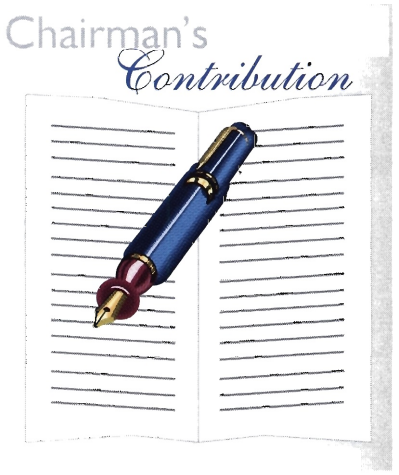
Competition and one other issue



A month ago, the International Bar Association held a six-day conference in Durban. The conference was an unqualified success, both in the efficiency of its organization and in the quality of its substance. Felicitations are due to many, but ultimately to IBA President Dianna Kempe QC with whom, as in all these things, the buck invariably stops.

The Barristers' and Advocates' Forum of the IBA is the only professional international home of the referral Bar. Its origins date back to 1996 in Berlin when Andrew Hardy QC (Scotland), Malcolm Wallis SC, and Frank Clarke SC (Ireland) conceived of a body within the IBA which would more effectively represent the interests of advocates. On 6 November 1997 in New Delphi it was resolved to inaugurate the forum, and it was officially launched in Vancouver in September 1998. Its members are the representative advocates' bodies from Australia, England and Wales, Ireland, Northern Ireland, Scotland, Hong Kong, New Zealand, Zimbabwe, Namibia, and South Africa. The forum's inaugural world Bar conference took place in Edinburgh, Scotland, from 27 to 29 June 2002, and the next conference is planned for April 2004 in Cape Town.

At the Durban conference the forum's sessions on the challenges of competition, appeal advocacy, and training and teaching were pertinent and effective, and not overburdened by the usual "...we need to address these issues..." followed by an academic wish list. They underscored the value for the Bar of international synergy at this level, as was grudgingly conceded by some well-known hardened skeptics. In particular, the local competition commission's power to exempt the rules of professional organizations is, in terms of Schedule 1 to the Competition Act 1998, circumscribed with reference to "internationally applied norms." Elsewhere in this issue contributors from abroad give a glimpse of practice in their jurisdictions.

What did we learn? As regards competition authorities, that there are both similar and different responses to the challenges that confront the referral Bars. Firstly, competition authorities have universally suggested that the referral Bar's prohibition on partnerships is anti-competitive. Universally, none has been able rationally to justify that contention. The Bar's universal response to the contention is the same: advocate partnerships will in fact be anti-competitive. If advocates were permitted to practise in partnership, conflicts of interest will preclude, not encourage, competition between partner advocates. Of course, the cab rank rule would also go.

There are however additional reasons why in this country the public interest will be prejudiced by advocate partnerships. Firstly, the already limited pool of available independent trial specialists will be reduced. Secondly, partnership overheads are higher than individual overheads, and so access to legal practice, especially by those previously disadvantaged, will be stifled whereas it should be facilitated. Thirdly, the disappearance of the cab-rank rule here will have the effect of type-casting certain advocate partnerships. There will be plaintiffs' partnerships and defendants' partnerships; big business partnerships and individual partnerships; and partnerships that do government work and those that do not. In the larger industrialized countries this phenomenon may be acceptable; here the result will be, again, a strain on an already limited pool of trial specialists.

Secondly, the competition attack on the prohibition of direct access is equally universal. The universal response has been that since the attack is not driven by non-referral lawyers, it is difficult to appreciate what competition principle is served by proscribing a prohibition on direct access. In South Africa, the added dimensions are that the Minister of Justice and Constitutional Development has formally adopted the position (on affidavit, in the Constitutional Court) that voluntary imposition of the referral principle is to be protected; and that the organized non-referral lawyers (the law societies of South Africa) have long adhered publicly to the same position. Why the local competition authority finds itself at odds with the whole profession is not readily apparent. This is not to say that the referral principle is immutable. The notion underlying the principle is that unless the trial lawyer is freed from attendant litigation services, specialization in trial advocacy is not possible. If however the result is that the public is effectively denied access to those trial specialists, the principle must, to that extent, be revisited. The GCB has done exactly that by permitting direct access in the case of community based law centres, such as the LRC and university law clinics. The point is that relaxation of the referral principle is obviously necessary where that which its imposition seeks to achieve, is stultified by strict adherence to it.

In the recent Supreme Court of Appeal judgment, the GCB's application for an exemption of the provisions of chapter 2 of the Act was referred back to the competition commissioner. We are confident that the commission will upon reconsideration of the Bar rules, take a broader view than before.

Reverting to issues more domestic, one notes with appreciation the efforts of the "Court Services" Business Unit of the Department of Justice and Constitutional Development to clear backlogs and advance case flow. It recently held a seminar the objective of which was to develop a home-grown integrated case flow management system that would address delays and improve efficiency. The unit had committed itself to parliament in May 2002 to instill public confidence in the court system. Among the challenges it identified were the high rate of uncontrolled postponements, the many lost or missing files, and protracted delays especially in criminal matters.

The seminar could not have come at a better time. Legitimacy of the courts depends not only on a Bench that is seen to represent the people that it serves, and to do so effectively by means of judgments (not orders) delivered timeously, but also on a court system that operates in conditions that instill confidence and respect. The reports that have been coming in from colleagues concerning the conditions under which some of the magistrates' courts on the Reef are functioning, are alarming. Those in Alexandra, Benoni, Brakpan, Springs, Vosloorus, Tembisa, Randburg and Johannesburg are telling examples. The complaints are invariably the same: poor security, poor office facilities, filth, missing files and dockets, lack of basic infrastructure such as ready access to fax machines and photocopiers, and the like. Recently the unacceptable conditions that have been known for a long time to those practising in the Johannesburg high court became public when the judges there spoke out. The Johannesburg Bar has for some years raised these issues in appropriate fora and meetings. It went to the lengths of producing an album of photographs to illustrate that the complaints were valid. The result has, as is now plain, not been satisfactory.

The time has come to remove responsibility for all aspects of court buildings from the Department of Public Works and to place it under the Department of Justice. The senior judicial officer of the particular court must have the ultimate authority to issue directions and enforce sanctions for non-adherence. Only then will inept officialdom and buck-passing be arrested.