

Time to open up courts and let justice be seen

Seth Barrett Tillman

WITH a few exceptions, justice in Ireland is administered in public. If a party's barrister goes to court and makes an argument, you get to hear what the barrister says. You get to listen to the proceedings.

However, if that same barrister reduces his argument to a written form and sends his legal submission to the judge and his opponent, then you do not get to see that document (even if you offer to pay for a copy!).

Does that make sense? You know it doesn't.

Not only does it not make any sense, but the other English-speaking countries of the common law world do not do this. The High Court of Australia posts attorneys' legal submissions on its website – a day or so after they are filed.

In the United States, at both the federal level and in every state, legal submissions are posted on the websites of the two dominant electronic publishers: Westlaw and LexisNexis.

And if a person cannot find them there, she has access to them at the relevant courthouse as a matter of federal constitutional right.

In Canada, England, Wales, New Zealand, and South Africa, a process is in place for the public to request such documents. Such requests are subject to judicial discretion, but they are frequently granted.

And here? In Ireland, no process is in place to ask for copies of these documents; indeed, the courts of record do not even maintain the documents on file.

I do not doubt that there are a few classes of cases that call for some level of confidentiality. One might exempt from automatic disclosure legal submissions in cases involving minors, unproven allegations of sexual misconduct, confidential business information, ongoing criminal prosecutions heard by juries, and national security.

But the vast majority of cases going through the courts do not involve such claims. The legal submissions in those cases should be public, and that is the policy in every other major English-speaking jurisdiction.

Why should you care? First, the current position of the Irish courts is inconsistent with modern notions of transparency, access to information, and simple fairness.

It is also inconsistent with prevailing western good governance norms. Judges are government functionaries and filings in lawsuits are, when all is said and done, an effort to lobby them – most frequently by private parties.

The public has every right to know who or what entities are lobbying the judiciary, what factual and legal arguments they are making, and what relief they are seeking.

Second, these submissions often form the basis of hearings, oral arguments, and other trial court or appellate proceedings. But such proceedings are incomprehensible (or nearly so) without advance access to these documents.

A judge will frequently refer to these documents during such proceedings; likewise, attorneys frequently frame their answers by referencing the arguments and factual assertions made in their submissions or those of their opponent.

Although the public can attend all such hearings under the Irish Constitution's "open courts" provision, the right to "hear" such proceedings is not meaningful without access to the parties' briefs. This is particularly true in so-called complex litigation, involving multiple parties, multiple issues, and multiple jurisdictions.

Third, competition for legal services is stifled by the lack of public access to these documents. Attorneys who wish to practise in a specialty which is new to them lack access to a library of written filings to use as models.

Ultimately, this bids up the price for legal services at the expense of overall consumer welfare.

Moreover, in regard to the bottom of the economic ladder, these restrictive trade practices might entirely prevent the poorest litigants from having access to the justice system. Not only can you not afford a lawyer, but you have no access to model legal submissions.

Fourth, the only way journalists can get copies of legal submissions in advance of a hearing is to ask (actually, beg) attorneys on the case for a copy.

The attorneys are not obligated to turn copies over to the press, but if the attorneys do turn copies over to journalists, that too has troubling transparency implications. Attorneys can extract favourable coverage from journalists covering public proceedings. Journalists who do not "play ball" simply do not get access to the documents. If you want honest newspapers and media coverage, you have to open the courts up.

The Legal Services Regulation Bill has been formally introduced by Justice Minister Alan Shatter.

The Bill's text is not yet being finalised; indeed, it has not yet finished full review in committee.

There is still time for an amendment directing the superior courts of Ireland to maintain copies of a party's legal submissions as part of the official case records. There is still time to institute, excluding exceptional circumstances, some reasonably transparent process permitting public access.

Seth Barrett Tillman is Lecturer of Law at NUI Maynooth