

CHAPTER 10

ATTRACTION OF BUSINESS

Medicine, it has been said, is a science; acquiring a practice an art. The professions have always attached great importance to the ways in which a practice is built up. Numerous rules have been laid down, and most of the remainder of this Part will be concerned with them. It is worth pointing out by way of introduction that there are two aspects to the matter. One is the content of the rules governing the attraction of business. The other is the fact that, whether or not a professional man agrees with the rules, if he does not obey them he is gaining an unfair advantage over his colleagues who do. There is no objection to anyone seeking to persuade his colleagues that a rule needs altering; until he is successful in this, however, his colleagues will feel very strongly that he ought to abide by it. "Letting the Work Come to you"

The essence of the professional approach to acquiring business is that it should be allowed to come without being actively sought by the practitioner. As the Law Society put it, the proper method is "by his name becoming known to prospective clients in the neighbourhood without the solicitor himself actively participating in that process". (1) The professions warmly agree with the view expressed by Thomas Carlyle in his *Past and Present* in 1843: "Nature requires no man to make proclamation of his doings and hat-makings; Nature forbids all men to make such. There is not a man or hat-maker born into the world but feels, or has felt, that he is degrading himself if he speak of his excellences and prowesses, and supremacy in his craft; his inmost heart says to him, 'Leave thy friends to speak of these; if possible thy enemies to speak of these; but at all events, thy friends!' " (2)

Admittedly the professions do not altogether prohibit a man from plates. We shall come to these in Chapter 12. Some practitioners perform in public and can make their abilities obvious. As the Bar 132

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133 Council point out, much of a barrister's work is done in this way: "He can be judged by his successes and failures, by the quality of his public performance." (3) Most professional people however are not in this position, perhaps to their relief.

The building up of a practice can be very difficult, and the way is often particularly hard for newcomers. A family connection still counts for something. W.J. Reader, writing of the nineteenth century, observes that the professional classes, having got rid of aristocratic patronage in the public service, had no intention of doing the same for their own affairs. Openings in family businesses or practices, like family livings, were family property, only to go to outsiders under the most unusual circumstances. (4) Today there are still many old-established firms, especially of solicitors or surveyors, where representatives of each family generation take their place among the partners almost as a matter of course. Naturally they have to satisfy the increasingly rigorous demands of the examiners, and a fool will not be tolerated long even if he has managed to acquire paper qualifications. The Bar Council point out that a young barrister may benefit at the start from family connections, "but this is of no advantage to him (indeed may be a disadvantage) if he cannot sustain it by his personal qualities and performance". (5)

Skill is of course needed in building up a practice. The words of H.B. Thomson, a nineteenth century writer on the professions, are still apposite: "The great struggle is for a connection, and every art is necessary to extend it, so far as it can be done without . . . compromising the integrity of the mind." (6) Certainly a professional firm whose partners spend their entire time wrestling with problems of law or accountancy will not prosper, though it may be highly respected. Lewis and Maude put the point in perhaps a slightly cynical

way: "There are contented and prosperous partnerships in accountancy, architecture, and several other professions, in which the labour is shrewdly divided between the partner who plays golf, bridge and billiards, attends cock- tail parties and dances, and the partner who just does the work." Professional advertising, they add, is a little art of its own — clothes, manner, politics, technical and popular journalism, all play their part in it. (7) Are these authors accusing the professions of hypocrisy? It seems not — they merely recognise that realism comes into the matter, and it is a question of drawing the line in the right place. Undoubtedly the view taken by the law itself is widely supported. Lord Upjohn in *Dickson v. Pharmaceutical Society*, remarked that the professional man must submit to such "elementary" restraints as prohibition against advertising and touting. He added parenthetically: "but of course there is no harm in letting the work come to you". (8)

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Professional men and women do not easily find words to justify a rule they regard as fundamental. As the R.I.C.S. said in their submission to the Monopolies Commission, it is not altogether surprising that when professional people are asked why they refrain from commercial methods of obtaining business their reply is apt to be on the lines of saying "We are professional people; it is against our professional creed to do these things; and therefore we do not do them." (9) Nevertheless reasons can be found, and perhaps the most significant is that it is wholly to the public advantage if success in a profession comes through merit rather than other causes. Advertising, say the Bar Council, cannot advance the public interest; and may be detrimental to it. "The corollary is that, in a profession, success should depend only on individual ability." (10) It is also felt to be important that the public should have a free choice, and should not be directed or persuaded to consult a particular practitioner. The B.M.A. regard it as essential to safeguard the free choice of doctor or dentist by the patient. (11) The Law Society feel that "it should always be left to the individual freely and without pressure or financial inducement to choose his own solicitor." (12)

