STEPHEN MAYSON

An independent mind

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ACCESS TO JUSTICE AS A BUSINESS[1]

Professor Stephen Mayson[2]

Introduction

Thank you to the President for his welcome. I am delighted to be speaking at this important conference.

I have never had any difficulty treating legal practice as a business. But I have to confess that, when I was invited by the President to speak about 'access to justice as a business', I did feel a sense of discomfort. At so many levels, I cannot consider that access to justice can be seen as a business matter. However, given that in many practical senses access to justice is delivered by law firms acting as businesses, I think it might just be possible to tie the two concepts together.

I am not a legal aid practitioner, and never have been. My purpose this morning is to offer some thoughts about the context in which access to justice and legal aid practice take place, and to suggest ways in which firms who practise in this area might think about their strategy and business.

The big picture

All business is conducted within a broader context, and this will shape what can and cannot be done. The context of access to justice is particulary challenging.

First, Parliament has a significant role to play in matching the creation of legal rights and duties with citizens' ability to pursue those rights. Some of our most complex laws

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[1] This paper is based on the keynote address at the Law Society's annual conference on legal aid in London on 17 March 2016. It is not a transcript.

[2] Honorary Professor, Faculty of Laws, University College London; independent non-executive director; recently chaired a regulators' review of legislative options for the future development of legal services regulation. The views expressed here are personal and should not be attributed to any organisation with which I am connected.

are intended to support the most vulnerable members of society. It is meaningless to create those rights if citizens then have no reasonable prospect of enforcing them. There can be no access to justice if Parliament does not match rights and the wherewithal to pursue them.

Second, for me access to justice is a vital part of the public interest. I see the public interest as having two principal components[3]. The first component is the fabric of society itself. In the broadest sense, this includes things like defence and the state of the economy; in the context of law, it includes the rule of law and the administration of justice. These are public goods, available to all, irrespective of whether they are parties to a contract.

The second component is then the legitimate participation of citizens in that society. Again at a general level, this includes such things as good health, housing and education; in the context of law, it includes access to justice. Without effective access to justice, the rule of law is meaningless. The public interest therefore also includes the broader public good of judicial decisions that help shape the actions, decisions and resolution of disputes in ways that go beyond the immediate parties to those judicial determinations.

What is currently disturbing about access to justice and the public interest is both the involuntary and voluntary exclusion of citizens from legitimate access. Involuntary exclusion is caused by lack of public funding through legal aid, such that vulnerable citizens cannot pursue their legal rights. Voluntary exclusion arises when individuals conclude that legal services are too off-putting or too expensive, and decide that they will not take matters any further.

Third, then, this raises questions about the public interest and the economics of law. We have to face client perceptions of affordability and value for money. There are government perceptions of affordability and value for money (as custodians of the public purse). And there are lawyers' perceptions of a 'reasonable return' for their time, effort and risks in providing legal services. These perceptions are clearly not aligned. We might not like them, and think that clients and government are wrong. But that's not the issue. Perceptions are neither right nor wrong; they just *are*. If we are not happy with them, we cannot simply complain but must do everything possible to try to change them.

So is it possible to find any mutual interests in cost-efficiency in legal services? It looks somewhat challenging when one side wants to cap prices and the other maintain profitability. Nevertheless, it seems to me that resourcing is the key to all of this. We need to look carefully at how people, technology and processes are used, and to make sure that the right people are always used – with the most expensive of those people used only where they must be – supported by technology and processes wherever possible to make sure that consistency and efficiency are achieved and maintained.

But government must also make sure that the courts are properly resourced. It is not right that lawyers and their clients should bear all the costs and financial implications

[3] See further, Mayson (2013) Legal services regulation and 'the public interest', available at https://stephenmayson.com/downloads/.

of poor court estate and administration, of poor technology, of wasted time or attendance at court, or of judges deciding at the last minute not to sit, and so on.

The problem with focusing on resources, though, is that it requires constant reinvention (innovation). It is never possible to say that 'the solution' has been found and now we just carry on doing it that way. It is often easier to resist further change, and it might seem quicker at the time to do so. But, ultimately, change will overtake or overwhelm those who do not embrace it.

There are many different and challenging aspects to this big picture. Some of them are not easy or comfortable to face up to. How, then, might you construct a business response to them? A business approach to legal aid practice would address two high-level dimensions: what is your strategy, and what is the appropriate business model to deliver that strategy?

What is your strategy?

In the time available this morning, I just do not have time to deal with this fully. So I am going to suggest three fundamental questons or elements relating to strategy, together with two consequential questions that flow from them.

All strategy is a matter of addressing three elements: *who* do you want to act for, *what* do you want to do for them, and *where* do you want to do that? All of them would be affected by how you might choose to position a legal aid practice. So, in the context of legal aid, this means deciding, first, whether you want to act for all potential legal aid clients, or only some types of clients (such as those facing criminal charges, or asylum-seekers)? If only some, on what basis are you making that decision – expertise, experience, comfort, etc? And are you only going to act for publicly funded clients, or do you wish to act for them alongside other clients? These are different markets and targets, and both the firm and its business development will need to be structured appropriately. Do you have the expertise and capacity to do them both effectively?

Do you then intend to provide all types of legal aid services to the chosen clients, or operate only in certain types of legal aid practice areas (such as housing or domestic abuse). Again, will you only offer services for which legal aid is still available, or how much more broadly will your practice areas go? And on what basis are you making that decision?

