The Lord Chancellor's Advisory Committee on Legal Education and Conduct

Annual Report for 1991–1992

Laid before Parliament by the Lord High Chancellor
pursuant to schedule 1.11 of the Courts and Legal Services Act 1990

Ordered by The House of Commons *to be printed*
18 November 1992

LONDON : HMSO

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Chairman's Foreword
From the Right Honourable the Lord Griffiths MC
To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain

I am pleased to present the first annual report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct.

The Advisory Committee's role is to advise on change. It was set up under the Courts and Legal Services Act 1990 as part of a somewhat complex framework designed to open up the right to conduct litigation and to appear as an advocate in court. On day one of the Committee's existence the Law Society presented us with an application to grant full rights of audience in the higher courts to suitably qualified and experienced solicitors. That application, and the question of rights of audience for employed barristers, have been the main items on the Committee's agenda in its first year. The Committee's work on them is described fully in the report.

I look forward to reporting, next year, on further progress in the extension of litigation and advocacy rights, beyond the two branches of the traditional legal profession. The Chartered Institute of Patent Agents was the first body representing non-lawyers to submit an application to the Committee—in their case for the right to conduct litigation in intellectual property proceedings in the High Court. The Committee's work on this application is in hand.

The Act requires the Committee to 'keep under review the education and training of those who offer to provide legal services'. This, in my view, is one of the Committee's most important functions. We are currently considering how our review of legal education should be conducted, and this is another area of activity on which I expect to report substantial progress next year.

It has been a pleasure and a privilege to serve as Chairman of the Advisory Committee during its first year of operation. The membership of the Committee brings together a wide range of expertise and experience, both from within the legal profession and from other spheres of activity. On the basis of its first year, I believe that the Committee, with the help of its secretariat, will make a very worthwhile contribution to the future shape of legal services in this country.

225098 A2

Contents

The Committee

Membership

1.1 The members of the Advisory Committee were appointed under section 19 of the Courts and Legal Services Act 1990, which came into force on 1 April 1991. The Act provides that the Committee's Chairman must be a Lord of Appeal in Ordinary or a judge of the Supreme Court, and that the rest of the members must include a judge who is or has been a Circuit judge; two practising barristers; two practising solicitors; and two people with experience in the teaching of law. In appointing the remaining 9 members, who are not to be legally qualified, the Lord Chancellor is to have regard to the desirability of appointing people with knowledge or experience of:

—the provision of legal services;

—civil or criminal proceedings and the working of the courts;

—the maintenance of professional standards among barristers or solicitors;

—social conditions;

—consumer affairs;

—commercial affairs; or

—the maintenance of professional standards in professions other than the legal profession.

1.2 The present members were all appointed as from 1 April 1991 for an initial period of 3 years, with the possibility of renewal. They are:

The Right Honourable The Lord Griffiths MC (Chairman)	Lord of Appeal in Ordinary
Mrs Liliana Archibald	Former Director, Holman Wade Insurance Brokers Ltd
Professor Richard Card	Head of School of Law and Professor of Law, De Montfort University, Leicester
His Honour Judge John Gower QC	Resident Judge, Crown Court, East Sussex
Mr Eric Hammond OBE	Former General Secretary, Electrical, Electronic, Telecommunication and Plumbing Union
Mr Brian Harvey	Solicitor; Recorder of the Crown Court
Mr John Hosking CBE	Former Chairman of the Magistrates' Association
Mr Patrick Lefevre	Lay Worker, Brent Law Centre; Founding Director, Public Law Project
Mr Luke March	Director of Compliance and Secretarial Services, TSB Bank plc

The Reverend Dr Colin Morris	Former Controller, BBC Northern Ireland
Dr Claire Palley	Former Principal of St Anne's College, Oxford
Ms Usha Prashar	Former Director, National Council for Voluntary Organisations
Mr Nicholas Purnell QC	Former Chairman of the Criminal Bar Association
Mr Peter Scott QC	Former Chairman of the General Council of the Bar
Mr Graham Smith CBE	Her Majesty's Chief Inspector of Probation
Mr David Ward	Solicitor; President of the Law Society 1989–1990
Mr David Wilkins	Former Chief Inspector of Schools, Nottingham

Staff

1.3 There are 8 members of staff in the Committee's secretariat, of whom 6 are seconded from the Lord Chancellor's Department and 2 were directly recruited under the Committee's power to appoint its own staff. All staff are appointed for a period of 2–3 years (renewable, in the case of direct recruits, for one further 3 year term), and the Committee intends to work towards a balanced mix of seconded and directly recruited staff.

1.4 We are most grateful to all the staff for their invaluable contribution to the Committee's work. Those who have worked for the Committee during the year 1991–1992 are:

Mr A E Shaw (Secretary)
Miss B M Griffith-Williams
*Professor P Hassett (from 17 June 1991)
Mr R J Atkinson (to December 1991)
*Miss E Honer (from January 1992)
Ms P A Bell
Ms J Patterson
Mrs L Chittell
Miss M Souris

*Staff directly recruited by the Committee.

Statutory Functions

1.5 The statutory functions of the Committee are described in Appendix A to this report.

The Committee's Work, 1991–1992

2.1 Our work programme in our first year has been dominated by the Law Society's application for authorisation to grant extended rights of audience in the higher courts to solicitors, and by the question raised by the Director of Public Prosecutions and the Head of the Government Legal Service on Rule 402.1(c) in the Bar Council's Code of Conduct (rights of audience of employed barristers). These are discussed in greater detail in paragraphs 3.1–3.10 and 3.11–3.24 respectively, below.

2.2 We established a working pattern of two full days each month, meeting either as a full Committee or as two sub-committees, one dealing with education matters and the other with professional conduct. Membership of the sub-committees is as follows.

Education
Lord Griffiths (Chairman)
Professor Card
Mr Hosking
Mr March
Ms Prashar
Mr Scott
Mr Ward
Mr Wilkins
Professor Hassett (Secretary)

Conduct
Judge Gower (Chairman)
Lord Griffiths (*ex officio*)
Mrs Archibald
Mr Hammond
Mr Harvey
Mr Lefevre
Dr Morris
Dr Palley
Mr Purnell
Mr Smith
Miss Griffith-Williams (Secretary)

2.3 Our regular meeting programme has been supplemented by occasional additional meetings, and by a two day residential conference held on 31 October–2 November 1991 at Chilworth Manor near Southampton. The main sessions at the conference were devoted to a wide-ranging discussion of rights of audience for employed advocates, and to reports from the two sub-committees on the education and conduct aspects of the Law Society's application. This enabled us to make substantial progress in our work both on the application and on the question raised by the Director of Public Prosecutions and the Head of the Government Legal Service.

2.4 The Committee's discussions on both issues have been supplemented by a programme of briefing visits to courts, solicitors' offices, barristers' chambers, CPS offices and legal education institutions. This was to ensure that all members were aware of current practice in the areas most affected by the two major

applications, and to provide background briefing for the non-lawyer members. It has also proved helpful to those of us who are lawyers, but whose recent, more specialised experience has not enabled them to keep in touch with, for example, standards of advocacy in the magistrates' courts and in routine Crown Court cases.

2.5 At one of our regular meetings we held a seminar on the system of listing cases in the Crown Court. After an opening presentation by the Lord Chancellor's Department, there were further contributions from members of the judiciary, a solicitor, a barrister and two barristers' clerks. This discussion gave us a clearer insight into the problems caused by the late return of briefs, which had been put to us frequently in the course of our work on both the Law Society's application and the question of rights of audience for employed barristers.

2.6 We are very grateful to all those who helped to organise visits, offered us hospitality, and took the time to talk to us about their work.

Major Applications for Rights of Audience and the Right to Conduct Litigation

The Law Society's Application

3.1 The Law Society submitted an application for authorisation to grant extended rights of audience to solicitors to the Committee on 2 April 1991. Part I of the application sought to allow all solicitors on admission to the profession to appear as advocates in all Crown Court proceedings except jury trials, and in all interlocutory hearings in the High Court (whether held in chambers or in open court). Part II proposed a scheme enabling specialist solicitor advocates with appropriate additional training and experience to exercise rights of audience in either all criminal proceedings, or all civil proceedings, or both.

3.2 We have decided as a matter of policy that we should normally consult on all major applications for new or extended rights of audience or litigation rights. We therefore issued a press notice and consultation paper on the application on 25 April 1991. We approached over 60 organisations, asking them in particular to comment on the application in terms of the general principle and the statutory objective. About 30 responses were received, all supporting some extension of solicitors' rights of audience, though not necessarily on the terms proposed by the Law Society.

3.3 The main issues raised by respondents were:—

—whether solicitors should have any extended rights of audience on admission, without further training;

—the adequacy of the Law Society's proposals for the education and training of specialist solicitor advocates;

—the effect on the structure of the legal profession of granting solicitors unrestricted rights of audience in the higher courts;

—whether it was necessary for the Law Society's non-discrimination rule to take the form of the Bar's 'cab-rank' rule, which in principle obliges barristers in private practice to accept all work, including legally aided cases, on a 'first come, first served' basis; and

—whether the functions of litigator and advocate should always be carried out by separate people in higher court cases.

3.4 The full Committee and its two sub-committees held several discussions with the Law Society on various aspects of its application. The full Committee also heard oral evidence from the General Council of the Bar.

3.5 Our formal advice to the Law Society under schedule 4.7(2) of the Act was published on 3 April 1992. We advised the Society that, in order better to further the statutory objective and comply with the general principle, the application should be amended in the following ways:—

—Given the lack of specific training, solicitors' existing rights of audience on admission to the profession should not be extended.

—The higher courts advocacy scheme as a whole should at present apply only to solicitors in private practice, and not to those working for non-solicitor employers in either the public or the private sector.

—The experience requirement put forward by the Society for specialist higher court advocates should be strengthened, and the Society should ensure that candidates are familiar with the procedures of the higher courts, either through experience as litigators or through a period of structured observation.

3.6 We also advised the Society that we were satisfied in principle with its outline proposals for an advocacy test and course, but would need further discussion of the detailed planning necessary to finalise these proposals.

3.7 After careful consideration of the comments made by respondents to consultation, we concluded that it was not necessary, in order either to further the statutory objective or to comply with the general principle, for solicitor advocates to be subject to the Bar's 'cab-rank' rule. We did, however, convey to the Law Society our concern to ensure that the absence of such a rule should not lead to a restriction in the availability of advocacy services, particularly for legally aided clients.

3.8 The Law Society responded constructively to this concern, by offering to participate in an annual review of the availability of advocacy services so that steps can be taken, if necessary, to correct any undesirable developments. This review will be an important part of our work in future years, since it will provide the opportunity to consider with the Society, other authorised bodies, and others interested in these matters the effects of changes in the market brought about by our work.

3.9 We also looked carefully at the case for requiring a separation of the functions of advocate and litigator in all higher court cases. While recognising the value of a 'second mind', particularly in the more complex cases, we also accepted that in some cases there could be considerable advantage to the client in having a case conducted by the same lawyer throughout. We concluded that the balance of advantages could only be struck on a case by case basis and that the choice between a single litigator/advocate and an independent consultant advocate should, where possible, rest with the client. We attach considerable importance in this context to the Law Society's proposed 'choice of advocate' rule, which requires solicitor advocates to keep in mind whether it is in their client's best interests for them to continue with a case or hand it over to a different advocate, and to advise the client accordingly. We have advised the Law Society that this advice should be given to the client in writing, with an estimate of the likely cost of the various options.

3.10 The full text of our advice to the Law Society is appended to this report at Appendix B.

Rights of Audience for Employed Advocates: The Question Raised by the Director of Public Prosecutions and the Head of the Government Legal Service

3.11 The Director of Public Prosecutions (DPP) and the Head of the Government Legal Service (GLS) raised a question, under section 31 of the Courts and Legal Services Act, as to whether Rule 402.1(c) in the Code of Conduct of the Bar of England and Wales should be deemed to have been approved under the Act. The Lord Chancellor referred the question to the Advisory Committee on 26 April 1991, and we consulted on it in parallel with our consultation exercise on the Law Society's application.

3.12 The rule in question has the effect of restricting employed barristers' rights of audience so that they may appear as advocates on behalf of their employers in the county courts and magistrates' courts, but not (with some limited exceptions) in the higher courts. The submission from the DPP and the Head of the GLS argued that it was inconsistent with the statutory objective and the general principle for barristers employed in the Crown Prosecution Service (CPS), the Serious Fraud Office (SFO) and other Government departments to be excluded from appearing in the higher courts. They submitted that the proper and efficient administration of justice would be enhanced if Crown Prosecutors, and lawyers employed in other prosecuting Departments such as the Inland Revenue and the Department of Social Security, could present a limited number of their more straightforward cases themselves, instead of instructing independent counsel.

3.13 Although the question was concerned with barristers in the Government service, the Bar's rule applies to all employed barristers, and so we also considered its effect on those in local government and in the private sector. We also took the view that the Law Society's application raised similar issues about employed solicitors, and therefore decided that we should take forward our work on the Bar's rule in parallel with that on the Law Society's application. The section 31 procedure, however, required us to submit our advice on the question to the Lord Chancellor, who, together with the designated judges, would decide whether the Bar's rule should be approved or revoked. The rule will be revoked unless each of the five decision makers is satisfied that it should be approved.

3.14 In the course of our work on the question, we visited a number of CPS offices and observed CPS prosecutors presenting cases in magistrates' courts. We discussed the submission with the CPS and GLS, and heard oral evidence from the Bar Association for Commerce, Finance and Industry (BACFI) and the Bar Association for Local Government and the Public Service (BALGPS) who supported the submission on behalf of their members. We also heard oral evidence from the General Council of the Bar, who were entirely opposed to any change in the rule on employed barristers.

3.15 In addition to our basic consultation exercise, we sought information on the rights of audience of state prosecutors in a number of Commonwealth jurisdictions; and we gave particularly careful consideration to the position in Scotland, where advocates in the Procurator Fiscal Service, unlike their counterparts in the CPS, already have the right to appear in jury trials in all but the most serious cases. We also considered the position of employed lawyers generally in other member states of the European Community.

3.16 Our principal concerns about allowing employed advocates to exercise rights of audience in the higher courts were:

—whether they could be, and be seen to be, sufficiently free from pressure to conform to their employers' policies to present cases objectively and fairly; and

—whether they would have the opportunity to appear sufficiently frequently in the higher courts to ensure that the advocacy skills required at that level were kept up to date.

3.17 We considered separately barristers employed in the Government Legal Service, in local government and in the private sector. In each case, we had reservations about whether our concerns could be met now, although we identified a number of factors which might make it possible in the future. We therefore concluded that barristers in these categories should not at present be allowed to appear in the higher courts.

3.18 We considered the case for the CPS separately, since it was established as an independent prosecuting authority. We saw some attraction in a mixed system such as the CPS had suggested, with most Crown Court cases continuing to be prosecuted by independent counsel, but with the option for the CPS of presenting some of the less serious cases in-house. Both the CPS and the GLS told us that they would be willing to limit the number of prosecutions they presented in-house to a relatively small proportion of their overall Crown Court workload. There were, however, three factors that prevented us from making an immediate recommendation that rights of audience should be granted. First, we were not persuaded that the CPS had yet demonstrated a sufficiently uniform standard of achievement in its present functions to justify an extension of rights of audience. Secondly, we were aware that the recommendations of the Royal Commission on Criminal Justice, which is due to report next year, might significantly alter the role of the prosecuting advocate in the Crown Court and thus affect the way in which the CPS could exercise rights of audience.

3.19 Finally, we believe that, if there were to be a limited extension of CPS and GLS rights of audience, it should be subject to a formal limit on the proportion of Crown Court advocacy they undertook. That is to ensure that any extension did not become the thin end of a wedge leading eventually to a state monopoly. For all these reasons we concluded that we could not at present recommend any extension of advocacy rights for the CPS or the GLS. We believe that the formal limit on the extent to which any new rights might be used should be subject to consideration under the framework set up under the Act. There is, however, no certain way that could be done under the present legislation.

3.20 Our advice to the Lord Chancellor, which we published on 3 April 1992, was that Rule 402.1(c) in the Bar's Code of Conduct should be deemed to have been approved. The full text of our advice is appended to this report at Appendix C.

3.21 During our work on this question, we became aware of two areas in which it may be desirable to consider amendments to the Act. First, the procedure under sections 31 and 33 for determining whether the Bar's or the Law Society's rules should continue to have deemed approval only permits rules to be either approved or struck down. In the case in question, for example, we were faced with a choice only between advising that employed barristers should continue to have their present restricted rights, or that they should have the same rights as barristers in independent practice. Where any change is introduced to a body's professional rules, it is likely at the least that consequential amendments will be needed, and more substantive changes may be desirable.

3.22 This suggests that the section 31 and 33 procedure should be augmented by formal provision for the Advisory Committee to discuss with the relevant authorised body what other rules might take the place of those challenged. The authorised body should be under an obligation to have regard to any advice it receives during that process. The Committee's advice to the Lord Chancellor and designated judges could then contain details of other forms of rule which might be substituted, and the authorised body's likely reaction to them.

3.23 Secondly, the CPS and GLS have made it clear that they would not wish to undertake more than a comparatively small proportion of their own advocacy work if their employees were to have wider rights of audience. The exercise of those rights of audience would be controlled by the Service's own administrative directions. Clearly, any such directions would have a major impact on the exercise of rights of audience before our higher criminal courts, in a way directly comparable to the Bar and the Law Society's education

regulations and rules of conduct. Parliament has decided that these regulations and rules should take effect only after approval by the Lord Chancellor and designated judges, acting on independent advice from the Advisory Committee and the Director General of Fair Trading.

3.24 We believe that administrative directions governing the extent to which rights of audience enjoyed by lawyers employed by the Crown are to be exercised should also be subject to approval under the framework established by the Act. Using this mechanism would also provide a conclusive answer to the argument that extending the rights of audience of lawyers employed by the CPS and GLS would enable future governments to increase their use so as to establish by the back door the kind of monolithic state prosecution service which none of those currently involved wishes to see. We therefore advise that this change, at least, should be made before lawyers employed by the CPS and GLS are granted extended rights of audience.

Litigation in the High Court: The Chartered Institute of Patent Agents

3.25 The first application to come to us from outside the traditional mainstream of the legal profession was submitted in September 1991 by the Chartered Institute of Patent Agents. Registered patent agents already have (under the Copyright, Designs and Patents Act 1988) both rights of audience and the right to conduct litigation in the Patents County Court, which was established in September 1990. They also have direct professional access to barristers in non-contentious matters, including applications for the grant of patents to the United Kingdom Patent Office and the European Patent Office. The Chartered Institute is now seeking to grant to its members the right to conduct litigation in patent proceedings and certain other intellectual property matters in the High Court.

