

Barristers' clerks are one of the more unusual occupational groups in the UK today. They can be employed or self-employed and they even have their own tax office. The HMRC views them as a kind of employee but grants them self-employed benefits. Why is this group different? Who are they? What do they do?

Until some years back no barrister could practise without a clerk. Although the rule has been abandoned, most barristers still use them. The Bar is essentially a referral profession that organises itself differently from solicitors. There are no firms, no partnerships, and no holding of client monies. Think, then, of the legal profession as straddling the sacred and the profane worlds.

Mary Douglas, the late anthropologist, suggested when we are unsure of things we create taboos around them and segregate them. The law is one such entity. The practice of law runs the gamut from defending low-level criminals and handling conveyancing to arguing cases about the abstruse requirements of a trust in the Chancery Division or the extra-territorial reach of the Human Rights Act in war time before the House of Lords.

Interpreting the law

The Bar has long defined itself as a profession that is primarily concerned with interpreting the law while solicitors deal with the clients' needs. The world of interpreting law is then a sacred realm while clients' affairs descend into the profane. The sacred needs a priesthood, a role which barristers fulfil. And the sacred needs to be protected against the profane. Here the clerk's role becomes crucial.

There isn't much written about clerks. (I know because I have written the only book: *Barristers' Clerks: The Law's Middlemen*). Starting with basic information: how many barristers' clerks are there? No one knows. Perhaps a couple of thousand, but who is included in the count? Clerks, practice managers, chief executive officers, administrators, fees clerks, etc? The range is wide. So there is a problem defining the group.

There has traditionally been something amateurish about the organisation of the Bar. Just as civil servants were expected to turn their hands to whatever task was assigned to them, the Bar never engaged with specialists in management and organisation. In the 1990s barristers decided their chambers needed to be run more professionally. As chambers grew in size, new strengths were needed, ones which the Bar thought clerks couldn't provide.

A new division of labour

The answer was sought in the practice manager, a figure who would bring rationality, reason and profit to chambers. Those results depended on who was hired. Practice managers were a mixed bag, some were ex-army officers, some ex-solicitors, and others

THE FALL of BARRIS CLER



& RISE CLERKS CLERKS

John Flood
examines the
changing role and
fortunes of the
barrister's clerk

had real management experience. Each group had varying degrees of success.

For the chambers the crucial question was: how would chambers' administration be divided between the senior clerk and the practice manager? This assumed that chambers retained their clerks, though some decided to abandon them altogether. At first the division of labour was understood. Clerks would continue to set fees, arrange the diaries and advise. Practice managers would set up structures for strategic planning, marketing, and budget control.

For many clerks all this was new. For some it was anathema and they left. For those that stayed and were joining, new skills were learned. The managers were in virgin territory, but chambers are small organisations and it didn't take long to establish the necessary systems. Managers began to look for other things to do and clerks felt them looking over their shoulders, which they didn't like. Conflict was imminent.

Change came at the turn of the century as the Bar revised its view on how it should be managed and administered. There was a resurgence of clerks who began to take back their terrain, in part the result of a new generation. For the Bar

the cost of having both managers and clerks was too high, and clerks were a known entity. Clerks became chief executives, practice managers, marketing managers as well as being the senior clerk. They proved their adaptability by acquiring the skills of those brought into to replace them. In doing so, the clerk's percentage has largely disappeared, replaced by salary and maybe an incentive bonus.

The result is that clerks have made serious attempts to professionalise themselves with the establishment of the Institute of Barristers' Clerks and the introduction of clerking qualifications for junior members. (The practice managers formed their own group, the Legal Practice Management Association.) While clerks have taken this seriously, the Bar has not been entirely activist in providing time off for training and supporting the IBC. Although clerks are included on various Bar Council committees, it can be a struggle for them being heard and understood.

The preconceptions that each carries of the other do not always create harmony. Two vignettes illustrate this. A clerk said: "My barristers think they employ me. They don't: I employ them." One barrister said to another, "My clerk lives in Essex." The other replied, "My clerk owns Essex."

What do clerks do?

The role of the clerk is based on a fundamental set of ambivalences.

The first is that most barristers are short-termist and anxious about their prospects: where is the next job coming from? It doesn't matter how eminent or experienced they are, they feel it. The second is that when work and earnings are going well, it is the barrister who is responsible, but when work drops off, it's the clerk's fault. Clerks arrange the work of barristers, which they do by dealing with time, money, and careers.

Clerks manage the diaries ensuring the barrister is the right place at the right time and are not double-booked for cases. They negotiate fees and collect them. They counsel them on their careers – when to change line of work, when to take silk, and advise them on when to find another career, if necessary. Although it all sounds straightforward, none of it is.