The professions believe that it is undignified to solicit business, and harms the confidence of the client in his adviser. Provided the public find no difficulty in learning the whereabouts of suitable consultants (a point we shall return to later), the professions regard canvassing and advertising as wasteful in time, effort and money. Good wine, they say, needs no bush *

At the bottom of it all is probably the fact that people choose to go into a profession because they are interested in its expertise, perhaps being of a thoughtful or academic turn of mind. They often have little taste for the hurly-burly of commerce — if it were otherwise they would have chosen a different occupation. The point is well put in the R.I.C.S. submission to the Monopolies Commission: "We believe that all professions involve a vocation, a sense of dedication and a willingness to accept a measure of self-discipline as well as the ability to reflect deeply and sympathetically on the problems referred to them by clients.

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E.S. Turner observes that this proverb inspires in an advertising man the same reaction as "the Lord will provide" does in an insurance agent — *The Shocking History of Advertising*, p. 105.

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135 These qualities of mind and spirit are not called for in the same degree in commerce or industry, where forcefulness, ambition and enterprise (and sometimes even ruthlessness) may be valuable assets from the point of view of the national economy as well as the individual. It follows that it is the function, and indeed the duty of a professional body to seek to establish in the profession it represents conditions which will attract to the ranks of that profession the right type of recruit . . . Ideals tend to be suspect in a cynical society, but the professional approach involves idealism; the professions are the servants of truth and a professional man needs to be able to apply this approach to the problems presented to him if he is to give of his best to his clients. He needs some peace of mind for this and if he has constantly to be looking over his

shoulder to protect his livelihood from deliberate poaching, his approach to his work, for he is human, will become coloured by the need to protect himself... The professional man has to make his living. We firmly believe, however, that it should not have to be a professional man's prime preoccupation. The proper ambition of a professional man is not to obtain more work for himself at any price and without regard for his colleagues, but rather so to improve his skill and the quality of the service he provides as to attract more clients by the reputation he builds up." (13) Gaining Work through Recommendation A person needing professional advice, and having no first-hand knowledge of the profession, is well advised to seek guidance from someone who has this knowledge. Often he will know of another person who has faced a similar problem and received satisfactory professional advice or treatment. He will naturally enquire of that person the name of the practitioner concerned. In this way he will participate in the classic method of building up a practice. As the British Optical Association put it, "the whole basis of professional practice-building is by recommendations from satisfied patients or colleagues". (14) The professions are not of course alone in this. Even in the commercial field advertising can be relatively unimportant compared with recommendation from satisfied users of the product. Harris and Seldon report that in the case of brands advertised on television most users when questioned attribute their purchase to personal recommendation. (15)

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Disinterested advice need not be sought only from satisfied clients. Those whose job brings them into contact with professional people, and who are themselves of unquestioned integrity, are very often in a good position to advise. The local bank manager can be relied on to recommend a suitable accountant or solicitor. A solicitor will recommend an estate agent, and so on. Indeed this form of recommendation may be more reliable than that of the individual satisfied client. The latter may have no basis of comparison, and may unwittingly have received below-average service which nevertheless satisfied him. The person who is in constant touch with several practitioners in the same field will acquire an accurate impression of their relative standing.

Some professions, such as law and medicine, are organised on a two-tier basis under which the prospective client or patient first approaches a general practitioner, who from his knowledge of the specialist services available advises on an appropriate consultant. This is one of the great strengths of the so-called divided professions. A family solicitor whose client needs specialised advice on a point of taxation, or patent law, or town and country planning, has a wealth of skilled advice available to him among barristers practising in the field. If the law were a unified profession this range of advice would in practice be restricted, since the lawyer consulted by the lay client would naturally wish to confine the client to his own firm if possible. Under the present system there may be a little chain of recommendation. Where the client of a country solicitor needs specialist advice the solicitor may first go to a London firm of solicitors familiar with Counsel practising in the field concerned, who recommend a barrister. He in turn may advise that a particular leading counsel's opinion should be sought.