3.26 We issued a press notice and consultation paper on this application on 8 October 1991, and received 10 responses. By the end of the period covered by this report we had not had time to do any further work on it, since we thought it right to give priority to the Law Society's application and the question on employed barristers. We were, however, planning a programme of briefing visits to familiarise ourselves with the work of patent agents, and it was already clear that the breadth of the legal education needed to enable non-lawyers to conduct litigation in the High Court was likely to be one of the central issues in our later work.

Prospective Applicants

3.27 We have made it clear to all actual and prospective applicants that we welcome informal approaches and discussions. During the year our secretariat has therefore held discussions with a number of other bodies who are working on applications for authorisation to grant rights of audience or the right to conduct litigation. The Institute of Legal Executives has expressed a general interest in becoming authorised to grant extended rights to its members. The Association of Law Costs Draftsmen is considering an application for rights of audience in all proceedings concerning the taxation and allowance of costs. The Institute of Taxation may seek rights of audience for its members before the General and Special Commissioners of Income Tax. The Institute of Licensed Debt Practitioners prepared a draft application for the right to conduct litigation and rights of audience in uncontested debt proceedings in the county courts. One other body, the Institute of Credit Management, decided after a preliminary discussion that it did not want to proceed with an application at present.

Applications from Authorised Bodies for Amendments to Qualification Regulations and Rules of Conduct

4.1 Both the Bar and the Law Society have submitted a number of applications under section 29(3) of the Act, which provides that alterations to the qualification regulations and rules of conduct of authorised bodies must be approved by the framework set up under schedule 4, so far as they relate to the advocacy or litigation rights granted by the body in question.

4.2 Our normal procedure is to refer such applications for initial consideration to the relevant sub-committee, which then puts forward its advice for the approval of the full Committee. We have also agreed an expedited procedure for dealing with applications where the issues are entirely straightforward, or where the applicant body has a particular need for urgent advice.

Qualification Regulations

4.3 In July 1991, the Law Society applied for approval of amendments to its Regulation 16 which governs the training contract of trainee solicitors. The proposed amendments were intended to permit solicitor candidates to engage concurrently in part-time study and part-time work experience. The Advisory Committee approved the amendments.

4.4 Also in July 1991, the increasing number of applicants for the Inns of Court School of Law prompted the General Council of the Bar to apply for approval of a change in the admission policy at the School. The proposed amendment to Schedule 12 of the Consolidated Regulations continued the guarantee of admission to law graduates with first and upper second class honours degrees, and to graduates in other disciplines who had passed the Common Professional Examination (CPE); but introduced a 'first come, first served' selection procedure for those with lower seconds in law. The new admission policy was seen as a temporary measure (to apply to the academic year 1992–1993 only), to govern admissions while the Bar developed a more suitable long term selection procedure. The Advisory Committee approved the amendments.

4.5 In November 1991, the Bar returned to the Committee with an application to use a modified version of the interim selection procedure for the 1993–1994 intake because the development of the long term selection procedure was taking longer than originally expected. The modified procedure guaranteed admission to law and non-law graduates with firsts and upper seconds, and to non-law graduates who passed the CPE with distinction, but used a 'first come, first served' procedure for both law and non-law graduates with lower second degrees. The Advisory Committee, after consulting the Standing Conference on Legal Education (see paragraph 7.3 below), and advising a number of modifications to the 'first come, first served' element of the application, approved the use of an interim selection procedure for a second year.

Rules of Conduct

Conditional fees

4.6 The Law Society applied to the Committee in November 1991 for a proposal to amend the Solicitors' Practice Rules so as to enable solicitors to enter into conditional fee agreements under the terms of section 58 of the Courts and Legal Services Act. The Society was anxious to have its new rules in place before the implementation of section 58, so that there would be no delay in putting the new arrangements into practice.

4.7 We took the view that we could not advise the Law Society whether its draft rules should be amended until we had seen the terms of the Lord Chancellor's proposed Order under section 58. In the meantime, we responded to a consultation paper issued by the Lord Chancellor, indicating that, in principle, we were in favour of conditional fees as a means of extending access to justice for people of limited means who did not qualify for legal aid. We were, however, concerned to ensure that adequate safeguards were built into the scheme, especially for the protection of litigants whose opponents were proceeding on the basis of a conditional fee agreement.

4.8 In particular, we suggested that defamation as well as personal injury cases might be included in the first scheme; and that the Order should specify the event upon which a conditional fee would become payable (ie on delivery of judgment or on satisfaction of judgment in whole or in part) or what would happen when a case settled. We also thought it important that prospective clients should be properly informed of the implications of a conditional fee agreement, and any other options available, and suggested that the Law Society might devise a form for this purpose.

4.9 We look forward to discussing these matters further with the Law Society before the proposed conditional fee scheme is implemented.

Access to video recordings of child witnesses' evidence

4.10 The Law Society submitted an application in March 1992 for approval of a new rule of conduct making provision for the proper treatment of video recordings to be admitted as evidence, under section 54 of the Criminal Justice Act 1991, in certain types of cases involving child abuse. We advised the Society that, subject to a minor drafting amendment, the proposed rule did not need to be amended in order better to further the statutory objective or comply with the general principle.

The Drafting of Regulations

4.11 In our work on these applications and on the Law Society's application for increased rights of audience, we have had to consider the actual language in which regulations had been drafted. We are aware that the Law Society has plans to redraft its rules in plain English. We think this is a very important enterprise. The language of professional regulations and rules should make them accessible to non-lawyers as well as the judiciary and the legal profession. Only in that way will those seeking to enter the profession know what is expected of them, and clients know what standards to expect from their lawyers.

4.12 We have therefore advised the Law Society and the Bar to consider the scope for redrafting the common advocacy code which they have proposed, and which forms the basis of the Society's application, in a plainer version.

4.13 We will also seek to give more precise guidance on how to achieve results which would be clearer or more helpful to those who will be affected. For example, where regulations and rules impose conditions for qualification or professional obligations, but allow exceptions at the discretion of the authorised body, we believe that it is very much more useful for the regulations to spell out

the sorts of conditions under which the discretion might be exercised so that people will have a clear idea of whether or not they have a reasonable case for it operating in their favour. It will not, of course, be either possible or desirable for the regulations to try to spell out every possible eventuality: the aim should be to give clear guidelines on what would constitute a reasonable exercise of the discretion.

4.14 We have been concerned over the year at the length of time the Act procedures have required for the approval of the more minor and uncontroversial of these measures. We have discussed with authorised bodies how to minimise delay, and will seek further ways to expedite matters over the next years.

Probate

5.1 We have received informal indications from both the Institute of Legal Executives and the Council of Licensed Conveyancers that they are likely to seek to become approved bodies under section 55 of the 1990 Act. Before the new scheme comes into effect, however, the Lord Chancellor must make regulations relating to the handling of complaints about the provision of probate services by the new classes of probate practitioner created by the Act.

5.2 The Lord Chancellor's Department issued a consultation paper on the draft Probate Complaints Regulations in July 1991. We made a number of comments in response to the paper, expressing concern in particular about the lack of a positive obligation for probate ombudsmen to investigate complaints about costs, and the apparent absence of any effective sanctions for failure to comply with an ombudsman's recommendations. We understand that the regulations are to come into effect in the summer or autumn of 1992.

225098 B2

Research

6.1 We used our modest research budget for 1991–1992 to fund the contribution of the Association of Law Teachers (ALT) to a major project collecting essential general information on law teaching and students. The new project will update reports prepared by Dr S Marsh and Professor J Wilson in the 1960s and 1970s, which made an important contribution to the work of the Committee on Legal Education (the Ormrod Committee), which reported in 1971. We believe that the updating project will be equally important to the legal education review which we are required to undertake by the Courts and Legal Services Act 1990, on which we are hoping to start work in the forthcoming year.

6.2 The ALT's updating project is collecting data on the former polytechnic law schools, as part of a larger co-operative venture. It is mirrored by the Society of Public Teachers of Law's project to collect data on the traditional university law schools. We welcome the fact that both Dr Marsh and Professor Wilson are actively involved in the projects, and trust that their current work will be as valuable to all those interested in the teaching of law as their past reports have been.

6.3 In addition to providing financial support for the ALT's project, we were consulted on the content of the survey questionnaire. The questionnaire was circulated with a letter from our Chairman advising respondents of the importance of the project to the Committee's work and requesting their co-operation. The project results will be available in October 1992 when we expect to be able to begin our major work on the legal education review.

6.4 We hope to be able in the forthcoming year to broaden our research activity, not only to support our proposed review of legal education, but also to monitor the effect on the provision of legal services of any extended advocacy or litigation rights which are granted under the Act.

Consultation on Legal Education

7.1 The former, non-statutory Lord Chancellor's Advisory Committee on Legal Education (latterly chaired by Lord Justice Woolf) was superseded by the establishment of the new Committee under the 1990 Act. At an early stage of our own existence we were made aware of a degree of concern among the legal academic community at the loss of a body which had, uniquely, allowed wide-ranging discussion of current issues in legal education between teachers of law and the two branches of the practising profession.

7.2 Given the different nature of our new statutory functions and membership, it was not suggested that we should ourselves attempt to carry forward the work of our predecessor Committee. Our discussions with the academic profession led to the establishment of a new body, the Standing Conference on Legal Education, to continue the old Advisory Committee's role. It was agreed that the Standing Conference's main membership would be nominated by the Bar, the Law Society and various organisations representing teachers of law; that its agenda should be largely settled by those representatives, but with topics suggested by us; and that the secretariat should be provided by the nominated representatives. Our Chairman's offer to act as Chairman of the Standing Conference was accepted, and we have made our premises available to the new body for its meetings.

7.3 The Standing Conference held its first two meetings, which were attended by members of our secretariat, in October 1991 and March 1992. The pattern of two meetings each year is likely to continue. We have already consulted the Standing Conference on the Bar's proposals for a selection procedure for entry to the Inns of Court School of Law. We look forward to working in conjunction with the Standing Conference over the coming years on other matters concerning legal education.

Accounts

Report of the Auditors

To the Lord Chancellor:

We have audited the financial statements of the Lord Chancellor's Advisory Committee on Legal Education and Conduct set out on pages 22 to 24 in accordance with auditing standards and the scheme of audit dated 21 October 1992.

In our opinion:

(i) the financial statements present fairly the receipts and payments to and by the Advisory Committee for the year ended 31 March 1992 and the balances held at that date;

(ii) proper books of account have been maintained and a statement of account prepared therefrom in accordance with Schedule 1 sub-paragraphs 9(1) and 9(2) of the Courts and Legal Services Act 1990 and the direction of the Lord Chancellor;

(iii) receipts and payments have complied with relevant statutes and directions of the Lord Chancellor.

STOY HAYWARD
Chartered Accountants and Registered Auditor
8 Baker Street
London W1M 1DA

2 November 1992

The Lord Chancellor's Advisory Committee on Legal Education and Conduct

Receipts and payments account for the year ended 31 March 1992

	Notes	£	£
HMG Grants received:			
Grant received from Class X Vote 1			455,498
LESS			
Expenditure			
Salaries and Fees	3	352,105	
Other operating payments	4	84,143	
Furniture, machinery and computer		17,359	
Total expenditure			453,607
Excess of receipts over payments for the Financial Year 1991/92			1,891

For and on behalf of the Committee

A E Shaw
Secretary

Statement of cash balances at 31 March 1992.

	£
CASH AND BANK BALANCES	
Balance at the beginning of the Financial Year	—
Excess of receipts over payments for the Financial Year	1,891
Balance at the end of the Financial Year	1,891

Notes forming part of the financial statements for the year ended 31 March 1992

1. Accounting policies

The financial statements have been prepared on a receipts and payments basis as directed by the Lord Chancellor in accordance with Schedule 1 Paragraph 9(2) of the Courts and Legal Services Act 1990, and in accordance with applicable accounting standards except for the policies set out below. The following principal accounting policies have been applied:

Funding

The Committee is funded by an annual grant from the Lord Chancellor with the approval of the Treasury.

Fixed assets

Fixed assets purchased are written off in full in the year in which they are acquired.

2. Approval of the financial statements

These financial statements were approved on 2 November 1992.

3. Salaries and fees

	£
Committee members' remuneration	
Fees	116,681
The emoluments of the Chairman	—
The emoluments of the highest paid member	8,929
Other members' emoluments fell into the following ranges:	Number
£Nil – £5,000	1
£5,001–£10,000	14

There are no pension costs for Committee members.

Staff costs	
Wages and salaries	165,845
Social security costs	14,724
Other pension costs	23,997
VAT	30,858
	235,424

The Secretary to the Advisory Committee's total remuneration, including bonus and taxable benefits was £40,703.

At present, the position of Secretary to the Committee is filled by a civil servant who is on secondment from the Lord Chancellor's Department, and therefore all Civil Service conditions apply.

The following number of senior employees received remuneration falling within the following ranges:

	Number
£30,001–£40,000	2

The average number of employees during the year was made up as follows:

Office and management	8

4. Other operating payments

	£
Agency staff	5,155
Recruitment	4,917
Training	1,175
Research	12,000
Maintenance, heating and lighting	6,933
Office supplies, printing and stationery	3,225
Postage and telephones	9,389
Office machinery, rental and maintenance	2,867
Travel and subsistence	25,580
Conferences and catering	8,655
Books and newspapers	2,904
Miscellaneous	1,343
	84,143

No payment has been made in respect of rent and rates as this has been paid directly by the Lord Chancellor's Department.

5. Pensions

Pensions are paid in respect of staff on secondment from the Lord Chancellor's Department in accordance with normal Civil Service scheme rules.

6. Post year end payments

Payments in respect of March salaries and Members' fees totalling £12,876 were paid on 16 April 1992 and are not included in these financial accounts.

Appendix A

Statutory Functions of the Committee

A.1 The statutory objective of the Courts and Legal Services Act, which governs all the Committee's functions, is:

> 'The development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice.'

General Duty

A.2 The Act confers on the Advisory Committee the general duty of assisting in the maintenance and development of standards in the education, training and conduct of those offering legal services. It requires the Committee, in carrying out its functions, to have regard to—

(i) the practices and procedures of other member states of the European Communities in relation to the provision of legal services, and

(ii) the desirability of equality of opportunity between persons seeking to practise any profession, pursue any career or take up any employment, in connection with the provision of legal services.

A.3 The Committee may make any recommendations it thinks appropriate on any matters which it is required to consider or to keep under review. In discharging its specific functions, the Committee must have regard to the need for the efficient provision of legal services to people who have special difficulties in making use of those services, in particular in expressing themselves or in understanding.

Specific Functions

Rights of audience and the right to conduct litigation

A.4 The Act establishes a new basis for the grant of rights of audience and the right to conduct litigation. Hitherto these rights have been based partly on statute and partly on common law. The Act preserves existing rights, but establishes a framework under which they are in future to be granted by authorised bodies to their members. The Committee is a central part of the framework set up by the Act to consider applications from professional and other bodies to be authorised, or to change the rights they grant or the regulations and rules which govern them.

A.5 The principle governing the Committee's work in this area (set out in section 17 of the Act and known as the 'general principle') is that the question whether persons should be granted advocacy or litigation rights in any court or proceedings should be determined only by reference to:

—whether they are qualified in accordance with the appropriate educational and training requirements;

—whether they are members of a professional or other body with rules of conduct which are appropriate in the interests of the proper and efficient administration of justice;

—whether the body has an appropriate mechanism for enforcing its rules of conduct, and is likely to enforce them; and

—(in the case of a body granting rights of audience) whether it has an appropriate rule preventing advocates from discriminating between clients.

A.6 The detailed procedure for dealing with applications from professional or other bodies is set out in schedule 4 to the Act. The first step is for the Advisory Committee to advise the applicant body whether the qualification regulations and rules of conduct submitted as part of the application need to be amended in order better to comply with the general principle or further the statutory objective, or both. The final decision on an application rests with the Lord Chancellor and the four designated judges (the Lord Chief Justice, the Vice-Chancellor, the Master of the Rolls and the President of the Family Division), who receive advice from the Advisory Committee and from the Director General of Fair Trading.

A.7 Once a professional or other body has become authorised to grant advocacy or litigation rights, any amendments to its qualification regulations or rules of conduct (insofar as they relate to advocacy or the conduct of litigation), and any alterations to the rights granted by the body in question, must be submitted for approval through the same procedure as an initial application for authorisation.

A.8 Full rights of audience in the higher courts (the High Court, Crown Court, Court of Appeal and House of Lords) have previously been exercisable only by barristers. Solicitors, who have the right to conduct litigation in all courts, also have full rights of audience in the magistrates' courts and county courts, and limited rights in the High Court and Crown Court. The Act confers on the Law Society and the General Council of the Bar the status of authorised bodies, and deems their qualification regulations and rules of conduct to have been approved in relation to the rights currently exercised by solicitors and barristers.

Legal education and training

A.9 The Committee has a general duty to keep under review the education and training of people who offer to provide legal services, and to give particular consideration to continuing education and training. The Committee is also specifically required by the Act to consider the initial practical training required for advocates and litigators, and in other areas concerned with the provision of legal services.

Specialisation schemes

A.10 The Committee is required to consider whether specialisation schemes should be established by any professional or other body in any particular area of legal services, to keep under review specialisation schemes maintained by these bodies, and to consider and advise on any proposal for a specialisation scheme referred to it by a professional or other body.

Probate services

A.11 The Act contains provisions for bodies approved by the Lord Chancellor to permit their members to prepare for reward the papers on which to found or oppose an application for a grant of probate. Before deciding whether an application for approval should be granted, the Lord Chancellor must seek the advice of the Advisory Committee and of the President of the Family Division. These sections of the Act have not yet been brought into force.

Appendix B

The Lord Chancellor's Advisory Committee on Legal Education and Conduct

Advice to the Law Society on
its Application for Authorisation
to Grant Extended Rights of Audience to Solicitors

8th Floor
Millbank Tower
Millbank
London SW1P 4QU

3 April 1992

Contents

Summary

The Advisory Committee, which is a continuing statutory body with a majority of lay persons, has undertaken a large number of visits to courts, solicitors' offices, barristers' chambers, schools of law and other institutions to familiarise itself with the present structure and operation of the legal profession.

It has approached the Law Society's application accepting that it is implicit in the Courts and Legal Services Act 1990 that solicitors should have wider rights of audience provided they have received adequate training and will conform to suitable rules of conduct. The Committee also recognises that it has a responsibility to ensure, so far as it can, that the changes that will ensue are managed and monitored so that the proper and efficient administration of justice is maintained.

Education and Training

The Committee has considered the training and experience necessary to appear in the higher courts.

Rights on admission to the profession

The Committee advises the Law Society that the rights of audience which solicitors acquire on admission should not be extended. Solicitors have at present no compulsory training in advocacy and newly qualified solicitors will have little or no experience of advocacy.

