Time for a Fused Legal Profession

Quentin Bargate, Senior Partner of the City of London law firm Bargate Murray and a solicitor for more than 30 years, comments on changes needed to preserve the relevance of the legal profession in the face of competition.

A typical question I am frequently asked by overseas lawyers runs along the following lines:

“Please explain to me the difference between solicitors and barristers?”

Many answers spring to mind. One possible answer was that solicitors were the general practitioners, barristers the specialists. But that answer is untrue, as many solicitors are as specialized as any member of the bar.

Another answer might be that the bar comprises specialist advocates, whereas solicitors typically focus on preparing cases. But that answer has been undone by the increasing number of solicitor-advocates on the one hand, and rights of direct access now enjoyed by the bar on the other hand.

In fact, the correct answer, in my view, is that there are no substantive differences and that the division is outdated and irrelevant. It wastes costs and acts against the interests of justice. It is also a distinction largely abandoned in most if not all other common law jurisdictions. How is it that such an apparent absurdity is allowed to continue?

In 1946, Professor Gower wrote¹ that

“any objection that the divided profession is an essential element of a Common law system is sufficiently disproved by the United States and many of the Dominions which have found no difficulty in discarding it…”

The idea of a fused legal profession is not new. As Professor Gower made clear, fused professions have operated successfully in other common law jurisdictions for many years yet we in the England² continue with a system most others have long since abandoned, including territories closely connected with the UK like the Cayman Islands and the Isle of Man.

¹ 9 Mod L.R. 211 at 223
² I refer to “England” meaning England and Wales, although I am aware that other of the UK have bifurcated legal professions. As an English solicitor, it is probably safest to confine my comments to the professions in England and Wales.
What therefore makes England stand out as unique and unusual such as to justify swimming against this considerable tide? And if there once was a justification for two separate professions, does that justification hold water in 2014?

Further, we are entitled to ask whose interests does a split profession serve?

Let me be clear where I stand. I believe the current divided profession is wrong in principle and unsustainable in practice. Moreover, it is fraying at the edges as changes take place that blur the distinctions to the point of absurdity.

But the historic arguments for and against separate professions are now thrown in to sharper relief by the added competition that both Barristers and Solicitors will face from deregulation. Moreover, I believe that a united, single legal profession would be in a stronger position to meet head on the advance of Alternative Business Structures and to market the excellence of English legal services to the world at large.

As was noted in the Economist in 1983

“The original reasons for dividing lawyers into two categories, barristers and solicitors have long since disappeared, but the distinction remains...in fact, some barristers are not specialists, some solicitors are. Some solicitors are better advocates than many barristers.”

And as Professor Harry Cohen wrote in 1987

“It is obvious that the expenses of litigation would be reduced if a solicitor could handle a matter to its conclusion. By eliminating the costs of two persons sitting in court, duplication and unnecessary work would be avoided.”

The breakdown of divisions in practice

The role of the bar as a “referral” profession has now broken down. Members of the public may now instruct a barrister directly, without the need to instruct a solicitor first. Moreover members of the bar are also now able to “conduct litigation”, traditionally a job reserved for solicitors, subject to meeting certain bar council requirements. Thus, the role of the barrister as a specialist advocate and a solicitor as someone preparing the case no longer holds true.

Further, many solicitors are able to conduct advocacy in the higher courts (Crown Court, High Court, Court of Appeal and Supreme Court) through training to obtain a Higher Courts (Civil Advocacy) Qualification, or its criminal courts equivalent.

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3 Economist, July 30, 1983.
5 See https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/authorisation-to-conduct-litigation
6 If it ever did, given solicitors enjoy rights of audience in most courts and tribunals without the need for the higher courts qualification, including magistrates and country courts, and even the European Court.
7 See http://www.sra.org.uk/solicitors/handbook/higherrights/part3/content.page
Finally, with increasing competition from Alternative Business Structures, both barristers and solicitors may be involved in or be employed by non-traditional businesses offering legal advice and services to members of the public. The point of an ABS is to offer members of the public a “one-stop shop” for legal advice. A fused profession would make this easier for more traditional firms to do so too.

Against this background of change and increasing competition, whatever the original rationale of a divided profession may have been, it has long since passed its sell-by date. It now not only operates in an anti-competitive way, increasing costs to the public; it operates against the interests of the professions themselves, who would be better offering a seamless and single unified identity to the public.

By “public”, one should include businesses, particular overseas businesses who remain somewhat baffled by the divided profession. I am routinely asked to explain the division and find it increasingly hard to do so.

Convergence

It is true that the pressure for fusion has somewhat dissipated in view of the convergence in practice of the roles of the two professions. If solicitor-advocates appear in the higher courts, and barristers “conduct litigation” or undertake other direct access services, does it really matter if the two professions are fused?

In my view, the answer is a resounding “yes” for the following reasons:

1. As the relevance of the distinction decreases, the confusion in the minds of the public logically increases. How does one explain a distinction without a (relevant) difference?

2. The bar continues to enjoy some bizarre privileges. One is the idea that, because members of the bar are self-employed, two barristers from the same chambers may act on different sides of the same case. For solicitors, their role of practicing in partnership means they can only act for both side in very particular circumstances, and usually not at all. This is nonsense. Barristers share the costs of their chambers, market themselves together on chambers websites and in other materials, and are in many ways as financially dependent on each other as are solicitors practicing in partnership.

3. There remains the vexing issue of duplication. The fact is in many situations, the public pay for two lawyers where one would do. This is not consistent with the overriding objective in saving cost and improved access to (affordable) justice.

4. Other common law jurisdictions have abandoned the distinction, and thrive. The proof of the success of a fused profession is abundant and unarguable.

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*This is a subject I intend to cover in more detail in a future article.*
5. The divided profession almost certainly inhibits the development of advocacy
talent from within the wider profession, because advocacy is still seen a primarily a
job for the bar, however old fashioned and myopic that view might be.

6. A single profession would more easily meet the costs saving objectives of the
Jackson civil procedure reforms, which came in to force on 01 April 2013.9

7. Fusion would be good for the bar. Over the last few decades, solicitors have
formed international partnerships with overseas law firms and to some extent, the
bar has been left behind.

I believe the case for fusion is so clear cut, there is no need to go further. Perhaps the only
question left is what to call the new, fused, profession. I suggest the historic title of
“attorneys”, but I leave that as a matter of detail for later debate. When I am introduced
to a new client, particularly one from overseas, I tend to describe myself as a “lawyer”. It
suffices, and it usually more readily understood than “solicitor”.

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9 I will be commenting on the Jackson reforms and their consequences in an upcoming article.