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'CLIENT' OR 'CUSTOMER':
A DISTINCTION WITH OR WITHOUT MEANING?

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1. Introduction

Since I was called to the Bar (in 1977), there has been a noticeable shift and general decline in the use of the descriptions 'client', 'patient', 'passenger', and so on, to portray the relationship between an individual who has qualified and been authorised to conduct certain activities in the service of others. In their place has been a widespread move to the language of markets, consumerism and customers. My purpose here[1] is to explore why this shift has happened, what it signifies, and whether or not it matters[2].

At first blush, it might be tempting to think that any distinction between 'client' (or patient, etc[3]) and 'customer', 'consumer' or 'user' is just a matter of preference (on either side of the relationship). Lawyers sell, they buy; so what? Does it really matter?

[1] This paper is based on a keynote speech given at the Executive School of Management, Technology and Law of the University of St Gallen, Switzerland on 19 November 2014.

[2] My thinking on the topic was helped by McLaughlin (2009) 'What's in a name: 'client', 'patient', 'customer', 'consumer', 'expert by experience', 'service user' – what's next?', *British Journal of Social Work*, Vol. 39, p. 1101.

[3] My principal focus is on lawyers and legal services regulation, so I shall confine my descriptions from here on to lawyers.

2. Professionalism vs. consumerism

The traditional notion of the lawyer-client relationship is:

- founded in historical power: this was based on the lawyer's special knowledge and position in society;
- influenced by socio-economic, educational and political trends: this includes the historical imbalance in relative social and educational opportunities and attainment of those who became lawyers as against those they often advised, as well as a political climate that was willing to sustain the privileges of professional men[4]);
- now confounded by technology and social media: instant accessibility to information and comparative recommendations from a wide range of sources increases transparency and reduces social and economic barriers to seeking technical or professional advice; and
- suffused with passion and emotion: there are strong views (from both lawyers and clients) about how each side of the relationship should see itself in relation to the other; for lawyers, this can strike at the heart of their self-identity and what it means to them to be 'a lawyer'.

In addition, in the minds of lawyers, the nature of the relationship with clients is also inextricably linked to whether they see law as a profession (we advise or represent clients) or as a business (we serve our customers).

The professional-client relationship traditionally assumed that a client needed help and that the professional knew more than the client – and, indeed, knew better than the client what was best for the client. This was a relationship in which the client was relatively passive, and the professional adopted a somewhat protective, paternalistic position.

In these senses, the traditional relationship was based on the hierarchical power of the lawyer. This stemmed from the lawyer's superior or advantageous knowledge, expertise and experience (described by economists as 'information asymmetry'[5]). An implicit consequence of this asymmetry was that the professional was better placed than the client to define the content, timing, delivery and price of the lawyer-client engagement. This was a relationship in which the client must be grateful that the lawyer was willing to apply his or her expertise and experience for the client's benefit, no questions asked.

A further element of this traditional conception was that it was supported by the State through a 'bargain' under which the State allowed the professions to regulate themselves and determine who could be admitted, and then prevented anyone else from practising within these protected boundaries. The potential for professional self-interest in this bargain was supposedly tempered by the duties to act as officers of the court, to act in the best interests of clients, and to uphold high ethical standards.

[4] This traditional notion also generally pre-dates the admission of women to the ranks of practising lawyers.

[5] See further Mayson & Marley (2011) *The regulation of legal services: what is the case for reservation?*, Appendix 2, para 2.2, available at: www.stephenmayson.com/downloads.

3. The decline of professional supremacy

From the mid-1980s, the historical 'supremacy' of professionals came under increasing pressure. Self-regulation was increasingly seen to have led to self-interest and complacency, protectionist behaviour and unjustified barriers to entry. Indeed, in the minds of many practising lawyers, there was often a greater sense of affinity and accountability to the profession itself than to any particular client or the organisation in which they practised.

Self-regulation was also perceived as providing insufficient incentives for innovation in client service, in organisational structures and management, or in fee arrangements. Much of this was evidenced by increases in the number of complaints by clients and an apparent unwillingness on the part of lawyers (solicitors, particularly) to deal with those complaints appropriately or quickly.

The political mood also changed at this time as Thatcherism took root. We entered an era of greater emphasis on individual freedom of choice, 'the free market' as a guiding hand to public and private interactions, the retreat of the State from private activity, and a consequent 'deregulation agenda' that persists to this day. The sub-text of this political shift was that professionals were really nothing special – that they were engaged in economic exchanges much like any other service providers, and that the old 'bargain' of protected professional territories and self-regulation were no longer justifiable.