Full rights of audience in the higher courts

The Committee agrees with the Law Society's proposal that solicitors should be able to apply for full rights of audience in the criminal or civil higher courts, or both, once they have practised for three years.

The Committee agrees with the Law Society's proposal that applicants for higher court rights of audience must show suitable experience of advocacy in the lower courts, pass a test in evidence and procedure suitable to the courts in which they seek rights of audience, and attend and pass a course in higher court advocacy skills.

The Committee tenders the following advice to the Law Society.

Experience

Applicants should satisfy the Law Society that they have practised regularly as advocates in the lower courts. The Committee advises the Law Society that they should see a record of applicants' work as advocates over the two years preceding an application for higher court rights. Guidelines should be issued by the Society to indicate the range, quality, frequency and regularity of appearance expected of applicants. Applicants should provide the Society with referees who can speak to the quality of their advocacy.

The Society must be satisfied that applicants are familiar with the procedures of the higher court in which they seek rights of audience. If this has not been learned as an instructing litigator, provision must be made for a period of structured observation.

The test and course

The Committee is satisfied in principle with the Law Society's outline proposals and requires further discussion with the Law Society on the more detailed planning necessary to finalise both the test and course.

Rules of Conduct

Subject to certain amendments, the Committee approves the rules of conduct proposed by the Law Society. It also welcomes the Law Society's plans for all its rules to be redrafted in plain English.

The Committee has carefully considered the argument that the rules should provide that a case should be prepared for trial by a different person from the advocate who presents it to the court. The Committee does not accept this argument and believes that sometimes it will be an advantage if the same lawyer both prepares and presents the case, whereas in other cases it will be an advantage to bring to bear a second mind. This is a matter for properly informed client choice. The Law Society's rules require solicitors to consider whether they are suitable advocates for the case or whether they should advise the employment of another advocate. This advice should be given in writing to the client with an estimate of the likely costs of the various options.

The Committee also advises the Law Society that there should be an explicit rule against 'tying-in', ie refusing to act as a litigator for a client unless the solicitor is also employed as the advocate.

Cab-rank and legal aid

The Committee has also given careful consideration to the argument that solicitor advocates in the higher courts should, like barristers, be subject to a cab-rank rule making them take work on a 'first come, first served' basis. The Committee has concluded that it is not necessary to impose the Bar's cab-rank rule on solicitors, and approves the Law Society's adoption in its rules of conduct of the statutory rule against discrimination set out in section 17 of the Courts and Legal Services Act.

In the opinion of the Committee, section 17(5) of the Courts and Legal Services Act makes it clear that solicitors cannot be obliged to undertake legal aid work at whatever rates are currently being paid, and accordingly the Society could not be required to adopt the Bar's rule which requires barristers to accept a legal aid brief regardless of the amount they are likely to be paid. The Committee nevertheless believes that all practising lawyers should regard it as part of their professional obligation to help those who cannot afford legal assistance and hopes that all solicitors' firms will play their part in the legal aid scheme.

Monitoring

The Committee cannot exclude the possibility that the proposed changes might result in certain specialist advocacy skills being concentrated in so few solicitors' firms that client choice was unacceptably limited, particularly if such firms did not accept legal aid work. The Committee therefore accepts the Law Society's offer to participate in an annual review of the availability of advocacy services to see whether any such undesirable development takes place, and, if so, to consider the measures necessary to correct it.

Employed Solicitors

Advocates in the higher courts have special duties and responsibilities. They have to show the court and the public that they have the necessary detachment and impartiality. They also need to appear often enough to maintain the skills needed in the higher courts.

For the reasons set out at length in advice to the Lord Chancellor on the question raised by the Crown Prosecution Service and the Government Legal Service, the Committee does not consider that employed lawyers can at present sufficiently demonstrate either factor.

The Committee therefore advises the Law Society to amend its application to limit the grant and exercise of rights of audience to solicitors in private practice.

Part 1: Introduction

SECTION I: THE APPLICATION

1.1 The Law Society is deemed by section 32 of the Courts and Legal Services Act 1990 to have granted to solicitors the rights of audience exercisable by them immediately before 7 December 1989, and to have in force qualification regulations and rules of conduct which have been properly approved in relation to those rights of audience. The Society has applied under Part II of Schedule 4 to the Act to extend the rights of audience granted by it, and has accordingly submitted to the Advisory Committee:

(i) a statement of the extended rights it proposes to grant;

(ii) a draft of the qualification regulations which would apply to solicitors exercising extended rights of audience; and

(iii) draft rules of conduct to apply to all solicitor advocates.

1.2 This advice is offered to the Law Society under Part II of Schedule 4, which requires the Advisory Committee to consider the rules, regulations and statement of proposed rights which the applicant body has submitted and to advise the applicant to what extent (if at all) they should be amended in order better to further the statutory objective or comply with the Act's general principle. Annex A gives details of the Committee's work on the application.

SECTION II: THE COMMITTEE'S APPROACH

The statutory objective

1.3 The statutory objective, which applies to the whole of Part II of the Act, is:

> 'the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice.'

The general principle

1.4 The general principle relates only to the granting of rights of audience and the right to conduct litigation. It says that 'as a general principle the question whether an individual should be granted a right of audience. . . in relation to any court or proceedings, should be determined only by reference to—

(a) whether he is qualified in accordance with the educational and training requirements appropriate to the court or proceedings;

(b) whether he is a member of a professional or other body which—

(i) has rules of conduct (however described) governing the conduct of its members;

(ii) has an effective mechanism for enforcing the rules of conduct; and

(iii) is likely to enforce them;

(c) whether, in the case of a body whose members are or will be providing advocacy services, the rules of conduct make satisfactory provision in relation to the court or proceedings in question requiring any such member not to withhold those services—

(i) on the ground that the nature of the case is objectionable to him or to any section of the public;

(ii) on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to him or to any section of the public;

(iii) on any ground relating to the source of any financial support which

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may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available under the Legal Aid Act 1988); and

(d) whether the rules of conduct are, in relation to the court or proceedings, appropriate in the interests of the proper and efficient administration of justice.'

The statutory duty

1.5 Section 18 of the Act imposes a duty on anyone carrying out functions conferred by the Act in relation to the granting of rights of audience or the right to conduct litigation, the approval of qualification regulations or rules of conduct, or the giving of advice in relation to these matters. The statutory duty is expressed as follows:

'A person exercising any such functions shall act in accordance with the general principle, and, subject to that, shall—

(a) so far as it is possible to do so in the circumstances of the case, act to further the statutory objective; and

(b) not act in any way which would be incompatible with the statutory objective.'

The Committee's advice

1.6 Under paragraph 7(2) of Schedule 4 of the Act, the Advisory Committee is required to advise the applicant:

'of the extent to which (if at all) its qualification regulations or rules of conduct should, in the Committee's opinion, be amended in order better to—

(a) further the statutory objective; or

(b) comply with the general principle.'

The Committee's deliberations

1.7 The Committee has considered the draft qualification regulations and rules of conduct submitted by the Law Society, and concluded that some amendments are needed in order to make the rules and regulations better comply with the general principle and further the statutory objective. The Committee's advice to the Law Society on these points is set out in detail in Parts 2 and 3 of this advice.

1.8 In the Committee's view, there is implicit in the general principle a strong presumption that rights of audience will in future be granted to any member of a body which can satisfy the standards of training and conduct laid down in the Act, and not (as at present) restricted to members of a particular profession or branch of a profession.

1.9 The Act's objective of developing legal services (including, specifically, advocacy services) in England and Wales is to be achieved in two ways: by making provision for new or better ways of providing such services, and for a wider choice of persons providing them. These two ways of developing legal services are, however, to be balanced against the maintenance of the proper and efficient administration of justice.

1.10 In the Committee's view, the concept of the proper and efficient administration of justice is directed at the court's ability to do justice between the parties before it, and not at the specific size or structure of the legal profession. Since both civil and criminal procedure in England and Wales are essentially adversarial, the Committee takes the view that the proper and efficient administration of justice requires a sufficient supply of competent advocates to be available to all sections of the public. It does not require the present structure of the legal profession to be preserved, and in the longer term the objective takes no account of whether advocacy services are provided by

barristers, solicitors, or other members of authorised bodies who have demonstrated the appropriate standards of competence and conduct through the new framework set up by the Act. The Committee accepts, nevertheless, that for the foreseeable future advocacy services in the higher courts will in practice continue to be provided in the main by the Bar.

1.11 The introduction of a category of solicitor advocates with higher court advocacy rights will undoubtedly further the statutory objective by creating a new way of providing advocacy services, and possibly also by creating a wider choice of persons providing them. The Committee has heard arguments that the development of advocacy departments in the larger firms of solicitors would actually reduce choice. Its proposals for establishing whether this is in fact occurring are discussed below, in paragraphs 3.42–3.45.

1.12 The statutory objective would not be met if the granting of the Society's application created a shortage of competent advocates. The Committee has also heard arguments that such a shortage might be caused; for example, by the immediate flight from the Bar of some of the more experienced practitioners.

1.13 The Committee has at present no reason to believe that will happen. The application opens the way to a large pool of potential advocates of diverse expertise, and both branches of the legal profession have demonstrated a capacity for adapting quickly to developments in the market for legal services. The Bar, moreover, has every reason to be proud of the skills and professionalism of its members. Independent practice should give them a significant competitive advantage in terms of the quality and probably the cost of their services.

1.14 The Committee believes that the importance of regular practice of advocacy skills makes it desirable that practice as a consultant advocate should continue in the longer term to be a central way of providing advocacy services in this country.

1.15 The Committee believes that the impact of extended rights of audience for solicitors must be carefully monitored in order to ensure that changes do not happen so quickly as to reduce the Bar's numbers to an unacceptable level. Indeed, the Advisory Committee takes the view that a major part of its functions under the Act is assisting all those concerned to ensure as far as possible that the provision of legal services evolves through managed change, in ways which genuinely benefit both clients and the administration of justice.

1.16 In its detailed advice on the Law Society's proposed training regulations and rules of conduct, the Committee has suggested a number of ways in which these should be modified in order to maintain the proper and efficient administration of justice. These specific measures are discussed in Parts 2–4 below.

1.17 The Committee also makes proposals for monitoring a number of aspects of the application's effects in practice. This is necessary to ensure that the Committee is in a position to advise on the development of legal services and on the maintenance of the proper and efficient administration of justice. That includes the effect on both branches of the present legal profession of an extension of solicitors' rights of audience in the higher courts. This subject is considered further in paragraphs 3.42–3.45 below.

Part 2: Qualification Regulations

SECTION I: ADVOCACY SKILLS AND PRINCIPLES

2.1 The Advisory Committee's work on appropriate education and training requirements began with consideration of the skills an advocate needs. It concentrated on the report of the research carried out by Dr Johnston and Dr Shapland to determine the skills needed by barristers in their early years of practice, in preparation for the new vocational training course at the Inns of Court School of Law (ICSL).[1] That research provides:

(i) a list of the main skills required for practice as a junior barrister; and

(ii) a series of more general skills in managing a practice, dealing with people and adapting to new facts and circumstances.

2.2 Having made some rearrangements to reflect what it considers are the appropriate priorities among those skills, the Advisory Committee has adopted the following main skills for use as an initial checklist for examining proposals for training in advocacy.

(i) Assimilating relevant information from the brief or other instructions and noting discrepancies and holes.

(ii) Knowing and mastering the facts of the case in detail.

(iii) Conferring with clients, both lay and professional, and with expert witnesses.

(iv) Identifying the issues upon which the case will turn and those facts which the advocate will need to prove or disprove if the case is to be won.

(v) Advising, orally and in writing, upon the evidence needed for this purpose and what further information should be sought.

(vi) Formulating both strategy and tactics.

(vii) Researching the law.

(viii) Drafting written pleadings, interrogatories and affidavits and preparing written arguments.

(ix) Negotiating with an opponent where appropriate.

(x) Preparing and delivering an opening speech to the court.

(xi) Examining witnesses in chief, re-examining them when appropriate, and knowing when not to do so.

(xii) Cross-examining witnesses. This skill requires a clear appreciation of the object which the advocate seeks to achieve, the ability to modify the thrust and direction of the questioning in accordance with the advocate's assessment of the witness: ie whether honest but possibly mistaken, whether deliberately lying, etc.

(xiii) Having a mastery of the law of evidence: being equipped to take proper objection on the instant to inadmissible evidence and to deal instantly with objections taken by the advocate's opponent or the judge.

(xiv) Being able to change tactical direction according to the 'run' of the case.

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[1] Developing Vocational Legal Training for the Bar, by Valerie Johnston and Joanna Shapland; Faculty of Law, University of Sheffield; 1990.

(xv) Preparing and delivering a closing speech. This may have to be 'off the cuff' with little opportunity for preparation.

(xvi) Using language skills effectively, and maintaining audible speech and absence of distracting mannerisms.

2.3 The Advisory Committee believes that it is right to emphasise the importance of research, proper preparation, and an adequate degree of familiarity with the tribunal and its procedure in acquiring competence as an advocate.

Principles of advocacy training

2.4 The Advisory Committee has also adopted two main principles in its approach. First, it believes that competence as an advocate requires a number of individual skills, in each of which basic competence can be acquired, and development and improvement accelerated, by training directed at specific skills.

2.5 At least as importantly, the Committee believes that regular and frequent practice as an advocate in the relevant courts or tribunals is necessary to develop general competence and to acquire specialist skills. Such practice is also necessary to *maintain* the advocate's skills, which disuse is likely to blunt.

The aim of training

2.6 The Advisory Committee therefore believes that the aim of the educational and training requirements for rights of audience should be to enable the potential advocate to reach a satisfactory level of competence in the range of work which might reasonably be expected to be done by someone beginning practice in the work of the court or proceedings concerned. The development of excellence, and of particularly specialist knowledge and skills, must be mainly a matter for development by experience. That learning process can, however, be considerably assisted by structured training, within a programme of continuing education.

Frequency of appearance

2.7 The Committee has therefore considered whether specific measures should be required to deal with advocates who, having qualified, do not exercise rights of audience sufficiently often to develop and maintain them. In the case of solicitors this might, for example, involve them certifying in their annual application for a practising certificate that they had appeared in court on a specified number of occasions.

2.8 The Committee notes that the Bar does not make any such requirement. The alternative would involve the imposition of a detailed and artificial system of monitoring of individual work patterns, and a considerable interference in the professional responsibility of individual practitioners. Both barristers and solicitors are required to consider whether they are competent to handle work, on a case by case basis. The Committee considers this to be at present a sufficient practical safeguard.

2.9 It follows from the Committee's general approach that there would be considerable concern about extending rights of audience to groups of people who were unlikely to be able to exercise them frequently. The Committee takes the view that it would be unlikely that solicitors in private practice who had built up enough of a practice in advocacy to satisfy the Law Society that they were qualified for specialist rights of audience, and had then committed the time and resources necessary to pass the proposed test and course, would allow these expensively acquired skills to dissipate through disuse. Different considerations arise in relation to employed solicitors, however, and they are dealt with in Part 4 of this advice.

Solicitors' current rights of audience

2.10 Solicitors have rights of audience in the magistrates' courts under section 122 of the Magistrates' Courts Act 1980, and in the county courts under section 60 of the County Courts Act 1984.

2.11 Under practice directions made by the Lord Chancellor on 7 December 1971, 9 February 1972 and 15 August 1988, under powers now contained in section 83 of the Supreme Court Act 1981, solicitors have rights of audience in:

(i) appeals or committals for sentence to the Crown Court from a magistrates' court if the solicitor, or any solicitor who is a partner or employee of the same firm, appeared on the defendant's behalf in the court below;

(ii) civil proceedings on appeal to the Crown Court in similar circumstances; and

(iii) all cases at a small number of Crown Court centres serving areas where solicitors traditionally had full rights of audience at quarter sessions (Caernarfon, Barnstaple, Truro, Doncaster and parts of Lincoln).

2.12 Under common law, solicitors have a general right of audience (which extends to their responsible representatives) in the High Court and the Court of Appeal when sitting in chambers, whether before a judge or master or district judge. They may also appear in:

(i) bankruptcy matters;

(ii) formal or unopposed matters where there is unlikely to be any argument and where the court will not be called upon to exercise any discretion; and

(iii) any case in the Supreme Court when judgment is delivered in open court following a hearing in chambers at which the same solicitor conducted the case for the client.

2.13 Solicitors' only right of audience in the House of Lords is to appear before its Appeal Committee when it is considering a petition for leave to appeal. Solicitors have no rights of audience before the Judicial Committee of the Privy Council.

2.14 Solicitors may also appear in tribunals, because there are at present no restrictions on rights of audience before most tribunals.

The application

2.15 The effect of the (amended)[1] Regulation 2 of the draft Rights of Audience Qualification Regulations included in the Law Society's application would be to grant to all solicitors on admission to the roll rights of audience in:

(i) all committals for sentence and appeals from a magistrates' court to the Crown Court (ie regardless of whether the solicitor, or any solicitor who is a partner or employee in the same firm, appeared on the defendant's behalf in the court below);

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[1] Following discussion with the Advisory Committee about the effect of draft regulation 2(b) and Schedule 1, the Law Society proposed an amendment to the sub-section so that it would read:

'In addition to those rights solicitors shall have the following rights of audience:

— before [the] Crown Court in any proceedings except jury trials; [and]

— before the High Court:

(a) in any proceeding the hearing of which prior to 1 April 1991 would have been conducted in Chambers;

(b) in any matter in which a hearing, having commenced in Chambers, is adjourned into open court; and

(c) in the Chancery Division on the hearing of any motion in open court except a motion under Order 52 (Motions for Contempt) or a motion which the judge directs is to be heard as a motion by order.'

(ii) all civil proceedings in the Crown Court (ie regardless of whether the solicitor or a solicitor who is a partner or employee of the same firm appeared in the court below);

(iii) trials in the Crown Court where the defendant pleads guilty; and

(iv) broadly, most interlocutory business in the Chancery Division. (Motions for contempt are normally heard in open court in all Divisions, and the Law Society does not consider it appropriate to seek rights in these cases. In the Queen's Bench and Family Divisions, interlocutory work is normally dealt with in chambers. In the Chancery Division, however, it is normally dealt with in open court, and so solicitors do not now have rights of audience.)

2.16 The Law Society takes the view that no changes to its existing training regulations are necessary for the exercise of these new rights.

A new basis for granting rights

2.17 Hitherto, the question whether any person had a right of audience in any particular court or proceedings was determined by common law, or by specific legislation. The Courts and Legal Services Act 1990 substituted an entirely new basis for granting any further rights (although it preserved all rights granted before its implementation). For the future, 'as a general principle, the question whether a person should be granted a right of audience . . . in relation to any court or proceedings should be determined only by reference to whether he is qualified in accordance with the educational and training requirements appropriate to the court or proceedings', and to whether he is a member of a professional or other body which has, and is likely to enforce, rules of conduct appropriate to the court or proceedings.

