities not guaranteed in someone who has graduated *cum laude*.

I have never been asked for my academic transcripts by a potential briefing attorney, so how would one *know* who has graduated *cum laude* and who has not? In any event, he or she would find my academic record unencumbered by the words “*cum laude*”, along with roughly 97 percent of all graduates.

Six years ago, I wrote a piece in this magazine (*Advocate* April 2009 28), complaining about the total absence of equitable briefing patterns I had experienced in my short time at the Bar. I suggested that a clerking system, as found in England and other common law jurisdictions, might be the answer. I pointed out that Legal Aid SA does something similar when distributing work, and as far as I’m aware, there is a tiered system for briefing that goes: black women then black men, then coloured women then coloured men, then white women then white men.

Of course, nothing changed – no one seemed to share my enthusiasm for the introduction of clerks to distribute work to baby juniors – although the article did yield some reaction: a furious rebuke from a white male counsel in Johannesburg and a telephone call from a black female counsel, also Johannesburg, just to check, she said, that I was still alive and no one had taken me out.



Six years later, I am still here, hanging on by the ragged tips of my fingernails. I survived by taking on interminable Legal Aid criminal trials, but eventually I had to bypass these in order to try to build up some sort of independent civil practice, and I was able to do this only thanks to my ever-expanding overdraft and also because, unlike many who try their luck at the Bar, I had an access bond which in periods of extreme economic distress, I reluctantly and bitterly cannibalised just to keep going. What I realise now of course, and what takes a few years to sink in if you’re as naively optimistic and stupid as I was, when I came to the Bar straight after completing my LLB, is that I had no idea what it entailed to build up a practice from scratch.

For this dangerous lack of insight the Bar itself is culpable and must take some responsibility – I believe that one of the biggest drivers of discontent for members is misrepresentation by the Bar, giving rise to unrealistic expectations about practice.

I don’t know how the Bar markets itself these days, but ten years ago, I was seduced by a presentation by the Cape Bar I attended in my final year at university. At the presentation we were urged to come to the Bar which was apparently growing too slowly(!) It sounded like a no-brainer, especially if (like me) this was your second career and you didn’t have time to waste. We were told that your mentor was your springboard to your future success, ensuring that you received your first briefs from the attorneys you’d have met during your year of pupillage, that you would undoubtedly gain even more experience assisting your mentor as a junior, and you were on your way! I was transfixed by the presentation and the vision of the friendly,

**'If you want to come to the Bar you can have an interesting, sometimes rewarding, if very stressful career. However, know this from the outset – you need to have a partner, spouse, parent/s, benefactor who can subsidise you for as long as it takes for you to build up a practice, which, at the bare and optimistic minimum, is probably about two years if you're lucky and get a bit of help.'**

helpful collegial atmosphere, the variety of the work, but most of all, the opportunities. The only warning notes I recall from that presentation were reserved for the demands of the tough year of pupillage and the gruelling Bar Exam. But once that was out of the way, what a career awaited!

It may sound absolutely crazy, but the last thing I expected when I arrived at the Bar was lack of work. This was most definitely *not* what was sold to us during that presentation. In fact, there was no hint of the trouble that waited ahead.

As I subsequently discovered, there are in fact a minority of pupils whose mentors are instrumental in helping them along, but for most, the minute you've passed your Bar Exam, it's thank you and goodbye. Your mentor is understandably just happy to have his/her chambers back without you hanging around in them. So yes, what was pedalled at the Bar presentation was an idealised version of what might happen to two percent of those coming to the Bar, but I would have preferred to have been told the truth.

Here's what should have been said:

*'If you want to come to the Bar you can have an interesting, sometimes rewarding, if very stressful career. However, know this from the outset – you need to have a partner, spouse, parent/s, benefactor who can subsidise you for as long as it takes for you to build up a practice, which, at the bare and optimistic minimum, is probably about two years if you're lucky and get a bit of help.'*

*'At the Bar we all compete with one another for work, and because of the moribund state of the economy, work is scarce and no-one can afford to litigate. And because of this, attorneys are also increasingly desperate, and take on clients and brief counsel without cover. So it means that after working incredibly hard on a matter and having sleepless nights over it, well, you won't get paid. And that's just tough. Because even if you blacklist an attorney, it won't motivate them to make a plan to pay you. No. You'll have to sue. And what a schlep that is. In the meanwhile, you have to pay all your expenses – your cash flow problems are yours alone.'*

*'And yes, attorneys who brief you regularly sometimes leave the profession or the city or the country (or even join the Bar) and that personal relationship you worked so hard to establish is gone – no more briefs from them! If you're unfortunate, this can happen with more than one of your attorneys at the same time. So that means you might have to start your practice from scratch all over again. But if, after hearing this, you still feel that this is the right move for you, welcome, but don't say you weren't warned.'*

I'm comforted to discover that my cynical view of practice is borne out in other jurisdictions, and in England the sole-trader model of self-employed barristers is acknowledged as archaic, precarious, and probably doomed<sup>1</sup>, mostly because, like us, they suffer the tyranny of what they call "aged debt" and what I call non-payment.

So I'm pleased to see that the transformation lobby has brought up the non-payment of fees and challenged the Bar's apathy on the issue. I know from grim experience how eye-bulgingly demented you can get when you *cannot* extract your hard-earned cash, and for many attorneys (840 at last count) the blacklist is their comfort-zone and they continue to practise unimpeded.

I once lobbied the Cape Bar Council on this issue with what I thought was a brilliant strategy (sadly not my idea, but that of an inspired colleague) which was to publish the blacklist of naughty attorneys in national newspapers in the Legals column. While the general public may not know what it was all about, the occasional civic-minded citizen might look a bit deeper, and this wider distribution of names might just give some attorneys pause for thought before briefing counsel without getting cover beforehand. Apparently this suggestion made it on to the agenda for a Bar Council meeting but got short shrift, and I was informed that my suggestion had been rejected. No reasons were given.

So all power to the transformation lobby if they can move the Bar to do more to assist counsel who are owed money. At the very least the Bar can strictly enforce the blacklisting rule, and also forbid members to accept briefs from blacklisted attorneys, and police this rigorously. It might even make a difference.<sup>2</sup>

I now know that no-one, unless of independent means, is immune to the ghastly vicissitudes of fortune at the Bar. I know that there are times when even white, male senior counsel struggle to earn enough to cover their monthly expenses. I have seen excellent colleagues who, desperate through lack of work and payment, are forced to leave the Bar, and I believe that the rate of attrition at the Cape Bar is in the region of three to five members per month. This is the kind of reality check that should be well advertised to everyone aspiring to a career at the Bar. **A**

#### Endnotes

- <sup>1</sup> [www.thelawyer.com/home/opinion/is-the-bar-a-profession-in-decline/](http://www.thelawyer.com/home/opinion/is-the-bar-a-profession-in-decline/)
- <sup>2</sup> Editorial Note: In 2001, following a complaint to the competition authorities that rules relating to the defaulters' list were anti-competitive, the GCB amended the defaulters' rule no longer to prohibit accepting briefs from an attorney on the list, whilst retaining the obligation of reporting and maintaining the list.