Status of Barristers - a view from NZ

The NZ Law Society journal LawTalk *has published a series of interesting letters over the past few months stimulated by a letter from a practitioner, Mr Faleauto, questioning the various roles of barristers and solicitors in the NZ profession.*

The following letter, published in issue 464 of 16 September expressed particularly clear and succinct views and it is to be hoped that the readers of Balance *will find it of interest.*

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Mr Faleauto, in his most recent letter (LawTalk 462) still seems to be confused about what it is that barristers do, as distinct from barristers and solicitors. However I agree that the distinction between barristers sole, and barristers and solicitors, is an historical one which may have failed to keep pace with changing times and circumstances.

Virtually all New Zealand practitioners were admitted to practice as "barristers and solicitors". As such they have rights of audience in all courts.

Most practitioners choose not to practise in the courts. The standard of advocacy of those who do practice in the courts varies from the absolutely superb to the appallingly bad. Some of New Zealand's best advocates choose to practice as barristers and solicitors, either as sole practitioners or within the framework of a partnership.

Some practitioners choose to practice as barristers only. The standard of advocacy of barristers sole similarly ranges from the superb to the absolutely appalling.

Simply hanging out a barrister's shingle is no guarantee of the quality of advocacy. Indeed, it could be argued that the ability of barristers to set up and practise without any post admission experience and without supervision results in a lower standard of advocacy than would otherwise be the case. The intervention rule could well be seen as a consumer protection measure. It cannot be in a client's interests that inexperienced barristers sole should be let loose on the public.

To make use of the generic term "lawyer" will not assist. I am a partner in a legal firm, although my practice is that of an advocate. To suggest that, because I am a "lawyer" I would be competent to convey unit titles, would cause consternation amongst my partners and a sharp intake of breath from our insurers.

Perhaps the best solution is to abolish the present practice of barristers sole, and to those practitioners who have no need to deal with clients' money some relief from audit requirements and the Fidelity Fund.

Such practitioners should be required to satisfy the Law Society that they are competent to practise without supervision in a manner similar to those practising as barristers and solicitors in sole practice. This requirement could be met by some minimum period of post admission experience, coupled with attendance at an advocacy version of the "Flying Start Programme".

These practitioners would be required to maintain a trust account, subject to audit. The audit requirements would be minimal, since there would be a restriction in the funds which can pass through that trust account, and in particular a barrister should only be allowed to receive from the client funds which represent fees, disbursements and other payments made on the clients behalf.

Currently the real distinctions between barristers sole and barristers and solicitors in sole practice is the extent to which each is able to deal with clients' money, and their liability in negligence.

Barristers sole, in theory, have no need to deal with money other than fees and disbursements. Barristers and solicitors (or more particularly the conveyancing and commercial barristers and solicitors) find it convenient to hold clients' money in trust for various purposes. I do not propose to go into this aspect of the matter in any detail and will assume that most non advocate barristers and solicitors will continue to have a need to deal with clients' money.

Those who wish to practise solely as advocates could do so and advertise as such. They could accept clients direct, but would not be able to deal directly with clients' money, other than fees and disbursements. There would be no reason why they could not work in partnership and employ others. They would also be able to sue for their fees. They would be able to be sued.

Whilst there are valid public policy reasons for allowing minimum immunity from suit for "in court activities", barristers sole would have to accept that they would be liable in negligence for "out of court" activities that have been traditionally performed by solicitors. To that extent, they would be required to have professional indemnity insurance in the same way that solicitors currently have indemnity insurance. Those who wished to practise as barristers and solicitors would carry on as before.

The bottom line is that there are traditional reasons for the distinction between barristers and solicitors. In New Zealand that distinction has become blurred.

There are two final matters.

The first relates to Mr. Faleauto's suggestion that barristers "operate more like a service business, charging for time plus expenses".

Rule 3.01 makes it clear that a practitioner (whether barrister or solicitor) may only charge a fee which is fair and reasonable for the work done and, having regard to the interests of both the client and the practitioner. The time expended is only one of the factors taken into account. Other factors, such as the skill, specialised knowledge, importance of the matter to the client and the results achieved , are often far more important than a mechanical calculation if time and hourly rate.

Secondly, if Mr Faleauto considers that much of a barrister's work is public performance similar to that of an athlete or entertainer he does his profession harm and is not doing good for his clients.

The role of barrister is to act as an advocate. The advocate's task is to present the client's case to the best of the advocate's ability, consonant with the barrister's duty as an officer of the court. The barrister is not there to entertain the public, but to persuade the judge or jury. I venture to suggest that, to most successful advocates, the appearance in court is the least important of the barrister's tasks, and most cases are won or lost in the preparation and not in the heart string pulling final address to the jury.

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