Existing training

2.18 The Advisory Committee has therefore considered the current training required for qualification as a solicitor. It acknowledges the high quality of that training, and the high standards required in the knowledge of substantive and procedural law. No mandatory training in the skills of advocacy is, however, prescribed, either during the present finals course or in the period of articles which follows it.

2.19 The Advisory Committee recognises that:

(i) The present, widely accepted emphasis on skills-based training for professional practice is recent in relation to training for the law. The first example of a full course of skills-based professional vocational education in England and Wales, the Inns of Court School of Law course, is now only in its third year.

(ii) The Law Society is engaged on a comprehensive revision of its training arrangements. Both the proposed Legal Practice Course and the proposed Professional Skills Course will be based on skills-related training, including advocacy skills. The Advisory Committee looks forward to working with the Law Society in this process over the next years.

(iii) Under the present arrangements, training under supervision in articles has been for most solicitors the only stage which gave them a chance to acquire an initial skill by observation and by participating in chambers hearings.

2.20 In addition, the Law Society's own annual advocacy course, and the many other course and training opportunities offered by the College of Law and other providers, have enabled many solicitors to acquire or develop advocacy skills under training, particularly in the early years of practice.

The Advisory Committee's views

2.21 Parliament has deemed the Law Society's existing training regulations to be appropriate educational and training requirements for solicitors' current rights of audience. The Advisory Committee is, however, obliged to consider whether or not the Society has established that those current training requirements, to which the Society proposes no changes for the purpose of Part I of the current application, are appropriate to the advocacy skills required for the new rights of audience set out in paragraph 2.15.

2.22 The Advisory Committee has concluded that, in the absence of training in advocacy which is specifically directed at the rights sought, or which could be reasonably taken to include them, it would not be possible in accordance with the Act to advise the Lord Chancellor and the four designated judges at the next stage of the application that solicitors are qualified in accordance with educational and training requirements appropriate to the court or proceedings dealt with in this part of the Society's application.

A different approach

2.23 The Advisory Committee has made its views known to the Law Society. In a letter to the Committee's secretary of 30 January, attached to this advice as Annex B, the Law Society has asked the Advisory Committee to consider and advise on a new proposal that the rights which the Society had sought to grant to all solicitors might be granted to those who had made substantial progress towards qualification for the specialist advocacy rights which the Society seeks in Part II of its application. The proposal depends on the Advisory Committee's recommendation that progress towards specialist rights should depend on a satisfactory record of advocacy experience, and is dealt with below in paragraphs 2.61–2.68.

Supplementary considerations

2.24 As explained in Part 1 of this advice, when considering the questions raised in relation to an application by the general principle, the Advisory Committee is required to act to further the statutory objective, so far as it is possible to do so in the circumstances of the case, and not to act in any way which would be incompatible with the statutory objective. The Committee has therefore considered a number of other factors in relation to the rights sought for all solicitors. It may help the Law Society to have an account of the Committee's thinking on these points. They all arise from the balance the Committee is obliged to strike between seeking to make provision for new or better ways of providing legal services and a wider choice of persons providing them, and maintaining the proper and efficient administration of justice. First, as on other aspects, the Committee has borne in mind the safeguard for the client given by requiring a separate advocate. Its thinking on this aspect is explained in paragraphs 3.12–3.16.

(i) Committals and appeals

2.25 The Advisory Committee regards the present compromise in respect of appeals, which restricts rights of audience to the advocate in the court below or to *a solicitor member of the same firm* as illogical, but it does not regard that illogicality as a sufficient justification for an extension of rights given the arguments in paragraphs 2.21–2.22. Moreover, the Committee thinks it unlikely that this restriction causes significant problems in practice.

(ii) Crown Court civil work

2.26 The Crown Court has first instance civil jurisdiction under a few statutory provisions, most of which pre-date its establishment under the Courts Act 1971 and reflect the local nature of the predecessor quarter sessions. The most important of these provisions, under which cases arise very infrequently, are the Reservoirs (Safety Provisions) Act 1930; the National Parks and Access to the Countryside Act 1949; the Highways Act 1980; and the Firearms Act 1968. The Crown Court also hears a range of appeals from decisions of magistrates and other authorities in civil matters such as licensing, and under various local Acts.

2.27 The Advisory Committee accepts that the types of cases dealt with by the Crown Court under its first instance civil jurisdiction are, in general, no more difficult or complex than the range of civil proceedings in the county courts and magistrates' courts, in which all solicitors currently have unrestricted rights of audience. Cases heard on appeal may, on the other hand, require the skills of a relatively experienced advocate.

(iii) Pleas

2.28 It is a natural part of a solicitor's preparation of a case for trial in the Crown Court to give advice on the appropriate plea. The Advisory Committee recognises that solicitors have accordingly developed expertise in this area, and that many clients will quite properly decide what their plea will be on the advice only of their solicitor. Where there is room for doubt about the proper plea, however, the advice of the advocate who will have to present the case to the court is crucial. For that reason, the Committee believes that significant experience of practice as an advocate in the court concerned is needed to deal best with pleas as an advocate. That is a particularly important factor in the Crown Court, where the consequences of a wrong decision will be very much more serious since that court has powers to impose unlimited fines or long or indeterminate sentences of imprisonment.

2.29 The Advisory Committee would therefore not think it appropriate to amend the application to include educational or training requirements directed specifically at appearances in pleas. It does not think it is likely to be in the client's interests to be advised by those whose advocacy experience would consist solely of appearances in pleas.

2.30 If a class of practitioners who (undesirably) specialised only in pleas did develop, it would under present listing arrangements be comparatively easy for them to attract to themselves a considerable quantity of the plea work available. The Advisory Committee believes that pleas are the work on which barristers new to the Crown Court will start, and will develop initial skills and familiarity with the tribunal. If the Committee's advice on the extension of rights of audience in the higher courts to suitably qualified solicitor advocates is accepted, plea work will no doubt also form an important element in the development of specialist solicitors' Crown Court practices. The Committee accordingly believes there are grounds to consider that an extension of rights of audience limited to pleas in the Crown Court might at present be incompatible with maintaining the proper and efficient administration of justice, albeit providing a new way of providing advocacy services.

(iv) Civil interlocutory work

2.31 As a matter of principle, the Advisory Committee regards it as illogical that rights of audience should depend on whether the case needs to be heard in chambers. That is a procedural question, in essence dependent on whether or not the issues or parties require the protection of privacy. Moreover, the Committee is not convinced that the present distribution of rights is ideal.

2.32. The Advisory Committee notes, however, that decisions in interlocutory matters can have major implications for the parties, either because decisions will substantially affect their rights, as in the case of some *Mareva* injunctions and *Anton Piller* orders; or because they may effectively determine the outcome of the case.

2.33 The Advisory Committee is impressed by evidence received from the judiciary and others that interlocutory work before a judge in specialist jurisdictions (whether in the Queen's Bench or the Chancery Division) requires specific and developed advocacy skills, and that as a matter of fact solicitors comparatively rarely exercise their existing rights of audience in such appearances before High Court judges. It should also be borne in mind that work in chambers (perhaps particularly before masters and district judges)

is rather different in atmosphere from that in open court. The issues and the reasons for decisions may need less meticulous spelling out. Equally, where a case involves confidential information, less damage will be caused if some is accidentally disclosed.

2.34 In the Chancery Division, where daily lists contain many cases which have to be dealt with quickly if the work is to be justly and effectively dispatched, the current administration of justice is likely to be disrupted by appearances by those (whether barristers or solicitors) who are not expert in the work of the Division. The Advisory Committee's view is that these factors dictate that this work should not be undertaken by those who have no training for this particular work.

SECTION III: RIGHTS FOR SPECIALIST SOLICITOR ADVOCATES

The application

2.35 The Law Society also applies to be authorised to grant to suitably experienced and trained solicitors rights to appear:

—in all proceedings in the Crown Court, and in all criminal proceedings in other courts;

—in all proceedings in the High Court, and in all civil proceedings in other courts; or

—in all proceedings in all courts.

2.36 As a measure of suitable experience, the Law Society proposes that it should be enabled to grant rights to those who:

(a) have been admitted or practised as solicitors for not less than three years, and have adequate appropriate experience of the higher courts concerned, for example, as former barristers or as judges; or

— have appeared as advocates in the relevant lower court in contested trials (with witnesses) on at least 20 days during the two years preceding the application, for those who wish to qualify in only one jurisdiction; or in both lower courts on not less than 15 days in each, for those who wish to qualify in both; or

(b) have substantial experience of advocacy and can satisfy the Society as to their advocacy experience and familiarity with the higher courts (the arrangements for which might include not more than 10 days' observation).

The training requirement would be satisfied by solicitors who had satisfactorily completed a test and course in advocacy skills.

2.37 The Society's proposals on the test and course were substantially revised and augmented in the course of discussions with the Advisory Committee. The submission outlining the revised proposals is attached as Annex C.

The structure of the application

2.38 The Advisory Committee believes that both structured training and the practical exercise of skills are necessary to development as an advocate, so it endorses the Law Society's approach in requiring four stages before an applicant can be granted rights of audience:

—a general period of practice as a solicitor;

—a period of concentrated work as an advocate in the lower courts, during which basic advocacy skills are learnt, and familiarity with the higher courts in which rights are sought can also be acquired;

(Both of these stages must be completed before proceeding to preparation for extended rights.)

—a demonstration that the advocate has acquired sufficient knowledge of the law, practice and procedure in the higher courts to function competently; and

—acquisition of competence in the advocacy skills needed for the higher court.

Practical experience

2.39 The Advisory Committee has noted from research conducted by the Law Society and from its own observation that young solicitors usually spend their first three years in practice (during which time they cannot practise on their own) in a comparatively wide range of duties.

2.40 Equally, the Advisory Committee notes that after three years experience most solicitors will have been training for and in their profession for a total of nine years. It considers that this is an appropriate stage for those who wish to do so to concentrate on the development of specialist skills. The Committee therefore agrees with the Law Society that solicitors should be entitled to apply for specialist rights of audience once they have practised for three years from qualification. It recognises that many, and perhaps most, solicitors will have practised for rather longer at the time when they decide to submit an application.

The experience requirement

2.41 The Law Society's proposals have been summarised above. The Advisory Committee's advice is that they need to be amended in order to comply with the general principle.

The measure of experience

2.42 The Law Society's proposals for assessing the range of an applicant's experience are based on appearances in contested trials with witnesses. The Committee accepts that such trials will normally have involved appearances in interlocutory and ancillary hearings, as will many of the cases which did not reach trial. This measure will therefore represent a rather greater and wider amount of actual advocacy experience.

The Committee's views

2.43 The Advisory Committee's approach is that in order to assess whether applicants are at an appropriate stage to progress to the test and course, it would be best to make an individual assessment of the following four factors in their advocacy experience:

—The *range* of an applicant's experience is important. Appearing in cases involving a very narrow area of the law, or in very simple cases, is unlikely to provide a solid background for appearances in the higher courts.

—It is important to look at both the *frequency* and the *regularity* of experience. However helpful formal training can be in developing advocacy skills, the Committee gives priority to the ' real life ' exercise of those skills in training new advocates in their job.

—The Committee believes that the *quality* of an applicant's experience should, if possible, be assessed. There would be little benefit in admitting to the higher courts those who had taken many cases in the lower courts, and done them badly.

2.44 In the Advisory Committee's view, the diversity of solicitors' practices and experience makes it impossible to test these four factors adequately by using a single measure of the number of appearances, or the number of hours, which advocates have clocked up, before deciding whether or not they are at a suitable stage to train for rights of audience in the higher courts. The Committee therefore advises that a rather different approach should be adopted, under

which the Law Society's proposed Higher Courts Qualifications Committee would test applicants' actual experience over a suitable period against the four listed factors. That assessment should be based on an actual record of work done, to be submitted by solicitors when they apply for higher court rights. The Committee has discussed these issues with the Law Society on a number of occasions, and has been very grateful for the help which it has received in formulating its views.

The qualifying period

2.45 First, the Advisory Committee agrees that the period in which qualifying experience is to be demonstrated should be the two years prior to the application. (That is, qualifying experience will begin at least one year after admission.)

Guidelines

2.46 If this approach is adopted, potential applicants will need a clear idea of what would be required of them. Equally, the Advisory Committee acknowledges that the criteria of experience should be sufficiently flexible to recognise the diversity of cases and solicitors' practices.

2.47 The Committee has therefore discussed with the Law Society the preparation of a set of guidelines which would assist solicitors to understand how the four criteria set out above will be applied to each of the three qualifications for appearance in the higher civil and criminal courts which the Law Society proposes. The Society has submitted a draft set of guidelines, attached as Annex D, based on the principles which the Committee had set out.

2.48 The Advisory Committee indicated that the guidelines should set out the experience that would be expected in appropriate categories of proceedings, such as ancillary, interlocutory, bail, and contested trial work. The Committee's view is that the total of appearances in these categories should be set initially in the region of 40–50 days over the qualifying two years for those who wish to appear either in the higher civil courts only or in the higher criminal courts only.

2.49 Because of the importance of adequate familiarity with the tribunal in which rights are sought, the guidelines should also include extensive experience as a litigator in the appropriate jurisdiction.

2.50 The Advisory Committee has reservations about unnecessarily early specialisation. It believes that experience in one jurisdiction or area of work often improves performance in another, directly or indirectly (if sometimes only at a later stage). It therefore believes that those seeking to qualify in only one jurisdiction should be encouraged to have and demonstrate experience in the other. It does not regard this as an essential qualification. For the same reason, the Committee agrees with the Law Society that those who are seeking to qualify in both jurisdictions should not be required to show a total of experience equivalent to the sum of the requirements for those seeking to appear only in one, and that some discount is appropriate for an application for the combined qualification.

2.51 The Advisory Committee suggests that some formal amendments to the Society's draft might show more clearly the relationship the guidelines should have to the four criteria, and wishes to make some minor suggestions of substance. A suggested reworking is attached as Annex E. Subject to that, the Committee is content with the draft which the Society proposes.

2.52. The guidelines will no doubt need to be updated, in the early years and as practice changes. In particular, the Advisory Committee is concerned to ensure that the guidelines should not impose requirements which interfere unnecessarily with solicitors' practices, particularly specialist ones, provided that solicitors are accumulating sufficient experience to qualify them for the

higher courts. The Advisory Committee therefore wishes to discuss with the Society a suitably flexible procedure for amendment, and suggests that any amendments to the guidelines should be approved by the Advisory Committee.

Exceptions

2.53 Even so, the Advisory Committee recognises the possibility that there will be applicants whose experience does not precisely meet that prescribed by the guidelines, but is clearly adequate as a basis to proceed to the test and course. Provided that the Law Society was satisfied as to the quality of this experience, the Advisory Committee believes that the proposed Higher Courts Qualifications Committee should have discretion to allow such applicants to proceed to the test and course. The Advisory Committee will wish to see how this discretion is used in the early years. The Society is therefore asked to keep records which will enable this to be done.

The quality of experience

2.54 The Advisory Committee has considered very carefully what arrangements should be made to judge the quality of applicants' performance and advocacy skills, and their capacity to benefit from experience.

2.55 It has considered a number of specific tests of that experience, such as requiring the Law Society to set up a system of interviewing panels, or retaining observers who would be able to observe applicants' work in the courts. The Advisory Committee recognises that there is no practical way in which such arrangements could be made without a wholly disproportionate use of resources.

2.56 The Advisory Committee has also considered the possibility of requiring solicitors to produce references from members of the judiciary with first-hand experience of their work. The Committee has, however, heard arguments that there will be a significant proportion of solicitors whose practices (mostly in inner-city areas) are so widely spread that there would be serious problems in attempting to find a judge or magistrate who had enough experience of their work to give a reference that was worthwhile, and also arguments that the giving of references on advocates is not an appropriate judicial function.

References

2.57 The Advisory Committee does, however, consider that references have a useful and acceptable role when considering people's qualifications. It advises the Society that all applicants should be asked to provide the names of two referees when submitting the record of work experience.

2.58 If the references are to be of any value, they should come only from those who have first-hand experience of the applicant's advocacy work, and whose standing as members of the judiciary or of the legal profession would enable them to offer informed opinions.

2.59 The Society may wish to consider using a standard form of reference asking how often the referee had seen the applicant's work, and about the quality of preparation, the grasp of substantive and procedural law, the skill in presentation, and the integrity as an advocate which had been demonstrated by performance in the relevant lower court.

2.60 Here, too, the Committee will wish to see whether the procedure is accurately identifying solicitors who are ready to proceed to final training for the higher courts.

'Additional rights'

2.61 The Law Society has asked the Advisory Committee to consider and advise on a proposal which would grant to those who had made significant progress towards qualifying for specialist advocacy rights the increased rights of audience which it had sought for all solicitors on admission. (The Law Society's letter of 30 January to the Committee's secretary is at Annex B to this advice.) The Society originally sought the right to appear in:

Criminal

(i) all committals for sentence and appeals from the magistrates' courts to the Crown Court;

(ii) trials in the Crown Court where the defendant pleads guilty;

(iii) all civil proceedings in the Crown Court; and

Civil

(iv) broadly, most interlocutory business in the Chancery Division.

2.62 The Society now seeks to grant those rights to solicitors who have practised for three years, and have satisfied its proposed Higher Courts Qualifications Committee that their record of advocacy experience over the previous two years justifies their training for rights in the higher courts. Rights in the Chancery Division would only be granted to those with directly relevant advocacy and litigation experience, and the right to appear in pleas might be limited.

2.63 The Law Society submits that at this stage of their career solicitors would have had some practical and continuing training appropriate to this work. They would have demonstrated sufficient satisfactory experience of advocacy in the lower courts to establish that they were likely to be competent in it (and indeed that they were at a suitable stage in their careers to progress to appear in all courts after passing the test and course). In the Law Society's submission, they would thus satisfy the educational and training requirements for the limited rights sought.

2.64 The Law Society also argues that the ability to grant these restricted rights would have significant advantages in improving its overall education and training proposals. The solicitors who had exercised these limited rights in the higher courts would benefit greatly from that experience when learning the skills needed for handling the more difficult cases in the higher courts.

The Advisory Committee's views

2.65 The Committee has considerable reservations about this proposal. As paragraphs 2.21–2.22 make clear, the Committee believes that the Courts and Legal Services Act 1990 requires there to be adequate educational and training requirements in respect of any new right applied for under it. The Committee does not believe that a requirement to appear frequently as an advocate in the preceding two years is, of itself, sufficient for these purposes, although it plays an important part in preparing for specialist rights.

2.66 The Committee has also already set out its view that it is undesirable to separate advice or appearances as an advocate in Crown Court trials where the defendant is pleading guilty from the wider context of practice in the Crown Court. It therefore believes that specific training in advocacy skills and Crown Court practice and procedure is required.

