



Observations on a fused profession: the Herbert Smith Advocacy Unit

By David Sulan¹

Herbert Smith LLP is a market leading litigation firm and the first in the UK to establish an in-house advocacy unit. The firm's dedicated Advocacy Unit began in April 2005, with the recruitment of two leading London silks, Murray Rosen QC and Ian Gatt QC. The firm notes that the unit:

...allows Herbert Smith to offer clients a complete litigation service, in which legal teams of solicitors and barristers work together from the outset to prepare and present cases. We believe that, in appropriate cases, this integrated approach improves the efficiency of the litigation process and offers real benefits to clients in terms of the ability to manage cases.

We do of course always offer clients the option of instructing outside counsel and we retain strong relationships with the Bar. A member of our advocacy unit will only be recommended, as one of a number of options, where we believe that that individual is right for a particular case².

On joining Herbert Smith the silks became solicitor-advocates (whilst retaining their non-practising memberships of the Bar), since English barristers cannot practice as partners.

The associate solicitors recruited to the unit work closely with the silks. For associate solicitors in the unit the experience provides an opportunity, in a supervised environment, to improve skills in drafting pleadings and submissions and on occasion to appear in the High Court of England and Wales.

The Advocacy Unit may claim some advantages over the external Bar in the right sort of case. For example, efficiencies in flow of information between the advocate, solicitor and client may be achieved, maximising the focus and direction of a case from the outset which can be particularly important when dealing across time zones with international clients. Herbert Smith uses the Advocacy Unit as a focal point to encourage solicitors to improve their advocacy skills and confidence for court appearances.

The Herbert Smith Advocacy Unit has been in operation for over two years. Since it began it has expanded by adding a leading litigation partner. Other firms have announced the hiring of senior barristers and there is talk of some following Herbert Smith in setting up dedicated in-house advocacy units.

The creation of such advocacy units is, for a number of reasons, a natural step for a large London law firm with a significant international client base.

First, international clients, particularly those from the US and Japan, do not always understand the split profession. It is not uncommon for the client to be introduced to their advocate on the doorstep of the court at the beginning of the case. For the client, having spent the vast majority of the preparation time dealing directly with the solicitors involved, it must be a somewhat strange experience not to have a working relationship with the barrister appearing at the hearing.

Second, the international arbitration market in London is booming and a number of major firms with significant litigation practices have created separate international arbitration groups. The partners in these groups often conduct the advocacy and work as part of an integrated

team in taking the matter through to hearing. The advocacy unit represents, in some respects, an extension from arbitration to litigation of the 'one stop shop'.

Third, UK firms have an eye on their competitors across the Atlantic in the US. A number of US firms have set up offices in London. Of course, in the US, the split profession does not exist and the US firms operating in London will no doubt create trial lawyer departments when they become established in the London market. To maintain their competitiveness London firms will need the same capability as their US competitors.

Fourth, the charging structure at the London Bar has a lack of transparency. Barristers charge a brief fee payable on 'delivery' of a brief before trial. The brief fee is rarely refundable if the matter settles before trial. The brief fees involved represent the bulk of the trial costs and can often be extraordinarily high for heavy commercial cases. The barrister is thereafter usually entitled to a daily 'refresher' for each additional day of the trial.

The brief fee is often the subject of negotiation just before the trial commences at a time when the barrister is already fully integrated into the case. The timing of the negotiations often leaves the barrister (or more likely, their clerk who conducts negotiations on the barrister's behalf) in a strong negotiating position. The Advocacy Unit on the other hand charges at an hourly rate which is far easier to justify and explain to the client. If the matter settles or is adjourned significant costs are not borne by the client.

An advocacy unit for Sydney firms?

Is in-house advocacy an inevitability for Sydney firms? In my view the answer is no; at least not in the short to medium term. The reasons are largely because many of the justifications set out above do not currently apply in the Sydney market.

First, for an advocacy unit to work, the firm must be capable of supporting it. That means the firm must have a significant litigation practice, with the ability to continually refer work to the in-house advocates. That requires a mass of litigation and the right sort of cases. There is no point in the in-house advocacy unit being consumed by a huge piece of litigation that runs for years. The unit is at its best for shorter hearings and mid-sized cases. There are only a few firms in London that can realistically say they have enough of the right sort of cases to make it work. In Sydney, with the smaller market, it is unlikely that many firms would have the mass of litigation and right mix of cases to justify a dedicated unit.

Second, Sydney firms tend not to have the background in international arbitration. The focus on arbitration in London means that firms are geared up to conduct advocacy in-house with many of the partners possessing significant advocacy experience. The leap to provide an in-house capability for High Court litigation was not great. That arbitration platform does not generally exist in Sydney.

Third, there are fewer multinationals litigating in Sydney than in London. The split profession is generally understood by companies and other sophisticated users of legal services that are accustomed to seeing bewigged and robed women and men walking along Phillip St.

Fourth, the charging structure of the Bar in Sydney is very different to the brief fee system in London. There are greater transparency and disclosure requirements on barristers in Sydney compared to their counterparts in London. Moreover, the hourly and daily rates of the Sydney Bar mean that the use of counsel or a counsel team can often be more cost-effective for the client when compared to rates the client pays solicitors.

Finally, it is likely that it would be difficult for Sydney firms to attract members of the Bar to move in-house. In London, barristers tend to move directly into practice after university and Bar Finals without ever having set foot in a law firm. That means the step into a law firm may be seen for some London barristers as an untried career change. In Sydney, it is often the case that barristers have spent years at a firm before making the decision to move to the Bar. The experience of a firm will be well known to these barristers and the move into a firm would not be anything new.

An integrated approach

In my view, although the split profession should not be under threat in Sydney, the experience of London firms provides some worthwhile reminders for those at the junior end of the Sydney Bar. An integrated

team approach with the barrister working closely with solicitors and clients ensuring a good flow of information and ideas will almost always result in a more satisfied client. Such an approach will in turn help to ensure that the Bar remains a relevant and efficient provider of advocacy services for years to come.

¹ I have recently returned to Sydney to start at the Bar having spent the last 3 1/2 years working at Herbert Smith LLP in London. My last 18 months at Herbert Smith were spent in the firm's dedicated Advocacy Unit.

² <http://www.herbertsmith.com/Services/PracticeAreas/Disputeresolution/Advocacyunit.htm>

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