Thus, a new age of markets, competition and consumerism arrived in professional services. It heralded the rise of the educated, informed, sophisticated consumer who would make his or her own choices about content, timing, delivery and cost. This, in turn, changed the expectations and role of 'clients' from passive to active: they decided when to use (or not use) lawyers and on what basis, and they used their new 'freedom' to shop around. These changes inevitably over time drove a greater need for cost-efficiencies, processes and structures in both law firms and in their relationships with their clients.

As a consequence of these developments, there was a gradual shift in power in the relationship from the lawyer to the client. There was also a shift in power, influence and participation as between individual lawyers and their organisational or managerial setting. In all senses, the status and autonomy of the individual practitioner was being eroded.

The eventual political outcome of this fundamental change was the conclusion that self-regulation had failed to keep pace. Cue Sir David Clementi and the Legal Services Act 2007 with its new regulatory settlement that significantly curtailed self-regulation, and the arrival of alternative business structures with external owners and investors.

4. The limits of markets

As someone who has always believed in the idea of law as a business, clearing the way for markets and competition to play a more active role in legal services was not an unwelcome development. However, not all legal services are simply a private transaction. Law is closely connected to the public interest and public goods[6] such as the rule of law, the administration of justice and access to justice, as well as public judicial determinations[7].

Nor is law a 'perfect market'. Market theory assumes that consumers make informed choices on a more or less rational basis[8]. I have already referred to the information asymmetry that nearly always exists as between lawyer and client. One of the consequences of this asymmetry is that if clients are not truly able to assess the quality and value of what they are buying, they might simply buy on price and force the market price ever lower – with an implicit response from providers that they will gradually lower their quality to reflect reductions in rewards (creating the so-called 'market for lemons'[9]).

Another potential consequence of asymmetry is that lawyers will provide lower-quality (unseen by clients) services at high prices. This creates a 'moral hazard' in the lawyer-client relationship[10].

These various imperfections mean that consumers do not have complete information on which to make their supposedly informed choices: to economists, these are all market failures (even though it is inevitable, given the very notion of a specialist) that justifies regulatory intervention[11].

Further possibilities arising from a market approach are that providers will choose the most profitable or rewarding areas of work ('cherry-picking') or exit from unprofitable or unattractive areas leaving some consumers without access to legal help (advice deserts). In both cases, there is a potential distortion in the provision of legal services that might not have arisen but for allowing market forces greater sway.

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[6] See, for example, Mayson (2013) *Legal services regulation and 'the public interest'*, Mayson (2013) *Review of legal services regulatory framework*, and Mayson (2014) *The future for legal service regulation*, all available at: www.stephenmayson.com/downloads.

[7] Although a dispute might only be between two parties, the public determination by a judge and the enunciation of a decision – and the development of the common law – benefits third parties and society generally even though they do not directly pay for it. This is an economist's 'positive externality', that is, a benefit that accrues to others who are not parties to the transaction: cf. Mayson & Marley (2011) *The regulation of legal services: what is the case for reservation?*, Appendix 2, para 2.4, available at: www.stephenmayson.com/downloads.

[8] See further Mayson & Marley (2011) *The regulation of legal services: what is the case for reservation?*, Appendix 2, para 2.2 and particularly para 2.2.3, available at: www.stephenmayson.com/downloads.

[9] Cf. Mayson & Marley (2011) *The regulation of legal services: what is the case for reservation?*, Appendix 2, para 2.2.4, available at: www.stephenmayson.com/downloads.

[10] Cf. Mayson & Marley (2011) *The regulation of legal services: what is the case for reservation?*, Appendix 2, para 2.2, available at: www.stephenmayson.com/downloads.

[11] Cf. Mayson & Marley (2011) *The regulation of legal services: what is the case for reservation?*, Appendix 2, para 2.1, available at: www.stephenmayson.com/downloads.

Finally, in relation to the public funding of legal aid, there is only one buyer and such a monopsony also risks distorting the breadth, depth and distribution of the market for legal advice and representation.

In all these senses, one can argue that a 'free market' approach could result in behaviour or outcomes that are not in the public or consumer interest. Markets clearly have limits[12], and it is in managing the risks arising from those limits that the need for some sector-specific regulation arises.

5. The significance of labels

If, then, there has been a shift in labelling from 'client' to 'customer', what does this signify? Perhaps the principal point is that labels signify categories: each label therefore describes the relationship in a different way and imports different underlying assumptions. To simplify, for instance, based on a sense of popular conceptions and usage, the following descriptions might be associated with certain labels:

- 'clients' are passive beneficiaries in a dependent (possibly long-term) relationship;
- 'consumers' are active designers of their own service choice in a free market; and
- 'customers' are (usually short-term) transactional purchasers of a commodity.

These different descriptions not only offer a different label but also suggest a different relationship with different underlying assumptions, a different identity, and a different balance of power. Any shift in label would therefore suggest a shift in one or more of these components[13].