2.67 The Committee also believes that specific training in the practice and procedure of the Chancery Division is required for advocates who wish to appear in interlocutory matters, which are heard in open court in that Division. As the Committee has already indicated, it agrees that Chancery practice is specialist, and the efficiency with which cases in the interlocutory lists can be dealt with is likely to be reduced significantly if advocates appearing have not been properly trained to deal with it.

2.68 The Committee also has reservations about the Society's proposal to allow solicitors who had been granted these intermediate additional rights to retain them if they did not go on to take the test and course (and, indeed, only to review the rights if the solicitor had actually attempted and failed either the test or course). At this stage at least, there are significant advantages in not

complicating the scheme for granting these additional rights of audience to solicitors. Indeed, solicitors would only become eligible for the additional rights at a stage when they were ready to progress to the test and course. Since they are likely already to have acquired much of the knowledge necessary for the former, and many of the skills necessary for the latter, there would seem to be little reason why they should not acquire the full qualification speedily. The Committee therefore advises that the Society's application should not be amended to include provisions granting intermediate additional rights to solicitors who were authorised to proceed to the test and course.

The test

2.69 The Committee believes that the Law Society's proposals, outlined in Annex C, would, when further revised, establish a system which would enable a proper test of the applicant's knowledge of procedure and evidence in the higher court or courts concerned. The Advisory Committee notes that the Inns of Court School of Law course uses 1½ hour multiple-choice tests for the examination of procedural law in the vocational course for qualification as a barrister. The Law Society has been invited to continue with more detailed planning for the course, since the Advisory Committee considers that the Lord Chancellor and the designated judges must be satisfied, in broad terms, by the quality and stringency of the testing procedures before determining whether the education and training requirements are appropriate for the grant of further rights of audience. Relevant questions will include the areas of procedure and evidence which will be tested; the nature and purpose of the test; the assessment criteria; the pass mark; and the system for monitoring the operation of the test.

The advocacy course

2.70 The Advisory Committee considers that the Law Society's proposals are likely, when suitably revised and implemented, to provide an adequate basis for training those with substantial advocacy experience, and with the detailed procedural knowledge demonstrated by the test, in the specific advocacy skills required for practice in the higher courts. It has invited the Society to proceed with detailed planning, and the Committee's education sub-committee looks forward to considering these details before advising the Lord Chancellor and the designated judges.

2.71 The most important area for discussion will be the course objectives (specifying the proceedings in which applicants will be expected to demonstrate competence) and the skills required to deal with them.

2.72 The Advisory Committee has also identified a number of subsidiary points on which further discussion is proceeding. These include:

(i) the specific skills of preparation and presentation that course managers will be asked to teach in order to help applicants meet the objectives;

(ii) a detailed outline of the course;

(iii) how it is proposed that the preparation time on the course should be managed;

(iv) how the time available for the course will be used to achieve the identified objectives;

(v) how time on the course will be allocated between teaching information and practical exercises;

(vi) the nature of the materials which will be used on the course;

(vii) the assessment criteria, and how they will be implemented;

(viii) the arrangements proposed for monitoring and validating the course;

(ix) who is likely to provide the course, and with what personnel; and

(x) the degree of involvement which can be expected from the Society's Advocacy Examination Board and Advocacy Training Adviser.

Observation

2.73 The Law Society suggests that a period of observation in the higher courts might be a supplementary requirement in cases where the applicant's advocacy experience is deemed somewhat deficient or is not recent.

2.74 The Advisory Committee believes that familiarity with the actual operation of a court should in all cases be a prerequisite to practice in that court. It therefore recommends that all applicants should be required to demonstrate that they have undertaken a suitable period of observation in the higher courts. That should be structured in such a way as to allow the solicitor to understand the substance of the cases the court is dealing with, and to discuss the merits of the way in which they are being handled with those involved. That requirement may, of course, be met by applicants who have acted as litigators in the court concerned and attended all of the hearing of their cases. Other options may be feasible, and will be considered further with the Law Society.

Continuing training in advocacy

2.75 The Advisory Committee notes that the application assigns no role to continuing training in advocacy, either before or after qualification as a specialist advocate. The continuing legal education scheme is, however, a major part in the Law Society's provision for the training of solicitors. The Committee believes that several aspects of the application would appear to have a natural place in that programme. Examples are preparation for the written test, and participation in a suitable scheme of structured observation.

2.76 More generally, the Advisory Committee's belief in the importance of both structured training and practical experience in maintaining and developing advocacy skills means that the Committee also looks to continuing education at an appropriate level (and perhaps in association with the Bar) to develop the advocacy skills of those who have qualified as specialist advocates. The Advisory Committee invites the Law Society to consider specific provisions on both aspects alongside the application.

Advocacy in Europe

2.77 There is another important aspect of training which arises as a consequence of the application, and to which the Committee will wish to return. Already, solicitors as well as barristers are appearing before the European Court of Justice. The Committee welcomes this, since cases started in any court in England and Wales may end up in Luxembourg, and it is important that the client should have the option of keeping the same lawyer throughout where that is appropriate. The law and practice applied in the European Court is, however, very different from that in the domestic courts, and the Advisory Committee wishes to discuss with the Law Society and the Bar how both generalist and European specialist lawyers are trained and otherwise prepared for this increasingly important aspect of practice, although rights of audience in the European Court are of course a matter for that court and not this Committee.

The draft regulations

2.78 If accepted, the Advisory Committee's proposals on the record of advocacy experience would require significant amendments in paragraphs 7, 8, and 9(iii) in the draft qualification regulations. The Law Society proposes that the experience requirement should be met by solicitors who:

(i) have recent material experience, or its equivalent; or

(ii) have appeared in sufficient contested proceedings; or

(iii) have had an appropriate period of observation (see below); or

(iv) have held the Society's other specialist advocacy qualification in a single jurisdiction for two years.

2.79 The Advisory Committee agrees that provision must be made for those whose experience, for example, as a judge or in recent practice as a barrister, should exempt them from the whole of the proposed selection procedure.

2.80 The Advisory Committee advises the Law Society that the draft regulations would comply better with the general principle if a different approach were adopted. Draft regulations 7(iii)(b) and (c); 8(iii)(b), (c) and (d); and 9(iii)(b), (c) and (d) should be removed. Instead, the Higher Courts Qualifications Committee should be given the power to authorise solicitors to take the test and course if they have satisfied the Committee that:

(i) the frequency, regularity, range and quality of their advocacy in the lower courts; and

(ii) their experience relevant to the exercise of rights of audience in the higher courts

justify their proceeding to train for those rights. The Society should exercise that power having regard to guidelines prepared by it and annexed to the regulations. The Advisory Committee takes the view that the Advisory Committee itself should also approve the guidelines.

2.81 As matters of detail, the Advisory Committee recommends that new drafts of the regulations should make clear what would appropriately be considered to be the totality of equivalent experience. The Committee takes it that draft regulation 7(iii)(a) would be better expressed if it referred specifically to barristers as those having exercised rights of audience in higher courts (as draft regulations 8 and 9(iii)(a) do); and that 'in all proceedings' in that draft regulation is intended to refer only to 'both civil and criminal proceedings'.

Part 3: Rules of Conduct

The general principle

3.1 The general principle in Section 17 of the Act requires the Advisory Committee to consider four aspects of the Society's disciplinary arrangements—whether:

(i) the Law Society's rules of conduct are, in relation to the courts or proceedings in which rights of audience are to be granted, 'appropriate in the interests of the proper and efficient administration of justice';

(ii) the Society's rules make satisfactory provision for a non-discrimination rule in relation to the court or proceedings in question;

(iii) the Society has an effective mechanism for enforcing its rules of conduct; and

(iv) the Society is likely to enforce them.

The Law Society's rules of conduct

3.2 The Advisory Committee has considered the draft practice rules and advocacy code submitted with the Law Society's application, noting that:

(i) the rules and code are intended to apply to solicitor advocates in all courts, not only those to whom additional rights of audience will be granted if the application is successful; and

(ii) the draft rules and code must be seen in addition to the Society's existing rules which will also apply to solicitor advocates in the higher courts.

3.3 The Advisory Committee is concerned that the code of conduct should be accessible to lay clients as well as to the judiciary and the legal profession. In the Committee's view, it is essential for the client to have a clear statement of the standards to be expected from advocates, and information on complaints procedures. The Committee therefore welcomes the Law Society's plans to redraft all its rules in plain English, and suggests that particular attention should be given to the scope for a plainer version of the advocacy code.

A common advocacy code

3.4 The Advisory Committee has noted with approval the draft common code for advocates issued by the Law Society and the Bar in March 1991, and the fact that the draft rules of conduct in the application are largely drawn from that common code. The Committee does not consider that a common code is required by the general principle. It believes, however, that it is highly desirable, on grounds of practicality, for all advocates to be governed by the same rules covering the conduct of cases and behaviour in the face of the court, if the courts are not to be troubled by different, and perhaps even inconsistent, systems of regulation. The Committee recognises that some differences, usually in the regulation of matters not directly affecting performance in court, are appropriate, to reflect the different structures of the professions. The large measure of overlap with the Bar's rules means that consideration of a plainer draft of the rules must be a joint exercise with the Bar.

The Advisory Committee's approach

3.5 The Advisory Committee believes that the proper and efficient administration of justice in the higher courts requires that:

(i) advocates must recognise that their primary duty is to the court, and must observe high standards of conduct to both the court and their clients;

(ii) advocates must not take on cases beyond their competence; and

(iii) clients must have a real choice of the available options, and in particular must not be pressed into taking services they do not need.

3.6 The Committee has considered the draft rules submitted by the Law Society, and, subject to the particular matters dealt with below, agrees that these principles are met.

Separation of preparation and presentation

3.7 Some respondents to the Committee's consultation exercise on the application have suggested that the proper and efficient administration of justice requires the functions of litigator and advocate to be carried out by separate people in all cases in the higher courts.

3.8 It is implicit in the Law Society's application that a single person acting both as litigator and as advocate (although not necessarily as the only or senior advocate) will be able to conduct a case from start to finish in the higher courts. Equally, a solicitor acting as litigator will have the option of bringing in another solicitor, or a barrister, as the—or another—advocate in appropriate cases. In considering whether a separation of functions should be mandatory in all higher court cases, the Committee has noted that solicitors have for many years discharged both functions in magistrates' court and county court cases. The Committee has no evidence that this has caused problems. It notes also that there is a considerable overlap between the nature and weight of cases dealt with by the magistrates' courts and the Crown Court, and on the civil side by the county courts and the High Court.

3.9 The Committee has, in particular, considered representations that separation is especially necessary in serious criminal cases. It is argued that the need to prepare the case for submission to an independent advocate, and the special scrutiny given by the person who will have the responsibility of presenting the case in court, reduce the possibility of improper behaviour (such as coaching witnesses) during the preparation of a case.

3.10 The Committee does not accept this. Only a tiny minority of lawyers are likely to behave in an improper manner. Any defendant who does go to the trouble of selecting an unscrupulous litigator is likely to ensure that an advocate who is not over-particular is also instructed. Where an advocate of impeccable reputation is retained, a litigator who is setting out to deceive the court need only be sure that the case is prepared throughout in such a way as to conceal embarrassing facts from the advocate (as can, no doubt, be done) to add a spurious veneer of respectability. The Committee concluded that scrutiny by a consultant advocate was unlikely to be an effective tool to eliminate abuse. It considers that there may, indeed, be a greater advantage in some cases in exposing allegedly corrupt litigators to the direct scrutiny of the court and the opposing party when they also act as the advocates.

3.11 Aside from the question of dishonesty, the Committee agrees that it is sometimes desirable, particularly in heavier cases, for an independent advocate to review a case in order to see whether it has been properly prepared and whether the correct view has been taken of its merits. The undoubted benefits in some cases of a 'second mind' need, however, to be weighed against the positive advantages, to the court and the litigant, of having in other cases a presenter who has been intimately familiar with the case from the outset. The Committee believes that the balance of advantages will depend on the nature and weight of an individual case, not on the forum in which it is heard. It has concluded that there should not be a general rule requiring separation in all cases in the higher courts.

Client safeguards

3.12 The Committee has given much thought to the argument that the requirement for a separate advocate to be instructed to present the case is an important safeguard for the client, especially in the more serious and complex cases. Most (although by no means all) clients are at a disadvantage in the market for advocacy services, because they are unable to test reliably which advocate to

select for which work, or the quality of the services offered and provided. They look to the litigator to guide them in that choice. In a case where the litigator can also be the advocate, it is therefore essential to make provision for the client to be advised properly and given a real choice of the services needed.

3.13 The provision the Society proposes is a practice rule on choice of advocate. This obliges a solicitor who provides both litigation and advocacy services to consider, on receiving instructions and from time to time as the case proceeds, whether the client's best interests require a different advocate to be instructed, and to advise the client accordingly. The criteria to be applied are:

(i) the circumstances of the case, including its gravity, complexity and likely cost;

(ii) the nature of the solicitor's practice;

(iii) the solicitor's ability, experience, and seniority; and

(iv) the solicitor's relationship with the client.

3.14 The Committee has examined this rule with particular care. It considers that it imposes a clear and direct responsibility on the litigator, and notes with approval that it will apply in both lower and higher courts. The Committee has also received evidence from the Society and the Solicitors Complaints Bureau that the rule is capable of being enforced.

3.15 The Committee has also considered whether the rule needs to be reinforced by more detailed formal rules, or by guidance, on the types of cases in which other or additional advocates are needed. It has concluded that at this stage the need for a separate advocate can be left to the solicitor's individual judgment in particular cases. A need for further general or specific guidance may emerge with experience, and the Committee will consider this in due course with the Society and the disciplinary authorities.

3.16 There are, however, two aspects on which the Advisory Committee believes that further provision should be made: which advocate to choose, and cost. The Committee is concerned that these are areas where many clients will find difficulty in making decisions. Great care is needed to make sure that they have, and understand, the necessary information. A central factor will be the relative cost of using a combined package, instead of a separate litigator and advocate. The Advisory Committee appreciates that there may be problems in providing precise estimates, but considers it important that clients should be given the best possible guidance on the costs of the options open to them. The Committee believes that this information should be provided in writing, and that it may be helpful to clients to have the litigator's advice on the appropriate choice of advocate in writing as well. The Advisory Committee invites the Law Society to consider how this might most helpfully be achieved.

Tying-in

3.17 It follows from the Law Society's proposed rule on choice of advocate, which the Committee approves, the tying-in of advocacy to litigation services is not allowed: that is, a client who instructs a solicitor as litigator cannot be forced to accept advocacy services from the same solicitor or a member of the same firm.

3.18 The Advisory Committee has considered the Law Society's submission that the need to prohibit tying-in is adequately met by the proposed practice rule on choice of advocate, and that a separate rule against tying-in is unnecessary. The Law Society has also said that it does not expect a significant problem in this area, pointing out that there is no evidence of solicitors abusing their powers to act as both litigators and advocates in county court and magistrates' court cases.

3.19 The Committee believes, nevertheless, that an explicit rule would be preferable for higher court cases, where solicitors have not previously had the choice of using themselves instead of barristers as advocates, and where different considerations may apply from the more straightforward cases in the lower courts. The Committee's principal objective is that the position should be made clear to prospective clients. The Advisory Committee therefore advises the Law Society that its advocacy code should include an explicit prohibition on the tying-in of advocacy to litigation services, along the lines that a solicitor shall not at any time require advocacy services to be provided by him, his firm or agents as a condition of providing litigation services.

3.20 The Advisory Committee has also considered the question of 'cut-price packages' for combined advocacy and litigation services. It has heard the Law Society's view that reduced rates are acceptable, provided that both services are carried out to a satisfactory standard and that the 'cut-price' offer is not used as an unfair inducement. The Society considers that this is adequately covered by Rule 4(d) of the Solicitors Publicity Code 1988:

> 'No publicity may quote a composite fee for two or more separate services of a solicitor unless the solicitor is willing if required (i) to quote separate fees for the individual services (which separate fees may not total more than the composite fee), and (ii) to carry out any one only of those services on the basis of such separate fee.'

3.21 The Advisory Committee agrees, provided that the alternatives to combined services, and the financial consequences of accepting them, are fully explained to the client. The Committee advises the Law Society to consider how this can be ensured.

3.22 The question whether tying-in of litigation to advocacy services should be permitted (ie whether a solicitor advocate should be obliged to accept cases in which a different firm is acting as litigator) is dealt with below under the heading 'The non-discrimination rule'.

The non-discrimination rule

3.23 Section 17(3)(c) of the Act requires authorised bodies which grant rights of audience to their members to include in their rules of conduct a non-discrimination provision which is 'satisfactory in relation to the court or proceedings in question', and which forbids an advocate to withhold services:

> '(i) on the ground that the nature of the case is objectionable to him or to any section of the public;
>
> (ii) on the ground that the conduct, opinion or beliefs of the prospective client are unacceptable to him or to any section of the public;
>
> (iii) on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available under the Legal Aid Act 1988).'

3.24 The Law Society proposes, as part of its draft advocacy code, a non-discrimination rule which prohibits discrimination on the grounds specified in the Act, and which is close to the wording of the Act itself. In the Advisory Committee's view, the statutory requirement is to be seen as a minimum. The Committee has therefore considered whether the Law Society should be advised to apply a more stringent non-discrimination provision to solicitor advocates practising in the higher courts, in order to ensure that appropriate representation is available to everyone who needs it.

Prohibited grounds for discrimination

3.25 The Committee advises the Law Society to add 'sexual orientation' to the list of grounds on which discrimination is to be prohibited.

The cab-rank

3.26 The Bar Council has argued strongly, both in its written response to the Law Society's application and in its oral representations to the Committee, that the non-discrimination provision applying to specialist solicitor advocates should be in the form of the Bar's 'cab-rank' rule (rule 209 in the Bar's Code of Conduct). That requires a barrister in independent practice, subject to the exceptions set out in rules 501, 502 and 503 of the Code, to accept any brief or instructions to act on behalf of any person 'in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded'.

3.27 Among the most important exceptions are that a barrister must not accept work for which, having regard to his other professional commitments, he has insufficient time, nor take on cases which might give rise to a conflict of interest or a breach of confidence. In addition, a barrister is not obliged to take a case which is not being offered at a proper fee in relation both to the nature of the case and to the barrister's ability, experience and seniority (except a legally aided case, when the legal aid fee is deemed to be a proper fee unless the Bar Council has determined otherwise).

3.28 The Bar's first argument is one of principle: that a right of audience is a privilege carrying with it a corresponding duty; and that anyone who seeks a right of audience in the higher courts, which decide vital issues concerning people's liberty and livelihood, should in principle be prepared to accept a positive duty to act for any client.

