Thoughts on the merits of the divided Bar and the 'cab-rank' rule

Anton Katz and Michael Osborne, members of the Cape Town and New York Bars

The independence of advocates and barristers is often the *raison d'etre* for the existence of the divided Bar in South Africa, England, and other common-law jurisdictions. But what precisely does it mean to say that advocates and barristers are 'independent'? From whom or what are they independent? And what are the advantages of this status?

We would suggest that the term is usefully understood as three closely linked concepts. First, and most obviously, the independence of the Bar entails a division of labour. Second, members of the Bar argue cases unencumbered by certain of the protocols that apply to their instructing attorneys or solicitors. Third, an advocate or barrister, being at one remove from the client, is able to represent him or her vigorously, with the detachment that only such independence permits.

The benefits to the client arising out of the specialisation of practice at the Bar are clear. Although many attorneys and solicitors have similar academic qualifications to advocates, their experience is different in nature and in kind. It is the advocate or barrister who generally prepares pleadings and presents clients' cases to the courts. It is the attorney or solicitor who investigates the facts and issues; causes service of process; and organises discovery and inspection of documents, the procuring of evidence, attendance of witnesses and the execution of judgments. Each applies his or her different skills for the benefit of the client. Now it is true, of course, that a lawyer can learn through experience to excel in all these areas. Many American lawyers have done so. But we would argue that the demands of practice at the Bar are such that an exclusive concentration on advocacy produces skills that very few generalists could hope to attain.

Yet another benefit of the divided Bar is that the advocate or barrister is somewhat removed from the nitty-gritty of the litigation. This is not to say that conscientious attorneys and solicitors will not be able to maintain a healthy detachment from the day-to-day combat. But the referral system interposes an extra layer of separation between the client and the lawyer who stands up in court, which makes it less likely that the latter will become embroiled in disputes about the manner in which the litigation is conducted. Consider, for example, the case where a litigant's explanation for failing to launch an urgent application sooner is that she was unable to obtain legal representation expeditiously, or, if she did, that her attorney or solicitor was unable immediately to file papers, because of other pressing commitments. Or suppose a chain of correspondence between attorneys or solicitors becomes a part of the record in the litigation – where, for example, the question of pre-filing settlement offers is raised during argument about costs. In these instances, the fact that the advocate or barrister has stood above the fray frees him to present arguments (often based upon affidavits and letters signed by his attorney), with a detachment and objectivity that would be impossible had he, for example, signed the documents himself.

But beyond these practical considerations, perhaps the most important advantage of the divided bar is that it facilitates what one might term independence from the merits. Attorneys and solicitors very often have a long-standing relationship with their clients. Not surprisingly, this means that they will identify strongly with their clients' causes and interests. (Not infrequently, the subject of litigation will be a contract that was drafted on a client's behalf by the very attorney or solicitor bringing the matter to court.) In these circumstances, there is much to be said for a system wherein presentations to the court are made by a lawyer who, although professionally obligated fearlessly to advance any legitimate argument that might serve the client,[1] will do so with a measure of objectivity and detachment that an attorney or solicitor who has lived with the client and the case for months or years might find difficult.[2] First, the quality of argument will often benefit from being filtered by an independent lawyer able to assess the facts and the law from a critical distance. The interests of the client are also served if, as is often the case, the advocate or barrister, coming to the case from the outside, is able to identify weaknesses in arguments that the client and instructing attorney or solicitor would wish him to present. Second – and this is perhaps a somewhat idealistic rationale – the independence of the advocate or barrister should offer some immunity from the temptation to prosecute the client's case with the kind of untrammeled zeal that can lead to the cutting of ethical corners and other deficits in candour.