Another important source of recommendations is the professional institute. If a prospective client tells the institute the nature of his problem and where he is located they will usually suggest the names of members who could advise him. To enable them to provide this service, the R.I.B.A. for example invite private practitioners to submit details of their capability, such as qualifications of partners and staff, buildings executed, photographs, etc., to be used as a basis for advising on choice of an architect for a specific job. Almost invariably the institutes will decline to name a specific firm alone, but will give a choice of three or more without indicating any order of preference. This is necessary because members are quick to resent any indication that their professional body regards them as sub-standard. Nevertheless if the institute is satisfied that the enquirer will not make trouble in this way it can sometimes be induced to indicate a preference. This is very valuable, because few outsiders have as much knowledge of individual practitioners as their own society.

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Solicitors are forbidden to do anything which is calculated directly or indirectly to attract business unfairly. (16) Other professions, while not using the phrase, apply what is in substance the same rule. We have incidentally considered some practices which infringe this rule, such as the sharing of premises and poaching of existing clients. There are many other types of infringement which are considered in detail in the remainder of this Part. Most of the rules are of long standing, though one ancient injunction to the medical profession is regarded by the General Medical Council as “demode” “: “Do not adopt, in order to gain a patient, luxurious headgear and elaborate perfume.” (17) Taking Advantage

It is regarded as attracting business unfairly if one takes advantage of opportunities afforded by holding a post or other position giving contact with potential clients. The professions deal with this either by regulating the way in which new clients may be accepted or by forbidding the taking up of such positions altogether.

Where a salaried employee is allowed by the rules of his profession to take private work in his spare time he must exercise care in attracting clients. It is for example stated to be unethical for a hospital dental officer to use his position to influence patients to consult him in his private capacity, whether for dentures or otherwise. (18) Employers of solicitors often wish to use them to provide welfare services for other employees, for example free conveyances under a house purchase scheme. In agreeing to this the solicitor must observe the rules regarding attracting business unfairly. He must ensure that the employer neither directly nor indirectly touts for him, as would be done if the employer sent a circular round the staff stating that the services of the employed solicitor were at their disposal. A fellow-employee who consults him must be told that he is free to instruct any outside solicitor of his choice on equally advantageous terms. While the service to the fellow-employee may be free, this must not be achieved by any reduction in the normal remuneration payable to the solicitor for the service in question. In other words a “free” service to the employee must be paid for on his behalf by the employer. If the employee chooses to avail himself of the opportunity to consult an outside solicitor instead, he must be given time off to do so. (19)

Another case which has given the Law Society some anxiety is that of the solicitor working as a volunteer at a free legal advice centre. While this is not discouraged in itself, it must not be used to attract business unfairly. Where a solicitor is found to be acting for reward for

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Solicitors are subject to detailed rules preventing them taking advantage of the relationship with a client in order to attract business from other persons connected with the client. A company which is the client of a solicitor in private practice may for example be moving its factory and wish the solicitor to execute the conveyances on behalf of employees forced to move house. The same rules apply as govern an employed solicitor. It would thus not be proper for the solicitor to accept the instruction where the employer had told his staff that he would only defray their expenses if they employed the firm’s solicitor. (23) A solicitor retained by a trade union or other association which wishes to supply its members with legal advice may only provide such advice if it is conveyed through the staff of the association and the identity of the solicitor is not disclosed. (24)

A solicitor is often in a good position to pick up business through existing clients. A client with funds to invest may become the mortgagee of another client who is buying property. The solicitor must not use the provision of mortgage money as a lever to secure the work of executing the conveyance. Similarly a solicitor acting for a house builder who is selling his houses with offers of free conveyances must ensure that purchasers are put in as good a position as if they had been separately represented, and must indeed enable them to be separately represented without financial loss should they so wish. (25) The Chartered Accountants Institute has found it necessary to warn members holding the secretaryship or other office of a trade association or similar body not to misuse their position for the purpose of obtaining professional work. "In particular a serious view would be taken of a member who used his influence with a trade association to obtain liquidation work." (26)

The possibility of taking advantage of the position to gain clients has led to rules prohibiting members of one profession from entering into a

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139 partnership with members of others (see page 85). For the same reason sharing of business premises is discouraged (see page 89). Little need be added here to the earlier discussion, and we content ourselves with a simple statement by the Bar Council, who impose the sternest restrictions of all: "A barrister who engaged in a second profession, business or occupation would have an advantage over colleagues in the sense that he would obtain or be in a position to obtain professional work at the Bar arising directly or indirectly out of his other profession, business or occupation." (27)

A censorious view is sometimes taken of the possibilities afforded by a wife's business activities. A chartered accountant is told that if his wife runs a secretarial service or an employment agency he must not use this to attract clients, and the wife's business ought to be carried on at a separate address. If the wife of an accountant set up to give advice on tax or any other accountancy subject the Institute would make very searching enquiries to make sure she was qualified to do so. (28)

