Transformation of the Bar: briefing patterns

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The problem

Briefly stated the problem is that black and female advocates are substantially underbriefed. Underbriefing takes place both at a quantitative and at a qualitative level. By that I mean not only that a disproportionate number of briefs are allocated to white males but that that sector of the Bar receives the vast bulk of the high-end commercial work. As far as black advocates are concerned, a fortunate few are heavily briefed, particularly in relation to work which has a statal or parastatal element. Even these few privileged black members of the Bar are however in the main not briefed to do the high-end commercial work.

Female advocates are probably in an even worse position than black members of the Bar. Not only is their exclusion from commercial work well entrenched, there also does not appear to be any substantial commitment to changing that pattern.

The causes of the problem

As far as black members of the Bar are concerned, there are multiple causes of their present predicament. These include:

a) Poor education, both at secondary and tertiary levels

This problem needs no elucidation here.

b) A poor command of the English language

This is obviously a substantial disadvantage for anyone whose main skill is supposed to consist of an ability to persuade others to his or her point of view.

c) A failure to secure articles before joining the Bar

In the past the vast majority of advocates first completed articles with a firm of attorneys or at the very least prosecuted before joining the Bar. In the former case articles served not only to ensure that new members arrived with some litigation skills, but also with some useful contacts. In the latter case members started practice with a substantial grounding in court-craft. Presently the bulk of members arriving at the Bar come straight from university without acquiring any practical skills and without any useful contacts. If they come from historically black universities, even their knowledge of substantive law may be suspect.

d) An oversupply of advocates

Unlike the attorneys' profession, where the number of entrants to the profession is regulated in the sense that each firm of attorneys take on only as many new candidates as it believes it can manage, the Bar has adopted an open-entry policy. Any person who has the appropriate qualification may apply to join the Bar and if he or she passes the requisite examinations and completes pupillage, may commence practice. The Bar is unable to control the inflow of new members. That increased inflow is not at present matched by an increase in the total amount of work available for members nor by a concomitant increase in the resources available to the Bar to deal with such numbers.

e) The nature of the advocates' profession

Each advocate is required to practise independently. Although at the Johannesburg Bar the group system provides some form of corporate structure, in general the individualistic nature of the Bar makes it very difficult to effect the kind of changes which have occurred and will continue to occur in commerce in order to meet the legitimate aspirations of previously disadvantaged South Africans. The top-down approach adopted by most commercial organisations means that if the management of a company is persuaded that change is necessary or advantageous, change follows. At the Bar the fact that the GCB or the individual Bar Councils may be persuaded that change is necessary or desirable does not inevitably lead to change. There are very real limits to the degree to which either the GCB or the Bar Councils can give effect to decisions aimed at transforming the Bar.

f) Briefing patterns

Attorneys brief counsel for various reasons, but mainly because they believe that the counsel in question will do a proper job at an appropriate fee. The attorney's paramount concern is the interests of his or her client. In practice that disinclines attorneys from taking risks in relation to the briefing of new counsel or inexperienced counsel in all but the simplest of matters. In other words, attorneys are in the main not willing to experiment nor are they willing to place transformational needs above the need to satisfy the client. Traditional briefing patterns, and in particular the briefing of white males to do work of any complexity, tend to be maintained, if only through inertia and the sense of comfort which continuity brings. Efforts by the GCB and its constituent Bars to change those patterns by writing to the larger firms of attorneys and their corporate clients and attempting to meet with them have proved largely ineffectual.

I shall consider these last two problems in greater detail below.

The individualistic nature of the Bar

Whilst most members recognise the need to transform the Bar into something more closely approaching a normalised society, self interest and inertia present very real obstacles to the achievement of those objects. Every brief that is diverted (for one reason or another) from a particular class of member represents a diminution in income for members of that class. A request to white male advocates that they participate in a process which is intended to diminish the number of briefs received by them, and to increase the number of briefs received by those categories who are historically disadvantaged, must necessarily meet with some resistance, if only through indifference.

Whereas in a corporate structure management may be able to appreciate that the company (and its employees) must make some short-term sacrifices in order to achieve long-term goals, that

approach is more difficult in a society of individuals. The horizon in the latter kind of organisation is apt to be much shorter. What concerns the average advocate is not where he or his colleagues will be in five or ten years' time, but what his or her next month's fees will look like.