3.29 The Bar also submits that the cab-rank rule confers a substantial additional benefit on clients by preserving their choice of advocates, and that the rule enables clients to get the advocate of their first choice.

3.30 The Committee does not accept the argument that to maintain the proper and efficient administration of justice the statutory objective or the general principle requires a cab-rank rule for advocates in some or all courts. The cab-rank rule clearly did have such a function when it first developed. At that time there were few barristers, and they had a complete monopoly of rights of audience in the higher courts. It was therefore necessary to ensure that litigants were not left unrepresented, even though acting for them, or in a particular case, might bring odium upon the barrister. The force of the Bar's argument depends on there being a narrow monopoly of rights of audience in the higher courts. That would no longer apply if rights of audience were extended under the framework set up by the Act. If extended rights are granted to a body of potential specialist advocates as large and as diverse as solicitors, it is difficult to see what force the argument based upon monopoly could have, provided that satisfactory provision for a non-discrimination rule short of a cab-rank could be made. The Committee accepts that by adopting the non-discrimination rule in the Act, the Law Society has in fact provided a satisfactory non-discrimination rule (subject to the minor suggestions in paragraphs 3.25 and 3.47–3.48).

3.31 The Committee also doubts whether the reality of practice at the present Bar is accurately reflected by the claim that a cab-rank rule always enables clients to get the advocate of their first choice. The prevalence of returned briefs, with the consequential redistribution of work within chambers, and the intense competition for the services of the best known and most senior barristers, are only two of the factors which limit the extent to which clients can realistically expect to be represented by the advocate of their first choice.

3.32 The Committee has seen considerable force in the arguments that a 'first come, first served' rule would serve to prevent access to advocacy services becoming restricted in some specialist areas of the law. The particular concern is that the relevant skills could become concentrated in a small number of solicitors' firms which had effectively replaced the specialist Bar in their own particular fields, and

which did not take cases on referral from other solicitors' firms acting as litigators. If the Law Society adopted a 'first come, first served' form of non-discrimination rule, including an obligation to take cases on referral, it would be open to the clients of other firms to use their specialist services.

3.33 The Committee has heard arguments from a number of sources about the way in which solicitors' firms would organise themselves in order to exercise rights of audience in the higher courts. The worst case, as presented by the Bar Council, is that all or most of the larger firms would immediately set up advocacy departments, staffed initially by former barristers who could relatively easily requalify as solicitors and then obtain exemption from the Law Society's experience and training requirements in order to qualify as specialist solicitor advocates. An advocacy department would be used as a selling point for clients, who might see considerable attraction in the availability of a 'one-stop' service; and this, together with the dwindling size of the Bar, would create pressure on firms which did not originally want to set up advocacy departments, but which would be forced to do so in order to keep up with their competitors. The former barristers would in due course be joined by 'home-grown' solicitor advocates, who would, with experience, progress from acting as second or third advocate to taking over complete responsibility for major cases. Economic pressure to make the fullest possible use of available in-house resources would be an additional factor in discouraging use of the independent Bar.

3.34 The overall effect, on this argument, would be to concentrate specialist advocacy services in a small number of the very largest firms. That would prevent clients who were not able to use those firms (for example, because there was a conflict of interest), or who did not wish to (for example, because they had an established relationship with a smaller, more local firm), or who could not afford their services, from getting access to advocates with the right skills for their case.

3.35 A rather different picture is offered by evidence taken from the Law Society (including evidence offered on behalf of the largest firms in the City of London), and by individual solicitors' firms with which the Committee has had direct contact (some of which have already set up advocacy departments). Their argument is that, in the highly complex areas in which they practise, the market for legal services, and advocacy services in particular, is increasingly specialised. Their first thoughts are that the services they would want to offer initially would be limited in range: for example, to offer their clients in-house advocates who could deal with simpler interlocutory work, and support leading counsel. They argue, however, that they could not afford to employ a sufficient range of advocates to meet the diversity of their needs, and would not have enough advocacy work of the right level to keep the most senior in-house advocates fully occupied with work within their own speciality. It is therefore cheaper and better for their clients to have the services of a sufficiently wide pool of independent consultant advocates to enable the high degree of specialisation their practice now needs. At least in the short term, that can only mean the survival of a strong and independent Bar (albeit perhaps a more select and specialist one).

The need for a cab-rank rule

3.36 The Committee thinks a cab-rank rule would be very difficult to apply to individuals working in partnership, because the apparently overriding responsibility to take work on the cab-rank would impose obligations likely to conflict with a partner's need to take due account of the common responsibilities of the firm. Indeed, at an earlier stage of the debate, the Bar Council maintained that a cab-rank rule was incompatible with partnership, incorporation or employment.[1]

[1] 'Quality of Justice: The Bar's Response [to the Government's Green Papers]', p.47.

3.37 The Law Society submits that the imposition of a cab-rank rule would cause serious practical difficulties and be difficult to enforce for the reasons given above, whilst the Act's general principle requires that authorised bodies should be able and likely to enforce rules of conduct. The Law Society argues that the nature of a solicitor's work, involving not only the continuous pressure of litigation work and case management but also individual events such as interviewing clients or witnesses, makes it much more difficult to establish whether or not a solicitor is in fact free to accept work than it is for a barrister. The Law Society also submits that an imposed cab-rank rule would be incompatible with the statutory objective of widening choice, because it would deter some or many solicitors from taking up rights of audience in the higher courts. Similar views were expressed by the National Consumer Council and the Consumers' Association.

3.38 The Committee accepts that the cab-rank rule was devised to assist clients in getting representation from a profession of independent consultant advocates. Solicitors' practices are very different. Indeed, it is arguable that the Bar is only able to operate its own cab-rank rule because it is instructed in cases which have first been filtered by solicitors. It is solicitors, not lay clients, who can hail the cab.

3.39 On the basis of the evidence it has received, the Advisory Committee thinks it unlikely that specialist firms will seek to buy up specialist advocacy services in any particular field of law to an extent which would create shortages of advocacy services.

3.40 More importantly, even if that undesirable concentration were to take place, whether deliberately or through a combination of factors, the Advisory Committee thinks it unlikely that any shortages or problems that did develop would be dealt with effectively by the arbitrary imposition on one profession of rules of practice derived from another which operates in a fundamentally different way. The Law Society has outlined to the Committee a range of measures which might be adapted to deal with any problems which had been found in the availability of advocacy services.

3.41 For those reasons, and having regard to the other reservations that have been put to it about the effect of a cab-rank rule on solicitors' practice, the Committee does not advise that such a rule should be adopted by the Law Society.

3.42 If the Committee is to be in a position to advise on the development of legal services and on the maintenance of the proper and efficient administration of justice, it needs to be able to find out whether monopolies are in fact developing and leading to restrictions in access to advocacy services. Only if the necessary information is available will it be possible for any problems to be corrected. It has discussed the potential difficulties with the Law Society, which has put forward a proposal to consult the Committee formally, in each of the first three years after the approval of its amended rules, on the following question:

> 'In view of trends and developments in the market for advocacy services, are there any further steps which the Society should take, including the adoption of new rules, in order to promote access to advocates and the availability of advocacy services?'

Managed change

3.43 The Committee welcomes this proposal. For the reasons set out in Part 1 of this advice, it believes that the ability to monitor changes introduced under the Act is a central part of its responsibilities. The proposed survey of the availability of advocacy services will be the focus of that process.

3.44 The Committee considers that the process should be an annual one. It is unlikely that the full impact of extended rights of audience will be ascertainable after so short a time as three years. The Committee will consider with the Law Society, and with other interested parties, detailed plans for monitoring developments in the availability of advocacy services.

3.45 That process will take place in parallel with the other arrangements for monitoring and review which the Committee proposes, such as monitoring the exercise of discretion to exempt from the precise requirements of the guidelines for advocacy experience (see paragraph 2.52), and the procedures for examining suitability to proceed to the test and course generally (see paragraph 2.60).

Legal aid

3.46 Rule 2.5 of the Law Society's draft advocacy code allows solicitor advocates to refuse to accept instructions if they have reasonable grounds to consider that they are not being offered a proper fee, having regard to the circumstances of the case, the nature of their practice, or their experience and standing. The Advisory Committee recognises that this complies with section 17(5) of the Act, which provides that rules of conduct including such a provision are 'not on that account to be taken as being incompatible with the general principle'.

3.47 The Advisory Committee has nevertheless noted a discrepancy between the wording of the Law Society's rule and the text of the Act: in the draft rule, 'the advocate has reasonable grounds to consider' has been substituted for 'there are reasonable grounds for the advocate to consider'. The Advisory Committee's view is that the wording should follow the statute exactly, thus emphasising the objective nature of the criteria.

3.48 The Committee has also noted that the use of the words 'is not being offered a proper fee' does not make it clear how the rule applies to legally aided cases, since a lawyer taking legal aid work does not necessarily know at the outset what the eventual fee will be. The Committee suggests that this might be clarified by an explicit statement that in relation to legal aid cases, 'fee offered' should mean 'any standard fee payable under the Legal Aid Regulations for that class of case or the level of remuneration commonly allowed by the Legal Aid Board or Crown Court Determining Officers for cases of that class'. The precise wording would need to be settled in consultation with the Lord Chancellor's Department and the Legal Aid Board.

3.49 The Committee has indicated these concerns to the Law Society, which sees no problem of principle with either point.

3.50 The Advisory Committee is prevented by Section 17(5) from making it a condition of approving the application that the Law Society must adopt a rule obliging solicitor advocates to undertake legally aided cases. The Committee believes, however, that the Law Society must have some responsibilities in this area. From the earliest times, both branches of the legal profession have taken a pride in their ability to adapt their codes of conduct and working practices to ensure that those who need legal services, but cannot afford to pay for them, get help. Now, the main (but not the only) way of achieving this aim is through the legal aid scheme. Proper access to an appropriately wide choice of advocates by legally aided litigants is a feature of the maintenance of the proper and efficient administration of justice to which the Committee will continue to have regard. The Committee therefore urges the Law Society to be alert to the possibility of a reduction in the availability of advocacy services, and to encourage solicitors in all areas of practice to be aware of the special requirements of needy litigants. The Committee wishes to consider those requirements particularly carefully during the review process proposed by the Society.

Enforcement of rules of conduct

3.51 The Advisory Committee has considered a suggestion that there should be a common disciplinary tribunal for all advocates. The Committee sees some attraction in this, particularly as a means of ensuring that responsibility for incompetence is not passed from one branch of the profession to the other. The Committee recognises, however, that there are a number of practical difficulties, including the need for primary legislation, and some inherent disadvantages. The Committee therefore would not want to delay the application in order to pursue the idea of a common disciplinary tribunal, but will consider the matter further, as appropriate, in the light of experience.

3.52 The Advisory Committee has received evidence from the Law Society, the Solicitors Complaints Bureau and the Legal Services Ombudsman on the complaints procedures and disciplinary machinery. The Committee is satisfied that these are sufficient for the enforcement of the proposed rules, and that the Society is likely to enforce them.

3.53 The Advisory Committee considers that it would be useful for the Law Society to be able to remove or suspend a solicitor's specialist advocacy qualification as a disciplinary measure, in cases where the more draconian sanction of striking off would be inappropriate. The Committee advises the Law Society to consider whether its existing powers to impose conditions on solicitors' practising certificates could be used to this effect, or whether some new provisions more precisely directed at its grant of further rights of audience might be necessary or desirable.

Part 4: Employed Solicitors' Rights of Audience

SECTION I: THE APPLICATION AND THE CPS AND GLS QUESTION

The application

4.1 The Law Society's application makes no distinction between solicitors in private practice and those employed outside firms of solicitors (referred to as 'employed solicitors' in this advice). Under the terms of the application, any employed solicitor would be eligible to acquire the Higher Courts (Criminal Proceedings), Higher Courts (Civil Proceedings), or the Higher Courts (All Proceedings) Qualifications, and would receive full rights of audience in all of the relevant higher courts.

Employed barristers

4.2 The Crown Prosecution Service (CPS) and the Government Legal Service (GLS) have raised a question at the same time as the Society's application as to whether the Bar Council's Rule 402.1(c), which restricts the rights of audience of employed barristers to those enjoyed by solicitors before 7 December 1989, should continue to have deemed approval under section 31 of the Courts and Legal Services Act 1990.

4.3 The question was raised only in relation to barristers employed by the Crown. The Committee's view is that it is necessary to consider the question in relation to the rights of audience of all employed barristers. It has, however, reached its views on the question by considering both the question raised by the CPS and the GLS, and the Society's application, as raising the general issue of what form of regulation is appropriate for employed advocates in the higher courts. Indeed, none of the employers of lawyers who responded to the Committee's consultation indicated that they treated employed barristers differently from employed solicitors, and many specifically said that they treated all employed lawyers the same, and wished to continue to do so. For this reason the Committee's thinking on the general question is set out in detail in its advice to the Lord Chancellor on the CPS and GLS question dated 3 April 1992, which accompanies this advice. This section deals with supplementary issues relevant to employed solicitors.

SECTION II: THE WORK OF EMPLOYED SOLICITORS

4.4 The Law Society made available to the Committee preliminary findings from a survey of the work of solicitors outside private practice. This shows that employed solicitors are concentrated in commerce or industry, and in local authorities. (About a third of all employed solicitors work in these two areas.) The Crown Prosecution Service employs about one-sixth of all employed solicitors. Other significant groups include the magistrates' courts service, law centres and Citizens' Advice Bureaux, national undertakings, the Government Legal Service, the Law Society's own staff, and the Legal Aid Board.

4.5 It appeared, however, from the Society's survey that only 39 per cent of the total had recently appeared as advocates. On average, of these:

—only 31 per cent appeared in court once a week or more;

—38 per cent appeared between 1–3 times a month; and

—29 per cent appeared less than once a month.

4.6 Quantified evidence on the other functions carried out by employed solicitors, both those who act as advocates and those who do not, was not available to the Committee. The general evidence which it has received,

however, suggests that the duties carried out vary very widely. Particularly in the private sector, the provision of legal services is often not the principal function of employed solicitors. Many will hold posts, such as company secretary, which combine a range of functions, legal and non-legal. Many also hold senior positions, including directorships in the case of companies, and therefore share responsibility for their organisation's actions and policies.

4.7 Neither the Law Society nor the private sector employers of lawyers whom the Committee consulted on this issue thought it likely that they would be willing or able to make much use of in-house advocates if they obtained rights of audience in the higher courts. Indeed, there is some evidence that in-house advocates make comparatively little use of their existing rights to appear in interlocutory work in the High Court, particularly in cases of any complexity or those heard by High Court judges.

SECTION III: THE COMMITTEE'S APPROACH

The general principle and statutory objective

4.8 The Committee has considered some preliminary arguments raised by the principle and the objective which relate particularly to the approach to granting employed solicitors rights of audience in the higher courts.

Differences between solicitors

4.9 First, the Law Society has argued that it has been a basic principle of its approach to the regulation of solicitors over recent years not to distinguish between those in private practice and those in employment. The Society has made a powerful case for not departing from this approach. It argues that it has improved professional standards generally, and in particular significantly helped employed solicitors to carry out their duties professionally. The Committee accepts the Law Society's evidence that its employed members regard this as a principle of considerable importance. When advising on applications under the Act, however, the Committee is obliged to consider what specific requirements, in terms of both education or training and rules of conduct, apply to work in the court or proceedings in respect of which rights are sought. It is therefore necessary to consider both the work which lawyers are likely to undertake, and the circumstances and organisation in which they will operate. This involves the possibility that different regulations may be appropriate to different circumstances.

Existing rights

4.10 The Law Society has argued that solicitors already have the right to conduct litigation in all courts, and extensive rights of audience in the lower courts and in the Supreme Court in chambers. The Society suggests that the duties of an advocate in the higher courts are not substantially different from those which arise from existing rights.

4.11 The Committee does not agree with this approach, although it agrees that the existing obligations of a solicitor are heavy. Litigators, for example, have first responsibility for disclosure. Their detailed knowledge of the case acquired during preparation, and the opportunity to control access to the facts of a case, could be abused to interfere with the court's capacity to deal fairly between the parties as seriously as anything an advocate could do.

4.12 The Committee sees the essential difference as being that the advocate's role in our adversarial system is a public one, which depends on the skill, judgment and integrity of an individual. Advocates owe duties to the courts, and thus in effect to the public, as well as to their own clients. In civil cases these responsibilities include disclosure to the other parties of material including documents damaging to the case of the advocate's own client, settling the contents of written pleadings, and making submissions to the court. Advocates

must not knowingly mislead the court about the facts and must draw the court's attention to any relevant precedent or statute, even if it is damaging to the case they are presenting. In criminal cases, an advocate's responsibilities, which are conditioned by the principle that it is for the prosecution to prove its case, vary according to whether the advocate is appearing for the prosecution or the defence. This is discussed in greater detail elsewhere, but for present purposes it is sufficient to say that the proper discharge of a criminal advocate's responsibilities, whether prosecuting or defending, is of high importance for the proper and efficient administration of justice. Because of their direct experience of putting arguments before the courts, advocates' assessments of the strength or weakness of the arguments or evidence have a special authority, and the court and the public should be entitled to rely on their not wasting time with unsustainable arguments or proceeding for vexatious or oppressive reasons with cases that have no chance of success.

4.13 The judge will seek to take a more active part in any case where it appears that the quality of representation offered by one side is out of balance with that on the other, or that elements are missing, but that in no way diminishes the responsibilty of the advocates. If judicial intervention is necessary, it is likely to prolong significantly the time needed for the trial and interfere with the proper and efficient administration of justice.

4.14 The court and the public therefore need to be sure that an advocate's decisions are based on an impartial assessment of the merits of the case, not on the advocate's own interests, and that the advocate has been free of any pressure from the client or a third party which might interfere with accepting full responsibility for the way in which the case is presented in court.

4.15 In the Committee's view, there is a particular need for this reliance in proceedings in the higher courts. The consequences for a defendant in the Crown Court are potentially far greater if the prosecutor fails to comply with the special standards required of prosecution counsel. As the High Court becomes an increasingly specialist jurisdiction the complexities of fact and law increase and it therefore becomes even more important for the court to be able to rely on the fullness and accuracy of what the advocate says. Finally, the consequences and cost of failure in a case in the higher courts are so much more serious that it becomes far more important to have in place independent safeguards against cases being proceeded with vexatiously or oppressively.

Status

4.16 The Committee has noted that in much of the evidence it has received from both employed solicitors and employed barristers there has been an underlying suggestion that advocacy skills, and particularly those required to appear in the higher courts, are superior to lawyers' other tasks, and that therefore being denied the opportunity to qualify to exercise them is a denial of the opportunity to develop fully rounded practice as a lawyer.

4.17 The Advisory Committee does not believe that acquiring and maintaining advocacy skills in the higher courts should command any particular status, or that the ability to exercise them gives any branch of the profession some kind of competitive edge. Advocacy is a specialisation akin to others which are an increasingly common feature of legal practice.