If you have more than one office, will you offer legal aid services in all of them, or only some? Is there any practical, economic or competitive merit in consolidating your legal aid services in one location, or in establishing one or more offices as a centre of specialisation or excellence (either in type of client or service(s) offered)?

At one level, these are all pretty obvious questions; but finding the right answers to them can be very difficult and challenging. One of the reasons for this is that by saying that you will focus on certain things, you are also saying "this is what we're not going to do". Many firms understandably find that a tough decision to make and maintain.

There are then two consequential questions. The first relates to how you choose to position the legal aid practice internally. Is it to be a stand-alone practice, or will it be

cross-subsidised? There is much to be said for having the financial capacity to be able to support the more vulnerable and most disadvantaged clients. But equally today there is a counter-view. In a competitive world, clients of the non-subsidised practice areas are just as likely to say, "Hang on, why are we paying more for our services than we might elsewhere so that you can subsidise others?". This is potentially a demanding commercial position to adopt.

Also, if you choose to run a 'mixed economy' of legal aid and non-legal-aid work and, as often happens, the legal aid work does not produce the same level of returns as other parts of the firm, do you have the internal philosophical and economic tolerance and resilience to deal with those differences and the implications that arise from them? Many firms have struggled with the challenge of differential returns.

The second consequential question is, What is your competitive advantage? Why should clients come to you? Are you able to articulate that? And are you clear about what that advantage is based on – such as the scale or concentration of your services, the technology or processes you use, the staff you have and how you use them, your geographical or social reach, your centres of excellence, the personal service you offer, and so on? Your intended advantage has to be supported by how you resource the firm, otherwise it cannot be achieved or maintained. Being clear about what it is, where it comes from, and how you can explain it to clients and in marketing, are all vital.

Finally, there is a challenge in how you manage the balance – and tension – among cost, price, value and relationship. They are not the same. The cost to you of how you work (or would wish to work) might not be reflected in the price you can charge. We no longer operate in a 'cost-plus' market where you could add a margin to your costs in order to name a price. We are more often these days in a 'price-minus' world, where the price is fixed and profit is the residual difference between price and cost. This can be particularly challenging in legal aid work where the price is fixed at a low level, and the cost of the service provided is often determined by the need to offer senior, experienced and personal advice on some of the most technically complex law. There can be a clear disconnect between price and cost.

Cost, price and value might also be out of line. Sometimes the value to a client can be far in excess of the cost to the law firm, and if the price reflects cost more than value, the law firm will lose out. Equally, the value might be disproportionately low compared to the cost of producing it, and if the price is too high the client might not instruct the firm in the first place, or not return.

Finally, relationship and personal service are still important in many areas of legal practice. This comes at some cost to the firm. If the client's perception of the value of that personal service is not aligned with the cost or price needed to provide it, there will again be an uncomfortable disconnect.

How these sometimes inevitable tensions are managed needs to be thought through so that the firm can be sure that its strategy is capable of positioning the firm appropriately to deliver the required value and degree of personal service at a cost and price that will meet everyone's expectations.

The business model

A firm's business model[4] is simply the way in which it sets out to deliver and resource the creation of value for its clients and achieve an acceptable return for its own efforts and risks.

The creation of value for clients by a law firm is often the source of its competitive advantage. In many cases, 'value' is often equated to a financial outcome such as compensation. But – perhaps more so in legal aid work – that value can also be attached to more fundamental outcomes such as liberty, nationality, residency, a home to live in, access to children, or physical, emotional or financial security. Part of an effective business model is being able to explain to the market and to clients how solicitors are best positioned to deliver these outcomes.

When the value or outcome to be delivered is clear, a firm needs to be resourced actually to deliver it – as consistently and cost-effectively as possible. This involves some difficult questions about people, space, technology, and processes. Firms should be encouraged to ask themselves whether they need as many people as they used to, how many of them need to be legally qualified or whether they can use people who are not, to what extent they could substitute technology for human beings, whether everything needs to be done in person or can be done virtually, and whether processes (particularly case management) might help to deliver consistency and cost-efficiency. None of the answers is obvious or a foregone conclusion; but testing assumptions and history about how legal services are being delivered might lead firms to consider change and innovation where that might improve the client experience, value or profit, or reduce costs. Sometimes, even combining or cooperating with competitors in particular ways short of merger might achieve scale economies to everyone's benefit.

A business model should also address how the firm or a particular dispute might be financed. There are many more options these days, including damages-based and conditional fee arrangements, third-party funding (of litigation or the firm), and insurance. These alternative sources of finance might lead some firms to question whether the traditional partnership structure remains appropriate for them, or whether a corporate solution might make access to funding, as well as managing the risks and rewards, easier.

Finally, a business model needs to be clear about how it seeks to deliver adequate returns (whether financial, reputation or psychic), for whom, in what form, and over what period of time. The days of all financial reward being extracted as income on a current-year basis are being replaced with arrangements that separate more clearly owners and employees; income and capital; salaries, bonuses and dividends; current and deferred rewards; and the prospect of capital growth. This will not be suitable for every firm, but at least the options now exist to be considered.

There are challenges and difficulties everywhere, and no easy answers. But there are ways to look carefully and systematically at the choices available. The future is probably closer than you think – good luck!

[4] See further, Mayson (2010) Business models in legal services, available at https://stephenmayson.com/downloads/.