The 'cab-rank' rule is closely connected to the advocate or barrister's relative autonomy. Under that rule, although advocates and barristers are permitted to reject cases for a number of reasons, including lack of expertise, over-commitment, or conflicts of interest with other clients, they may not do so because they dislike the client or the case.[3] The rule has been seen as fundamental to the rule of law, because it guarantees representation to unpopular clients and causes. In 1792, Lord Eskine, called upon to justify his defence of the reviled atheist Thomas Paine, said: 'From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end'.[4] Yoram Sheftel, an Israeli lawyer who successfully defended an accused Nazi, said that '[b]ecause so many members of your family were massacred by the Nazis, you are duty-bound to join the defense team on the case. What the authorities plan to stage is a cynical show-trial that would indeed be a desecration of the memory of your family'.[5]

The cynic, a species not uncommon in the ranks of the legal profession, may dismiss these sentiments as outmoded and unrealistic. And it has been argued that the cab-rank rule is in any event a dead letter, given how easily it is evaded; perhaps the only time a member of the Bar will deliberately understate his competence in an

area of law is in order to escape a burdensome brief.[6] And certainly, as the example of the United States demonstrates, it is quite possible to administer justice absent such a rule. (Advocates and barristers need not concern themselves with the attitudes of their partners, as do US attorneys; moreover, the referral rule leaves it to attorneys and solicitors to screen unattractive cases.)

We submit, however, that the cab-rank rule remains vitally important, and should be respected to the extent practicably possible, precisely because it is an indispensable institutional buttress to the Bar members' autonomy. The corollary of the duty not to turn away instructions because we despise the client or cause is that our acceptance of an instruction signals no personal sympathy therefor. If judges, politicians, and the public do not understand that, we risk being tarred with the same brush as our clients, whether they be Demjanjuk, Dahmer, or Saddam Hussein. And because the erosion of the cab-rank rule would inevitably undermine our independence from the merits, the system of administration of justice would be that much the poorer.

Endnotes

1 *S v Ntuli* 2003 (4) SA 258 (W).

2 The South African Supreme Court of Appeal has gone so far as to hold that professional ethics demands a certain distance between a client and his or her advocate 'to ensure and preserve the advocate's independence'.

3 Under Rule 2.1 of the Uniform Rules of Professional Ethics, '[c]ounsel is under an obligation to accept a brief in the Courts in which he professes to practise at a proper professional fee, unless there are special circumstances which justify his refusal to accept a particular brief'. Paragraph 209 of the Code of Conduct of the Bar of England and Wales provides: 'A barrister in independent practice must comply with the "cab-rank rule" and accordingly ... must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded: (a) accept any brief to appear before a court in which he professes to practise; (b) accept any instructions; (c) act for any person on whose behalf he is briefed or instructed; and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character, reputation, cause, conduct, guilt or innocence of that person.'

4 Lord Eskine also said: 'When an advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of Judge; nay, he assumes before the hour of judgment, and in proportion to his rank or reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favour the benevolent principle of English law makes all presumptions ...' Quoted in *Kjell Tore Skjevesland v Geveran Trading Co Ltd* [2002] EWCA Civ 1567 para 43. More recently Cherie Booth QC came in for criticism for representing clients whose causes were inconsistent with her husband, Tony Blair's, political position, while he was leader of the opposition. Other members of the Bar came to her defence: '[Ms Booth] should be allowed to continue unharassed with her practice. Her critics should be grateful that the profession which she adorns is faithful to the rule which she applies. Some principles are more important than partisan political points.' Peter Goldsmith QC & Michael Beloff QC 'The Cab-Rank Rule Keeps Us Impartial' *The Times* Feb 13, 1996.

5 *Defending Ivan the Terrible: The Conspiracy to Convict John Demjanjuk* (1996) at 10.

6 See Michael Zander 'The Myth of the Cab-Rank Rule' (19701) 40 *New LJ* 558; *Saif Ali v Sydney Mitchell & Co (a firm) & others* [1978] 3 All ER 1033, 1044-45 (Lord Diplock) ('I doubt whether in reality, in the field of civil litigation at any rate, [the cab-rank rule] results often in counsel having to accept work which he would not otherwise be willing to undertake.')