The Bar is diverse in its types of chambers. They include "Magic Circle" corporate sets, large multi-location sets, small specialist sets, criminal sets, and general sets. Some earn high incomes while others struggle to get by. Clerking varies among them. In the successful corporate sets deciding the fees is a vital part of the work, whereas in the criminal sets fees are more structured and have less variance, but collecting the fees is more time-consuming and sometimes precarious. For the privately funded civil sets obtaining sufficient work for their pupils and new tenants is one of the clerks' main concerns. In

Legal hierarchy

Thirty years ago barristers' clerks were typically male and working class. They started as "lads" from school and learned the job by running around the Temple and to the courts, and watching what the senior clerk did. Of course this meant there were huge differences in status between barristers and the clerks.

At that time one senior clerk summarised them by advising a junior clerk that:

When I call a barrister by his first name, you call him "Mr Smith".

When I call him Mr Smith, you call him "Sir".

When I call him Sir, you don't speak to him.

While this places the junior firmly in the hierarchy, such things can be variable, as was suggested by another senior clerk, who said to his junior: "You are low in the hierarchy here, but he" – pointing at a pupil – "is lower than you."

Flood: clerks' roles are varied

those sets that depend on publicly-funded work just ensuring that there is enough work coming in is the key concern. One clerk mentioned how his chambers had had a steady flow of work from a particular government agency. When it moved out of London, the clerk felt it necessary to visit them to make sure the work did not go elsewhere. Marketing the chambers is important, but as most clerks say the best way to do it is to have all one's barristers in court being visible. Nevertheless, clerks do participate in beauty parades for clients. Their main task is to maintain links with solicitors and keep the work arriving in chambers. This is done both formally and informally through social contacts.

Diary management

Diary management is often synonymous with double-booking. The problems arise around booking

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counsel for court cases. In many situations it is a matter of following the warned lists published by the courts and being ready to send off the barrister. In some courts, like the Commercial Court, it can be necessary for the clerks to meet the listing officer and work through the possible times for the barristers and the judge. It's not merely a matter of balancing the barristers' commitments but also the amount of time a judge has available based on assize duties and needs of current cases. It is a situation where clerks have to be open with listing officers and keep them informed of changes or suspected changes in schedules. If they don't, listing could become an awkward experience.

Counselling role

The counselling role is the one that has least exposure. Given the anxieties of barristers and their need for reassurance, clerks are able to adjust expectations in subtle ways. If, for example, a barrister is not a robust advocate in court, the

clerk will suggest a move towards advisory work. Moreover, the clerk will actively seek this work for the barrister, which may be coupled with a decline in advocacy briefs. A clerk may want to build up a particular area of chambers' work and may persuade a barrister to move into that area. Alternatively, the barrister may commit to a change of direction in work. For the clerk this means bringing in this type of work, reducing the previous work to that barrister and trying to persuade solicitors that another barrister in chambers is more than competent to handle the work. The clerk will also have to warn the barrister of the potential drop in income while the change is made. It is the junior barristers who are most dependent on clerks for they are the conduit to the world of work and therefore can shape careers.

Taking silk

Taking silk is the big decision. It means a new status, bigger work and bigger fees. If clerks are planning well, they will have a good feel for when the time is right. Again they have to balance the remainder of the chambers' work when the elevation occurs. The new system is onerous in time and money and some barristers undertake training for the interview. The clerk sees all this, but may not be listened to. One clerk told of a barrister who twice applied unsuccessfully against his advice.

For the clerk the needs of the individual barrister are balanced against the requirements of the chambers as a unit. Is each barrister meeting his/her target? Is chambers growing in line with expectations? The worst that can happen to a clerk is for a set of chambers to fragment into a melange of cliques and dissolve.

The moral division of labour

In the 21st century there is something quaint, almost Dickensian about the Bar and clerks. There is no formal requirement to have a clerk and some chambers make a point of not hiring them. Yet the system persists.

Its basis lies in a moral division of labour that allows the Bar to maintain a superior tone. It is not seen to be involved directly with mundane things like money, scheduling cases, and handling success and failure within chambers. The problem is that it requires a clear sense of hierarchy and status.

Modern labour practices

The combination of modern labour practices, changes in education and in perception of class and informal working arrangements has implicitly undermined that sense. Who controls whom is no longer clear. More probably they complement each other.

However, having decided to work in this way neither side is completely at ease with the result. Many barristers see clerks as grasping and selfish, not committed to the ideals of the Bar. Many clerks see barristers as selfish and grasping, not committed to the ideal of the organisation of chambers. The mistrust comes out of their different expectations, which are not irreconcilable.

As long as the Bar is organised in its present fashion, there will be clerks. However, if the Bar decides to exercise its freedom to engage in "alternative business structures" as recommended by Clementi, then new systems can be created. But, as one clerk presciently told me, "Under Clementi I could open 'Barristers' R Us', employ them, give them 28 days' holiday and BUPA, and pay them £40k a year." ❖

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Barristers' Clerks: The Law's Middlemen is available for free download from www.johnflood.co.uk/pubsbycat.aspx?catID=3

Further Details

- The Institute of Barristers' Clerks: XXXX
- Clerking qualifications: XXXX
- The Legal Practice Management Association: XXXX