4.18 There are also practical limits to the number of skills that people can be expected to acquire and maintain simultaneously. Those limits are particularly important in the case of skills which need to be exercised to remain at peak efficiency. This is a strong argument on educational and training grounds for not extending rights of audience to a class of people who it was thought would not be able to exercise them frequently, or to a large group of people if it were established that only a comparatively small sub-set of them would exercise rights frequently.

The main arguments

4.19 For the Committee, the frequency with which rights once acquired might be exercised is a central factor in deciding whether, in accordance with the general principle and the statutory objective, extended rights of audience in the higher courts can be granted. The other central argument is whether advocates can demonstrate that they can operate with the necessary levels of objectivity and detachment when putting cases to the court. In the Committee's view the arguments on these points are the same for all advocates, particularly in the higher courts. The Committee therefore sets out detailed views on this question further in its advice to the Lord Chancellor on the CPS and GLS question, dated 3 April 1992.

Conclusion

4.20 Those arguments are considered in relation to advocates employed in commerce and industry, local government, the GLS, the CPS, and the SFO.

4.21 In each case, the Committee sees strong but in some cases different arguments against extended rights of audience, but also scope for changes which would make it possible for advocates employed in these areas to exercise rights of audience in the higher courts. In each area, likewise, the Committee sees new factors and recent developments which have the potential to encourage development in that direction but which have not yet worked into the system. The Committee therefore takes the view that it is not appropriate at the present time to extend the rights of audience of employed advocates in the higher courts.

4.22 The arguments for not extending rights of audience at present apply equally to solicitors and barristers. The Advisory Committee therefore advises the Law Society that, in order to comply with the general principle and to further the statutory objective, its application should be amended so that:

(i) solicitors employed by any person or body other than a solicitor in private practice should not be eligible for the Higher Courts (All Proceedings) Qualification, the Higher Courts (Criminal Proceedings) Qualification, or the Higher Courts (Civil Proceedings) Qualification; and

(ii) the Society's regulations should be expressed to make it clear that no solicitor who holds any of these qualifications should be able to exercise rights of audience in the higher courts at any time whilst in employment.

Annex A

THE ADVISORY COMMITTEE'S WORK ON THE APPLICATION

Meetings

1. The Law Society's application was submitted on 2 April 1991. The Committee meets for full day sessions, and has discussed the application on the following occasions:

Full Committee	—	9 full-day meetings and one 2-day residential conference
Education Sub-Committee	—	5 meetings
Conduct Sub-Committee	—	7 meetings

Visits

2. Members of the Committee have undertaken a number of visits in order to familiarise themselves with the court system, the work of solicitors and barristers, and the provision of legal education. The organisations visited are listed below.

Courts

(i) *Crown Court centres*: Birmingham, Harrow, Inner London Sessions House, Knightsbridge, Leeds, Lewes, Middlesex Guildhall, Newcastle, Portsmouth, Plymouth, Reading, Southwark

(ii) *County courts*: Birmingham, Nottingham, Oxford, Wandsworth, Westminster, Wood Green

(iii) *The High Court*: Royal Courts of Justice (Chancery Division, Commercial Court, Queen's Bench Division), District Registries at Leeds, Maidstone, Nottingham, Oxford

(iv) *Magistrates' courts*: Birmingham, Brighton, Horseferry Road (London), Luton, Manchester, Nottingham, West London

Solicitors' firms

Allen & Overy, London
S J Berwin, London
Booth Bennett, Slough
Hodge Jones & Allen, London
Hunt Dickens, Nottingham
Linklaters & Paines, London
Slaughter & May, London
Wilkinson Maughan, Newcastle-upon-Tyne
Winstanley Burgess, London

Barristers' Chambers

36 Essex Street (Temple)
5 Fountain Court (Birmingham)
1 Hare Court (Temple)
Queen Elizabeth Buildings (Temple)
8 The Crescent (Plymouth)
Trinity Chambers (Newcastle-upon-Tyne)

Legal education

The Inns of Court School of Law
The College of Law, Guildford
The College of Law, York

Consultation

3. The Committee issued a press notice on 25 April 1991, inviting comments on the application. Over 60 consultation papers were sent out, and replies were received from the following individuals and organisations:

(a)	Judiciary	1. Council of HM Circuit Judges 2. A Metropolitan Stipendiary Magistrate
(b)	Legal Profession	3. The General Council of the Bar 4. The Bar Association for Commerce, Finance and Industry 5. Justices' Clerks' Society 6. The Society of Conservative Lawyers 7. Holborn Law Society 8. The London Criminal Courts Solicitors' Association 9. S J Berwin & Co, Solicitors 10. Carter Lemon, Solicitors 11. Laurence Kingsley, Solicitor
(c)	Consumers	12. National Consumer Council 13. The Consumers' Association 14. North Western Legal Services Committee 15. Advice Services Alliance 16. Legal Action Group 17. A prisoner (name withheld) 18. P Amato 19. M A Philcox
(d)	Law Teachers	20. Society of Public Teachers of Law 21. Committee of Heads of Polytechnic Law Schools 22. Professor Bailey (University of Nottingham) 23. S C McKenzie, Vice-Principal of Advanced Law Tutors 24. Professor Michael Zander (London School of Economics)
(e)	Government Departments	25. Department of Trade and Industry 26. Legal Aid Board
(f)	Other bodies	27. Association of District Councils 28. Association of British Insurers 29. Institution of Mechanical Engineers 30. Trades Union Congress 31. The Royal Institute of Chartered Surveyors

4. A number of respondents expressed unqualified support for the application. All favoured some extension of solicitors' rights of audience, though not necessarily on the terms proposed by the Law Society. Issues raised by respondents included:

—whether solicitors' rights of audience should be extended on admission, without further training;

—the effect of the application on the structure of the legal profession;

—the adequacy of the Law Society's proposed education and training requirements for specialist solicitor advocates; and

—the need for a common code of conduct for all advocates, written in plain English.

Oral Evidence

5. The Law Society gave oral evidence to the Committee on the following aspects of its application:

Education and training requirements (Education Sub-Committee)

Enforcement of rules of conduct (Conduct Sub-Committee)

Rights of audience of employed solicitors (full Committee)

The General Council of the Bar gave oral evidence on the application to the full Committee.

Annex B

Communications Division

Walter Merricks
Assistant Secretary General, Communications

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Alistair Shaw
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DA/dw

30th January 1992

Dear Alistair

Part I of the Law Society's Application

Part I of the Law Society's application put forward the proposal that all solicitors be granted, on admission, certain additional rights of audience. These consisted of non-jury cases in the Crown Court and certain interlocutory applications in the Chancery Division. In your letter of 20th December you told us that the Committee's preliminary view was that there were some objections to this approach. We have considered the Committee's advice and now wish to put forward a revised proposal which we believe will meet some of the difficulties.

The proposal we would like to submit for consideration and advice is as follows. We now have a common understanding with the Committee on the record of advocacy and litigation experience which will be submitted to the Society, together with the names of referees, before applicants will be approved as eligible for entry on the test and course. We propose that the Society, at the same time as approving applicants as eligible to proceed to the course, should consider the grant to those solicitors of appropriate Part I rights (the scope of which we propose to modify as mentioned below). The effect therefore would be that the grant of Part I rights would be confined to those who were " on the trail " towards the acquisition of Part II rights before they had taken the course. Only those who were three years qualified, and were experienced regular advocates whose track record, together with some limited independent verification through references, had been approved by a Law Society committee, would receive the Part I rights in this way.

As solicitors proceed through the course their particulars will be seen by the Committee. Those who satisfactorily complete the course and have passed the test will be awarded the Higher Courts Qualification. In the case of those who have not satisfactorily completed the course, a report will be sent to the Committee. If it appeared that the candidate's performance on the course was so poor as to call into question the grant to that solicitor of Part I rights, we

would propose that the Committee be given the power to suspend those rights until the candidate had satisfactorily completed the course or otherwise demonstrated suitability to exercise the rights. There may of course be other candidates who do not satisfactorily complete the course, but whose performance is such that the Part I rights should not be made conditional in any way.

As far as criminal proceedings are concerned, in earlier correspondence we have explored ways in which the more serious offences in the Crown Court could be excluded from the Part I rights. This could be done by excluding the serious offences in classes 1, 2 and 3—murder, rape, conspiracy etc; or by excluding the offences which are indictable only. In practice there is not a great deal of difference between the two approaches to definition. The class 4 offences are regarded as suitable for trial by the less senior judiciary, and it can be argued that the seniority of the judge required may have some relation to the seniority that ought to be demanded for advocates. On the other hand it can be argued that in relation to the ' either way ' cases, solicitors are familiar with these in the magistrates' court and the transition to dealing with them in the Crown Court should not be that great. We would appreciate the Committee's advice on whether this proposal would be improved by confining the Part I rights in either of these ways.

In my letter of 9th September we offered a re-definition of the proceedings in the Chancery Division which would be granted in the Part I rights. The approach to the grant of rights in the civil field may be slightly different from that in the criminal field. In the civil field we may expect that solicitors may have a more varied mix of experience, both of litigation and of advocacy. Under this proposal, we would envisage that the Committee would only grant Part I civil rights to those solicitors whose litigation and advocacy experience disclosed that they had had advocacy experience in the Queen's Bench Division summons list and had had the conduct of litigation proceedings in the Chancery Division, including having conducted matters in the interlocutory motion list.

We would be grateful for the Committee's advice on this proposal.

Yours sincerely

Walter Merricks
Assistant Secretary-General

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Annex C

APPLICATION BY THE LAW SOCIETY TO THE LORD CHANCELLOR'S ADVISORY COMMITTEE ON LEGAL EDUCATION AND CONDUCT (APRIL 1991)

Part II—Full Rights of Audience in the Higher Courts

RECAPITULATION, CLARIFICATION AND AMPLIFICATION OF PROPOSALS

A. Introduction

This paper seeks to clarify and amplify the proposals made in Part II of the Law Society's Application to the Lord Chancellor's Advisory Committee on Legal Education of April 1991 (Full Rights of Audience in the Higher Courts) in the light of requests made by the Committee.

In preparing this paper the Society has had the assistance of advice from its Advocacy Training Adviser, Professor I R Scott of Birmingham University Law Faculty.

In what follows, section B consists largely of recapitulation of Part II of the Application. The remaining sections seek to clarify and amplify.

B. The Development of Advocacy Services

The 'statutory objective', set out in Section 17 of the Courts and Legal Services Act 1990, is the development of legal services, including advocacy services, by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice. The 'general principle' is that the question whether a person should be granted a right of audience should be determined only by reference to whether he is (a) qualified in accordance with appropriate educational and training requirements and (b) subject to appropriate conduct requirements.

The Advisory Committee has the general duty of assisting in the maintenance and development of standards in the education, training and conduct of those offering legal services and is required to carry out that general duty by performing the functions conferred on it by Schedule 2. The functions include that of considering what form of initial academic and practical training is necessary to ensure that those who qualify as persons entitled to exercise rights of audience are adequately trained under supervision (whether by their chambers or firms or otherwise) and consider the extent to which further training for persons exercising such rights is necessary.

The Law Society, believing that solicitors could contribute to the achievement of the statutory objective by providing a wider choice of persons providing advocacy services, proposed in its Application to the Advisory Committee that:—

(a) upon admission, solicitors should be granted wider rights of audience than they presently enjoy, and

(b) solicitors with appropriate post-admission experience and training should be able to obtain rights of audience in the higher courts beyond those automatically obtained upon admission (so-called 'full rights').

Pre-admission professional training requirements for the solicitors' branch of the profession are about to change. The centralised Law Society's Finals Course (LSF) is being replaced by a devolved Legal Practice Course (LPC) closely monitored by the Law Society, normally to be taken before the training contract (formerly articles of training), and a Professional Skills Course (PSC)

to be taken during the training contract is being added to the pre-admission training requirements. The Advisory Committee has received particulars of the LPC; attention is drawn to the training requirements therein relating to (a) the conduct of litigation and (b) advocacy. The details of the proposed PSC have not been settled but a paper setting out the Training Committee's current thinking is attached as Appendix A to this paper; attention is drawn to the advocacy training element of this course. It is convenient to note at this point that trainee solicitors may receive some formal advocacy training in the course of their articles and this is likely to become more common in the future. (A recent survey of 300 trainees revealed that 58 per cent received formal training in criminal litigation, 96 per cent in civil litigation, and 74 per cent in advocacy.)

The Society believes that the proposals in its application as clarified and amplified in this paper constitute, as the 'general principle' requires, 'appropriate educational and training requirements' for full rights of audience for solicitors in the higher courts.

Rights on Admission

In the Society's Application it was proposed that, upon admission to practise, all solicitors should be granted rights of audience in all Crown Court proceedings except for jury trials and in many interlocutory proceedings in the High Court, whether they take place in chambers or in open court. In the Application it was said that the pre-admission training provides a sound foundation for the exercise of rights of audience enjoyed by solicitors on admission and it was contended that this training would be adequate for the wider rights of audience sought on admission.

So far as full rights of audience are concerned, with the terms of the 'general principle' in mind, the Application proposed a scheme that took account of (a) education and training and (b) conduct requirements.

In relation to (a) (education and training) the scheme has four elements:

(1) a period of experience in practice since admission

(2) previous experience of advocacy

(3) satisfactory knowledge of evidence and procedure in the higher courts as demonstrated in a written test

(4) satisfactory completion of a training course.

Normally, a solicitor seeking full rights of audience in the higher courts would have to satisfy requirements under each of these four elements (but some may enjoy certain exemptions, see paragraph 38). It is envisaged that an applicant under the scheme might wish to secure rights of audience in either the High Court or the Crown Court, or in both.

The period of post-admission experience in practice proposed is three years. The suggestion that there should be such a period, and that it should be three years, seem to be uncontroversial. The 'previous advocacy experience' condition seems sound in principle but, obviously, the measuring of such experience needs careful consideration. It is generally agreed that, in the field of advocacy, experience is the best teacher and that no amount of formal training can fully replace it.

C. The Proposals for Full Rights of Audience; Testing and Training

This section seeks to clarify the Society's proposals concerning the remaining two of the four elements of the full rights of audience qualification scheme mentioned above, namely, (i) testing of knowledge evidence and procedure in the higher courts and (ii) higher courts advocacy training.

In relation to (i) the Application proposed that there should be a 'multiple choice test, probably lasting for about an hour' (paragraph 29). The topics to be covered by the test were outlined in Schedule 2 to the Application (page 16). It was said advice on the content of the test will be sought from the Advocacy Training Adviser 'who will be responsible for supervising the setting and marking of papers'. The Advisory Committee has asked the Society to clarify and amplify the proposals relating to the test.

In relation to (ii) it was said in the application that the required course aimed at assisting experienced lower court advocates to adapt to the higher courts. Thus, the course would concentrate primarily on the peculiarities of advocacy in the higher courts. The Application contained proposals for the content and duration of the training course (see paragraphs 33 to 35 and Schedule 3, page 17). The Advisory Committee has asked the Society to clarify and amplify the proposals relating to this course.

It is clear that, in settling the details of the testing and training elements of the Law Society's proposed full rights of audience qualification scheme, some assumptions will have to be made about the likely effectiveness of the 'three year post-admission experience' (during which applicants will have exercised their right to conduct litigation) and the 'previous experience of advocacy' elements. In practice, for no two applicants for full rights will the effectiveness of their experience be the same; some will have reached a higher level on preparedness for the exercise of full rights of audience than others. Inevitably, the design of the testing and training elements will have to reflect a middle course in this respect.

The testing and training elements will necessarily involve applicants in putting themselves to some expense. Some solicitors will be better placed to bear the cost than others. It would be undesirable for the arrangements put in place for testing and training to be so onerous and therefore so costly, as to have the effect of discriminating against the sole practitioner and the solicitor in the small firm.

(1) *A threshold difficulty: beyond the training 'common core'*

Any attempt to clarify and amplify the testing and training elements of the full rights of audience qualification scheme proposed encounters an unavoidable threshold difficulty. The Courts and Legal Services Act maintains throughout a distinction between (a) rights of audience and (b) rights to conduct litigation. The interpretation section in the Act (s. 119) says the 'right to conduct litigation' means the right '(a) to exercise all or any of the functions of issuing a writ or otherwise commencing proceedings before any court; and (b) to perform any ancillary functions in relation to proceedings (such as entering appearance to actions)'. As defined this right has civil litigation connotations. But it seems the definition is not exhaustive and that this right also includes the right to act on behalf of any party (whether prosecution or defence) in criminal proceedings.

As the law stands, upon admission solicitors obtain the right to conduct litigation (in both the civil and criminal senses). The professional training requirements (ie the LSF and its successor the LPC) include training in civil procedure (litigation), criminal procedure and evidence designed to equip intending solicitors for their exercise of this right in the magistrates' courts, the Crown Court, the county courts and the High Court. Further these requirements (including the new advocacy training requirements in the proposed LPC and PSC courses) provide the newly qualified solicitor with the basic training needed for the exercise of the rights of audience presently enjoyed by solicitors. Obviously, as a practical matter, the newly admitted solicitor is unlikely to get the opportunity to exercise his rights of audience except at a low level and in simple matters; the same may be said of barristers immediately after call. In any case, it would be professional misconduct for a solicitor to undertake work clearly beyond his competence; see Principle 9.03 in the 'Guide to the Professional Conduct of Solicitors'.

There is a difficulty in differentiating the professional training requirements that should be imposed on those, whether intending solicitors or intending barristers, wishing to exercise rights of audience in civil and criminal courts from those that should be imposed on professionals seeking the right to conduct litigation (in both its civil and criminal senses). Although the 1990 Act, for obvious reasons, draws a sharp distinction between a right to conduct litigation and a right of audience, it is clearly the case that a person exercising a right of audience needs an adequate knowledge of the rules of evidence and procedure relevant to the court or tribunal before which he or she is appearing in order to be able to exercise that right effectively. (This point was made in paragraph 29 of the Application.) A person seeking a right to conduct litigation would require similar training and this is reflected in the Law Society's current and proposed professional training requirements.

The point is that training requirements (a) for a right to conduct litigation before a particular court and (b) for a right of audience before it are not, and cannot be, mutually exclusive; necessarily, they overlap and there is what could be called a training 'common core'. This is the crux of the threshold difficulty. In considering the Law Society's full rights of audience proposals the Advisory Committee is dealing with a group of professionals who have the right to conduct litigation. If they were not, and were instead dealing with an application from a professional group who did not enjoy that right, the threshold difficulty would not exist. The applicant for 'full' rights of audience who has already acquired the right to conduct litigation must necessarily be regarded as if he has successfully completed a large proportion of the training requirements that could reasonably be laid down for those wishing to obtain rights of audience in the higher courts.

