

Practitioners' Affairs

Solicitors' Higher Rights of Audience (Part 5) – A Matrimonial Solicitor's View

In a series of articles, the Law Society's Working Party on Solicitors' Higher Rights of Audience will clarify the changes sought to current practice in Hong Kong. This is the fifth article in the series. Members are invited to let the Working Party have their thoughts on this important and pressing issue

In matrimonial proceedings solicitors have the right of audience in the High Court as well as the District Court to conduct cases, as advocates, that involve not only several millions of dollars but often complicated company law and trust structures. Matrimonial solicitors regularly deal as advocates with litigation where assets have been disposed of, hidden or squandered. Matrimonial solicitors are often involved in following an international paper trail which may involve legal applications in foreign jurisdictions. They deal in litigation concerning properties and assets throughout the world where beneficial interests are unravelled or asserted in the most complex financial structures. Matrimonial solicitors, as advocates, handle emotionally fraught legal issues concerning children, ranging from custody and access to international Hague Convention applications concerning abduction. Cross examination of witnesses often plays a crucial part in the process.

Matrimonial solicitors work in an area of the law where success or failure has a huge impact on the client as it involves not only the private individual's own finances but the lives of their children. There are no insurance companies to soften the financial blow for the litigants. No cheque from a wealthy company or financial institution is going to pay the legal fees or the financial settlement. It is real life litigation, grown up and fraught with financial risk.

There are no protests from the Bar or the Judiciary that matters as complex as this, involving considerable sums of money, should not be left to the advocacy skills of solicitors because, in the main, all matrimonial proceedings are conducted in chambers, even in the High Court. Therefore, the weary old argument that solicitors are not qualified to be advocates in such matters simply cannot be applied.

It seems an odd sort of distinction to make. Are chambers proceedings less important? Do they involve less complex law? Are the needs and requirements of litigants in chambers less important and less complicated than those in open court? Are the legal determinations made by the judges in chambers in the High Court or the District Court less relevant to the litigants, or for the development of justice generally? Since the answer to the above questions must be 'no', the higher rights of audience argument seems difficult to maintain in this day and age and in Hong Kong's judicial system.

The debate about higher rights of audience always seems to turn on how solicitors can pacify and reassure the Bar that their supply of work will not dry up once those rights are granted. This is rather like looking down a telescope from the

wrong end. It means we keep further and further from our sights the more important issues of what is in the public's best interest and what is the preference of the fee-paying client. One's role as a lawyer is to offer a client options so the client can make an informed choice about how they want their own legal proceedings to be pursued. Illogically, solicitors cannot offer their client any option whatsoever when it comes to High Court actions that are not in chambers, and even higher court appearances. In those circumstances clients are obliged to accept and pay for additional and duplicative costs because of a system which requires a barrister, who might never have been involved in the client's case before trial, to appear in a higher open court. Clients are right to be frustrated by the lack of choice in the matter and outraged by the additional expense.

Since solicitors in debating higher rights of audience do ultimately have to put forward arguments to pacify the Bar, let me do so now. The reality is that not all solicitors will exercise higher rights of audience, even when that right is granted to them. Some will, when the client so chooses it to be that way. In matrimonial proceedings where there is no obstacle to arguing one's client's case (until it comes to an appeal in the Court of Appeal) many solicitors do continue to instruct counsel.

In matrimonial proceedings there is a small and, in the main, highly specialised Bar. This specialised Bar is instructed for all the usual, sensible and logical reasons that apply to all areas of litigation. Those reasons will continue to exist even after higher rights of audience are granted. Solicitors recognise the importance of accomplished and intelligent advocates, but not all barristers can be described in this way. Solicitors recognise it can be in their client's best interest to have the best person for the job appear in court for their client. This will often mean that, notwithstanding the right of a solicitor to argue one's client's case, that solicitor will advise the client that counsel is the best option. It is the client who then decides.

The Bar will continue to exist and the need for the Bar will not be extinguished by higher rights of audience for solicitors. Indeed, few solicitors could afford the time to devote themselves to the preparation and conduct of a trial. In matrimonial proceedings, barristers frequently conduct matrimonial trials as well as all the difficult interlocutory matters. Such hearings can last for days, weeks or months. Solicitors handle a large workload from several clients and have to juggle the preparation of a client's case with correspondence on numerous clients' cases, not to mention the never ending phone calls from clients. They have the business of running a firm in addition to their legal work.

When granted higher rights of audience, solicitors will continue to instruct competent counsel, as they do now. All that will change is that it will become the consumer's decision, the client, who chooses how the case is to be conducted, not the Bar.

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