At the Johannesburg Bar there is a degree of corporatisation in the sense that groups assume a corporate form although comprised of individuals who are responsible for their own incomes. Increasingly, however, groups are becoming the real governance structures of the Johannesburg Bar. My suggestion in this regard is that the Bar Council's ability to give effect to its decisions will be substantially improved by the creation of a committee of group leaders who will in regular consultation with the Bar Council assist in giving effect to its decisions, particularly in relation to transformational processes. There may be some opposition from the more conservative group leaders to such an approach, but I believe that in time they will be persuaded to change.

Briefing patterns

Section 9(2) of the Constitution provides:

> "(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or category of persons, disadvantaged by unfair discrimination may be taken".

In the commercial world the Government has attempted to give effect to those provisions by establishing a set of criteria which must be met by successful tenderers for State work. The Government has in addition built into that process an advantage for historically disadvantaged tenderers in order to attempt to overcome their lack of access to appropriate skills and resources.

Insofar as State briefing patterns are concerned there does not appear to be a similar approach. Although Government, through the State Attorney, has affirmative action policies in relation to briefing, in the sense that attempts are made where possible to brief black counsel, either with a leader or alone, the policy is not uniform nor is it used to best advantage. It is in my view not sufficient to have a policy which simply requires that where State work is concerned the State Attorney (or private attorneys doing State work) should brief black counsel. All that will achieve in the long term is a class of black practitioner at the Bar which depends for its livelihood upon State work. That relationship is destructive of the independence of the Bar and unfairly exposes the recipients of such briefs to the perception that they are being briefed only because they are black and that they are unable to secure work in the private sector.

The proposed solution

I suggest that a more holistic and far-reaching policy be adopted by Government. That policy should include the following elements:

1. The Department of Justice should, in consultation with the GCB and the LSSA, formulate a sustainable policy for "*affirmative*" briefing setting out its objectives and criteria for selecting both attorneys and counsel from the ranks of the historically disadvantaged. Any firm of attorneys which wishes to take on State work should be required first to formulate a written policy committing it to addressing the results of past discriminatory briefing. Such a policy should set out in clear terms how the firm intends to meet the Department's criteria and objectives.
2. The firm's policy should concern itself not only with the allocation of State briefs, but also with the allocation of private sector briefs. The firm should thus be able to demonstrate how it has, or intends to, distribute its work more equitably.
3. Such a policy document will in itself be of limited use unless it is backed up by review process. I suggest therefore that in addition to the formulation of a written policy concerning briefing, firms that wish to make themselves available for State work should on an annual basis report back to the Minister of Justice on how their briefs have been distributed, both qualitatively and quantitatively, and whether their targets have been met.
4. It is important that affirmative briefing policies should not be reduced to a mechanical process of simply briefing more black people because they are black. What should be encouraged is a process whereby advocates who receive briefs in accordance with an affirmative briefing policy are appropriately evaluated by the attorneys concerned. Although the process may be difficult and will require careful thought, its object should be to support those black and female advocates at the Bar who deserve continued support. It is vital that in the medium and long term black advocates should form the bulk of the leadership of the Bar and that female advocates should be more fairly represented amongst the leading senior juniors and silks.
5. What I have said in relation to the difficulties facing black advocates applies equally to female advocates. They have also been disadvantaged by past discriminatory practices and deserve an equal opportunity to demonstrate that they are able to do work of the highest quality. As in the commercial sector, the State is able, because it is a substantial consumer of legal services, to bring pressure to bear, whether directly or indirectly, upon the suppliers of those services in order to give effect to the objectives of section 9(2) of the Constitution.
6. I wish to emphasize finally that the success of any initiative to change discriminatory briefing patterns will depend largely upon the co-operation of the Bar and the Side Bar and the adoption by Government of a carefully nuanced policy which maximises the influence of the State as a substantial consumer of legal services. I think that this would best be achieved through a joint committee consisting of representatives from the GCB, the LSSA and the Department of Justice.
7. The problems with which we are faced cannot be solved through the unilateral actions of any one of those three participants in the system. It will require the sustained effort and co-operation of all three participants. It will also require a comprehensive understanding of the circumstances under which attorneys operate and the basis upon which briefing decisions are made. Any initiative which fails to engage the attorneys' profession at the earliest stage and fails to meet their concerns is unlikely to succeed. 🕮