As a recent report put it[14]:

> Replacing 'client' with 'consumer' re-frames the expert-client relationship dependent on integrity and trust as an exchange relationship in the market. While competition can certainly aid accountability and contribute to professional standards, we are not persuaded that it is 'the most effective way to deliver all the regulatory objectives'.... We share Mark Carney's concern that markets and competition as an all-purpose solution means 'belief in the power of the market enters the realm of faith' (Carney, 2014:3[15]).

It is not necessary to characterise any particular label as 'good' or 'bad', 'welcome' or unwelcome', 'helpful' or 'unhelpful'. It is only necessary to acknowledge that each label carries different significance to another, either in the intention of the person using it or in the interpretation of the person to whom it is applied (or both).

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[12] I explored this issue in greater depth in Mayson (2013) *Legal services regulation and 'the public interest'*, in paras 4 and 6, available at: www.stephenmayson.com/downloads.

[13] Albeit that confusingly, although they can be meant or heard to import differences, they often overlap to some extent and are used interchangeably without discrimination in meaning or connotation

[14] Arthur et al (2014) *Virtuous Character for the Practice of Law*, available at: http://www.jubileecentre.ac.uk/1553/projects/gratitude-britain/virtues-in-the-professions-law.

[15] Carney (2014) *Inclusive capitalism: creating a sense of the systemic*, available at: http://www.bankofengland.co.uk/publications/Documents/speeches/2014/speech731.pdf.

6. Does it matter?

If labels signify differences, then labels must suggest distinctions in meaning. In the current context, therefore, labels are social constructions that signify not different types of *people* but different types of *relationship*. As such, they each privilege some aspects of the relationship over others in their description of function or power and, in doing so, incorporate a preference or predisposition (and possibly even prejudice).

When one party to the relationship has different assumptions and expectations to the other, then failed delivery, confusion and dissatisfaction are inevitable. Perhaps we should not be surprised that the number of 'client' complaints increased from the 1980s as clients increasingly stopped seeing themselves as passive beneficiaries of a paternalistic magnanimity and became active participants in their quest for preferred personal or business circumstances.

Similarly, if government (or society generally) has different assumptions and expectations about lawyers, then the public interest is at risk and public goods might be lost or compromised – if, say, the rule of law or access to justice is undermined by encouraging a shift from professionalism to consumerism.

So, yes, the labels we use matter. But then perhaps it is not so much the labels themselves that matter so much as the conception and functioning of the underlying relationship that is assumed or implied by particular labels. Arguably, in the modern world of legal services, any one conception or label for the relationship will necessarily be inadequate. The lawyer-client relationship is now more multi-faceted than it was historically; there is a much broader range of legitimate, but different, expectations that lawyers, clients, consumers and customers have.

Increasingly, the totality of relationships that lawyers have with those who buy their services will have simultaneous elements of 'client', 'consumer' and 'customer'. It will clearly not be helpful to have such a relationship characterised by just one of those labels with its implicit, but very different, assumptions about the nature and foundations of the relationship. Even so, there might be occasions when it could be more appropriate to adopt more of the elements of one description than others.

For example, when a lawyer is representing someone in court, say, in relation to a criminal matter, the lawyer's duties to the wider public interest and to the court will often clearly outweigh (and even override) what the client might regard as being in his or her personal best interests. In these circumstances, it could be contended that the 'lawyer-client' characterisation, with its more paternalistic, protective relationship in which the lawyer's view of the client's enlightened best interests, would be more appropriate than treating the accused as a 'consumer' or 'customer'.

Perhaps we need an expanded, more inclusive, notion of the relationship so that all labels are understood to include elements and expectations that are incorporated in the others. We can no longer use only one label, with its traditional or current meaning, to describe the relationship. Perhaps we even need a new label to describe the modern, multi-faceted, inclusive relationship?

7. Conclusion

Clients' expectations and experiences have changed. The historical lawyer-client relationship has been challenged – and found wanting. Labels signify different assumptions, expectations and power in the relationship.

Clinging to traditional notions of the 'lawyer-client' relationship will not survive the world of the twenty-first century and its shifts in the balance of power between lawyers and clients. But over-emphasising the position and power of consumerism and transactional customers will not help either: such a shift risks losing the public good benefits of 'responsible lawyering' with its commitment to higher duties than merely oneself, one's profession, or even (dare I say it?) to one's clients.

I used to think that the label didn't really matter: whatever was going on was the same, whatever it was called. But I now think that it does matter. We need clarity and mutual understanding about the underlying relationship; but we also need to recognise that the modern conception of that relationship now needs to be more extensive, flexible and responsive than it has been so far.