In some cases the retiring holder of an office is expected not to return to private practice, where he may profit from the contacts he has made. This applies to a stipendiary magistrate contemplating return to the Bar. (29) Hob-nobbing

Professional people are sensitive about being seen in company with possible clients; they feel they may be thought to be seeking business. Taken too far, this would involve a self-imposed purdah, since in some professions the whole world is a potential client. The feeling is illustrated by Reginald Hine, a country solicitor, who had been lecturing to a village audience on mediaeval England. Afterwards, "a fine old country couple came up to me and said: 'Mister Hine, we proper fancied what you said about them 'dieval wills, and if you dunt moind the missus and me 'ud loike to 'ave ouren dun arter ther same fashun.' For a moment I was taken aback. It rather looked as though I had been touting for business." (30) A solicitor must be careful about whom he entertains, and tax inspectors have been known to disallow as a deduction for income tax purposes expenditure incurred in entertaining clients on the ground that such entertainment is contrary to professional etiquette. Sir Thomas Lund comments: "That ground for disallowing them is bad. It is not so. It would, no doubt, be unprofessional to entertain persons who were not your clients with the object of attracting business to yourself unfairly . . ." (31)

The fact that barristers obtain their work only through solicitors has led to stringent rules restricting contacts by barristers with the other

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long been recognised that it is contrary to professional etiquette, as being a form of indirect touting, for a barrister to seek out the company of, or associate unduly with, persons (other than his personal friends) who are in a position to influence the sending of professional work to the barrister. Such persons include accountants, tax consultants, land agents, surveyors, consulting engineers and insurance agents.” (33)

It is becoming common for people of different professions to attend conferences or seminars on matters of common interest. The passing of a new planning act or tax law may affect barristers, solicitors, accountants, architects and surveyors, and participation in the conference may well lead to the attraction of business. This is not regarded as objectionable, provided undue steps are not taken to give prominence to a practitioner or his firm. Chartered accountants, for example, are told that a member who is invited to give a talk, or to be a member of a panel or brains trust, or to attend a conference is expected to take reasonable steps to ensure that there will not be for the practice or professional business in which he is engaged any undue publicity. (34) Paying Commissions

It is often a temptation to a professional man to pay a commission (it might be called a bribe) to someone who can put work his way. This has occasionally given rise to scandal. In the 1860s, for example, one Frederick Marrable retired from the post of superintending architect of the Metropolitan Board of Works and set up in private practice. Another official of the Board put a proposition to him: “We are about to buy land for the Thames (South) Embankment. I shall meet with a number of claimants who are without a surveyor. I could say to them, ‘Mr Marrable is a surveyor who has great influence with the Board, by reason of his former connection with it. If you put your cases into his hands he will get you a large compensation.’ If I send such people to you, will you give me one-third of your fees?” Marrable accepted, and was sent many clients. The two men quarrelled over the commission payments and asked the great rating surveyor Edward Ryde to arbitrate. In the words of F.M.L. Thompson: “Very properly Ryde declined to touch the case, and when Marrable protested that he did not see anything wrong in the affair, he was given a straight lecture on professional

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141 ethics”(35) This is a nineteenth century example, but similar cases arise today and the danger to the public is obvious and real.

Most professions state explicitly that commissions should not be paid, and this applies even where there is no fraud or impropriety on the part of the recipient. The matter has already been dealt with to some extent in the discussion on fee-splitting (page 89). The chartered accountants justify the rule by saying that it removes the temptation for a member to bribe persons, “who would not otherwise introduce work or clients to the member, thereby inducing them to act against the best interests of any person so introduced”. (36) There is also the point that if the full fee charged to the client is a proper one for the work done it follows that by giving some of it away in the form of commission the practitioner is putting himself in the position of being inadequately paid, with the consequent temptation to skimp the work. The rule is not limited to fee-splitting. In the version observed by the Bar it prohibits the giving by a barrister to anyone introducing business to him of any commission or present. This “would constitute most unprofessional conduct, and, if detected, imperil his position as a barrister”. (37) The architects apply the rule to the giving of discounts or commissions in recognition of introductions previously effected. The Bar extends it to the granting of any favour, such as the lending of money to a solicitor. (38)

Further rules govern the attraction of business by touting or canvassing, advertising and undercutting. Each set is of sufficient complexity and importance to warrant a separate chapter. The question of whether the rules restricting attraction of business can be justified in modern conditions is explored in Chapter 14 (pages 199-211).