If it is agreed that training for the right to conduct litigation and training for the exercise of a right of audience must necessarily overlap to a large extent, the question then becomes, what additional training should a person already enjoying a right to conduct litigation before a higher court, and with experience in exercising this right, undertake in order to secure for him a right of audience before that court? This, in a nutshell, is the threshold difficulty. The principal question is: what are the additional training requirements that should be imposed on such an applicant? What are, what could be called for convenience, the 'extra training ingredients' necessary for full rights of audience? The subsidiary question is: How best may these training needs be met? (These questions are not novel: they have been faced by the Bar Council in the designing of the procedure and evidence components of the 'aptitude test' currently used for EC lawyers from other jurisdictions wishing to join the Bar.)

(2) *Dealing with the threshold difficulty*

Solicitors now seek rights of audience in the higher courts. For the purpose of obtaining the right to conduct litigation in these courts, solicitors undergo professional training in civil procedure, criminal procedure and evidence and, civil and criminal practice. (Much of this training coincides with that undertaken by intending barristers.) Insofar as an advocate in these courts needs, as indicated above, 'an adequate knowledge of the rules of evidence and procedure relevant to the court. . . before which he is appearing' it could be argued that solicitors seeking rights of audience in the High Court or the Crown Court have satisfied all reasonable professional training needs in this respect (particularly if they have spent at least three years exercising their rights to conduct litigation in these courts). In other words the argument is that the solicitor's training in what was characterised above as the 'common core' should satisfy the procedure and evidence training needs and that attention should be focused exclusively on the 'extra training ingredients'.

The Society does not wholly share that view. In the Application the Society proposed that there should be an evidence and procedure test for solicitors seeking full rights of audience. If a justification for this test is needed it could be said that, given the importance of maintaining high standards in higher court advocacy, it is desirable that solicitors seeking full rights of audience should demonstrate their knowledge of the relevant evidence and procedure by passing the test. Confirmation of their understanding of recent developments in the law of evidence and procedure might be thought to be particularly important. A further related justification may lie in the fact that, although intending solicitors (for the purpose of equipping themselves to exercise the right to conduct litigation) and intending barristers (for the purpose of equipping themselves to exercise rights of audience) may both be required to study civil procedure, criminal procedure and evidence, topics within those subjects which are particularly relevant to the work of the advocate may not be covered in sufficient detail in the solicitors' pre-admission training (the law relating to the examination of witnesses might provide an example). The conclusion here, therefore, is that in relation to what has been called the 'common core' of the solicitor's training and the barrister's training on procedure and evidence, solicitors seeking full rights of audience could reasonably be expected to take a test designed (a) to confirm their grasp of rules of procedure and evidence relevant to higher court practice and (b) to ensure that they understand, what could be called, the 'advocate's slant' on these rules.

It is convenient to observe at this point that it may be possible and desirable to differentiate between the breadth, if not the level of detail, of the civil side of the test requirement on the one hand and the criminal side on the other with the former aspect of the test being narrower than the latter. In recent years, the harmonisation of the procedures of the county courts and the High Court has proceeded apace with each procedural regime contributing to the development of the other. The result is that, if highly specialised areas of practice are excepted (eg judicial review), the singular features of High Court procedure of any real practical importance from the advocate's point of view are becoming less common. Nowadays, familiarisation with the procedures of the county courts carries a lawyer a long way towards an understanding of High Court procedures. On the other hand, the procedural rules of the magistrates' courts and the Crown Court, and indeed the practical applications of the rules of evidence at each level of court, are not congruent.

On the matter of the 'extra training ingredients' (as defined above) necessary for full rights of audience the Society's Application in effect adopted a two-fold approach. First, by implication, if not expressly, a distinction was drawn between those solicitors of three years' standing who had exercised their limited rights of audience and those who had not. It was proposed that demonstrated and authenticated advocacy experience should in effect amount to training by experience. Secondly, it was further proposed that this 'training by advocacy experience' should be augmented by a training course concentrating 'on the peculiarities of advocacy in the higher courts'. The training course proposed in the Application is based on the assumption that the 'extra training ingredients' are likely to consist in large part (but by no means entirely) of the 'presentational skills' required by the effective advocate, rather than what could be called advocacy 'knowledge', and that, if it is thought necessary to impart these skills through training, this is best done through formal training that is both practical and participatory. The Application envisaged that by this combination of training by experience and formal training the 'extra training ingredients' necessary for full rights of audience would be provided.

In conclusion on this matter of the 'threshold difficulty' and the means for dealing with it it should be noted that the distinction suggested between what has been categorised as (a) 'common core' training and (b) 'extra training

ingredients' cannot be pushed to extremes. Some topics in the law of evidence and procedure may crop up in both. The subject of pleadings in civil procedure may provide an example. The law relating to pleadings can be dealt with under (a) and the technique of drafting pleadings under (b). (This demonstrates the point that training for (b) would not consist wholly of 'presentational skills'.)

D. A Design for Testing and Training

Principles

As a prelude to the clarification and amplification of the testing and training elements of the full rights of audience scheme proposed in the Application, the substance of what has been said in the previous sections of this paper may be summarised as follows:—

(1) a distinction may be drawn between 'common core training' and the 'extra training ingredients' that may be regarded as necessary for applicants seeking full rights of audience;

(2) the testing and training elements of the full rights of audience scheme contained in the Application should be seen as parts of an integrated formal training plan (as distinct from, 'training by experience');

(3) in settling the details of the testing and training it should be assumed (not to complicate matters unnecessarily) that the rights of audience on admission sought in the application are granted;

(4) the testing and training elements should take account of the impact on applicants for full rights of audience of (a) their pre-admission training and (b) their 'training by experience' (ie their 'three year post-admission experience' and 'previous experience of advocacy') but allowance should be made for the fact that the impact of (b) is likely to be uneven;

(5) the testing and training elements should take account of the fact that applicants may wish to exercise rights of audience in either or both of the higher courts;

(6) the testing element should focus on particular aspects of the 'common core' relevant to higher court advocacy and emphasis should be placed (a) on recent developments and (b) on the 'advocate's slant' on 'common core' topics;

(7) the criminal side of the testing element may have to be broader in the range of topics covered than the civil side;

(8) the training element should deal with the 'extra training ingredients' insofar as those ingredients are not adequately dealt with through the applicants' 'training by experience' (ie through their 'three year post-admission experience' and 'previous experience of advocacy');

(9) the 'extra training ingredients' are likely to consist, largely but not exclusively, of advocacy 'presentational skills' which an advocate with limited rights of audience may learn through experience, and which are best imparted through training that is practical and participatory (if formal training is thought necessary).

The nine matters summarised above could be described as the 'design principles' which may be used for settling the testing and training elements of the full rights of audience scheme proposed in the Application. (Two further principles are added below.) Subject to these it is important that the financial costs that applicants will have to bear in complying with the testing and training elements should not be unreasonable.

General objective and related principles

In addition to these principles, there is an overriding general objective that should be borne in mind. It flows from the fact that it would be unreasonable to expect that the testing and training elements of the Society's full rights of audience scheme should in combination provide an assurance that applicants are 'trained for life' as higher court advocates. The general objective is that

testing and training ought to be relevant to the applicant's handling in court of cases of the kind and complexity that junior barristers would handle when thay had reached the point in their career at which they begin to get regular briefs for appearances in the High Court or the Crown Court on their own and without a leader.

It follows from this that testing and training should be directed at, what could be called, advocacy in 'routine' High Court and Crown Court cases and matters. In short, it has to be accepted (1) that solicitors who obtain rights of audience in the higher courts cannot be expected to know everything at once and (2) that their careers as advocates will develop over time enabling them to take on, if they wish, cases of increasing importance and complexity. And it has to be understood that constraints similar to those that operate to ensure that barristers do not take on higher court work that is beyond their competence (eg highly specialised commercial and Chancery work) will operate on solicitor advocates. In this respect the practical constraints are reinforced by the powerful disincentive that exists to advocates overreaching themselves in the form of the prospect of disciplinary proceedings for failure to meet appropriate professional standards in the performance of advocacy work.

Related to this general objective is the point that testing and training must be effective in achieving relevant goals. The methods adopted must be and be seen to be rigorous and to cover the appropriate range of intellectual and practical skills involved. (It is for this reason, for example, that the Society agrees that the test should not consist solely of multiple choice questions.) The objectives of the testing and training must be relevant. Therefore, for example, in the civil field testing and training should not be concerned with knowledge and skill in procedural matters that are routinely dealt with, without the benefit of counsel's advice, by the solicitor exercising a right to conduct litigation. The temptation to erect testing and training requirements that will not assist in ensuring the applicants are equipped to exercise rights of audience in the higher courts and which consist of nothing more than a series of 'hurdles' designed to delay and discourage applications for such rights should be resisted.

However, although testing and training should aim to be effective in achieving the general objective, it has to be recognised that the syllabuses must necessarily be selective in both the breadth of coverage of topics and the level of detail required. The statement of the 'general objective' given above has already indicated one reason for this. It has to be assumed that applicants for rights of audience in the higher courts who can show that they have the requisite knowledge and skill in relation to selected topics, will, in so doing, have also demonstrated that they have wit and ability to master other topics as and when the need arises. Obviously, as in all forms of professional education, syllabus selection poses a problem. Ideally, syllabuses should be constructed so that, for the future, they are largely self-defining and re-defining. They should be self-defining (ie self-explanatory through reference to the principal sources) to give clear guidance to applicants and instructors. They should be re-defining ie subject to constant up-dating to avoid the building up of 'dead wood' as important emerging topics are added as the years go by without other topics being forced to yield (the problem of 'syllabus accretion').

Further, syllabuses should emphasise proficiency in the handling of primary legal sources. Traditionally, barristers have played an important role in the administration of justice as specialist advocates fully conversant with the primary sources of the law of procedure and evidence (especially rules of court). Solicitor advocates should aspire to a similar expertise and will need it if they are to be effective in the higher courts where primary sources, and not the potted versions of them found in texts and law school training manuals (primarily designed for students with no experience in conducting litigation or

lower court advocacy), are the currency of submissions and argument. In relation to the testing element in particular these considerations would suggest that the syllabus (a) should be tied closely to particular practitioner works (based on primary sources) of the kind that judges and barristers have permanently at their elbows and (b) should place special emphasis on modern legal developments (a point already made in guiding principle (5) above).

What has been said immediately above could be summarised as two further 'guiding principles' to be added to those listed previously as follows:—

(10) testing and training must be effective in achieving goals relevant to the general objective as defined;

(11) syllabuses should be largely self-defining and re-defining and, where possible, related to practitioner works in which primary sources are presented.

E. Testing and Training: Syllabus, Teaching Methods and Assessment

The principal purpose of this paper is to provide the Advisory Committee with clarification and amplification of two of the four elements of the full rights of audience scheme proposed in the Application; they are:—

(1) the test for knowledge of evidence and procedure in the higher courts (see paragraph 29 and Schedule 2) and;

(2) the higher courts advocacy training course (see paragraphs 32 to 37 and Schedule 3).

The rest of the paper will take each of these two elements in turn.

1. *The Test for Knowledge of Evidence and Procedure in the Higher Courts*

The Test is designed to ensure that those wishing to go on to take the Higher Courts Advocacy Training Course have sufficient knowledge of evidence and procedure to enable the course to concentrate on the practical skills and the appropriate approach to undertake effective advocacy in the higher courts. The test concentrates on those aspects which can be learnt (insofar as an applicant has not already acquired the knowledge by experience) by preparatory reading; although some applicants may wish to undertake formal courses by way of preparation for the test this will not be compulsory. The test will seek to assess those areas which are suitable for assessment by written unseen examination leaving to the course those skills which are more effectively tested over a longer period and/or through practical exercises.

(a) *The Test Syllabus*

The syllabus for Civil Procedure and Evidence is attached as Appendix B and that for Criminal Procedure and Evidence as Appendix C. Both syllabuses refer to the relevant primary sources, the Society's Code for Advocacy and to the necessary reading in practitioners' works.

(b) *Method of Teaching*

The Society believes that it will be quite possible for many experienced practitioners to acquire the knowledge necessary to pass the test by self-tuition through the reading indicated by the syllabus. However, it is likely that a number of organisations will wish to provide teaching to assist those preparing for the test. Such teaching might be on a distance-learning basis and might also include lectures and seminars, perhaps on an evening or weekend basis to minimise the time lost from the office. Such courses would be within the remit of the Society's Continuing Education Scheme and so the appropriateness of the course scheme, the expertise of tutors and the quality of any written materials would be subject to scrutiny by the Society. The Society also has power to monitor the quality of any such courses by sending observers.

(c) *Assessment: The Structure of the Test*

The test will be a three hour test comprising two one and a half hour papers, one paper on Civil Procedure and Evidence and the other on Criminal Procedure and Evidence. Those seeking full rights of audience in all higher courts will be required to take both papers, those only seeking rights of audience in either civil or criminal courts will only have to take the relevant paper. Those required to take both papers will have to pass in each; there will be no compensation provisions for those who are more knowledgeable about civil procedure and evidence than criminal procedure and evidence. The test will comprise a mixture of multiple choice, short answer and practical problem questions based on extracts from relevant documents. Candidates will be allowed to take into the test the materials referred to in the syllabuses. Specimen test questions will be prepared by the Society's Advocacy Training Adviser when the Society receives an indication from the Committee that the basic structure and objectives of the test and the test syllabuses are appropriate.

(d) *Administration of the Test*

The Society will establish an Examinations Board consisting of three senior practitioners drawn from the Society's Higher Courts Qualifications Casework Committee and two examiners, one responsible for the Civil Procedure and Evidence Test the other for the Criminal Procedure and Evidence Test. The Chairman and Chief Examiner will be the Society's Advocacy Training Adviser. There will be two sittings of the test per year and there will be test centres in London and in the provinces, with invigilation being provided by approved teaching institutions and local law societies. More detailed test regulations will be prepared with the assistance of the Society's Advocacy Training Adviser when the Committee indicates to the Society that the structure of the test is appropriate. Eligibility to sit the test will be determined by the Society. The fee for certifying eligibility is likely to be £150–£200 and the fee payable on giving notice to sit the test approximately £100 per paper.

2. *The Higher Courts Advocacy Training Course*

The Course will be in two parts, advocacy in the higher civil courts (High Court and Court of Appeal) and advocacy in the higher criminal courts (Crown Court and Court of Appeal, Criminal Division). Each course will be a highly intensive course lasting a minimum of 30 hours plus contact time with a further ten hours preparation time for each part. The total studying time therefore required for those seeking rights of audience in all higher courts will be 80 hours. This is the equivalent of a one month course on a traditional full-time academic course. These timings are on the assumption that the course will be residential spread over four days (probably from Thursday to Sunday). It would also be possible for the course to be offered over a longer period on a part-time basis, perhaps in the evenings, which would be particularly suitable for those in smaller practices who are unable to spend substantial time out of the office during the working week and for whom the costs of a residential course may be prohibitive.

(a) *The Course Objectives*

The course is not intended to involve merely the passive acquisition of further knowledge since the great majority of the knowledge components will be covered in the test in procedure and evidence. Rather, the course will concentrate on developing applicants' practical forensic skills, concentrating on those aspects which are particular to the higher courts. The course therefore concentrates on the special features of advocacy before a jury in criminal cases and the skills of dealing with evidential points and matters of law in civil cases and in appeals in civil and criminal matters. By the end of the course applicants should have achieved the objectives set out in Appendix D.

(b) *Methods of Teaching*

Apart from lectures on important points of the ethics and etiquette of advocacy by a senior member of the judiciary the course will be taught by a combination of case study, demonstrations and practical exercises. For both the

civil and the criminal courses students will be required (before coming onto the course) to undertake preliminary consideration of three case studies. Documentation will have to be read and answers prepared to questions relevant to the course exercises. In the Civil Course the case studies will include chambers' applications (eg an injunction) a trial and an appeal to the Court of Appeal. In the Criminal Course the case studies will include a trial and an appeal to the Court of Appeal. Demonstrations will be by course tutors and increasingly as they are developed by the showing of video-tapes of advocates with extensive experience of advocacy in the higher courts. The practical exercises will consist of role plays based on the case studies. Each student will be required to undertake three such exercises in each course. The students' performances will be videotaped and reviewed by the student and tutor.

(c) *Assessment*

Assessment will be undertaken by tutors who will base their judgements on students' performance in the three practical exercises. Assessment will be based on assessment criteria developed from the course objectives. The assessment criteria will be developed by the Society's Advocacy Examination Board so that the criteria are the same even though the course may be offered by more than one organisation. Consistency in the application of the criteria will be ensured by requiring tutors to assess simply on a pass/fail basis; by requiring tutors to give reasons where they find a student's performance unsatisfactory and by requiring a tutor to make available the video-tape of the practical exercises to the Society's Advocacy Training Adviser who will monitor the operation of courses.

(d) *Administration of Courses*

The course will be the Society's Advocacy Training Course. For an initial period of three years the Society will delegate the provision of the course to one or at most two providers. Selection of the provider(s) will be on a tender basis to ensure the appropriate quality of tutors (who will have to have experience of advocacy in the higher courts and/or of acting in a judicial capacity in those courts and/or of teaching advocacy skills), appropriateness of the teaching programme and of the materials and methods to be used. The Society would wish the course to be offered in a small number of provincial centres as well as in London. The total intake on to each course should not normally exceed 50 students and the minimum tutor:student ratio should be 1:8. This ratio is substantially better than found in existing advocacy training courses. The cost of each course on a residential basis is likely to be in the region of £1,250–£1,500, making a total cost for the combined course of between £2,500 and £3,000 at 1991 prices.

The outcome of each course would be a record of achievement setting out each student's strengths and weaknesses. This record would be made available to the Society's Higher Courts Qualification Casework Committee. As the Society should not delegate to any outside body the exercise of the statutory power to grant the extended right of audience, the ultimate decision must be for the Casework Committee. However, it would be very unlikely that the Casework Committee would wish to grant a certificate where the Society's approved Advocacy Course Provider was not satisfied with the applicant's performance on the training course.

F. Conclusion

The Society considers that the two part course of training proposed (the test in procedure and evidence and the course of practical instruction in advocacy skills) will ensure that those solicitors who are already experienced lower court advocates will have the necessary knowledge and ability to undertake effectively the tasks of advocacy in the higher courts now undertaken by barristers in their early years at the Bar. The experience and training requirements are rigorous but not so impracticable in terms of time and cost as

to be an insuperable barrier to solicitors in the smaller or legal aid type practice. It is impossible to create a scheme which will train an advocate (or any other type of lawyer) how to cope with every eventuality. The practice rules (and the good sense of practitioners) will prevent solicitor advocates taking on cases beyond their existing level of competence. There are many skills which can only be fully developed with the increasing experience which the new rights of audience will allow these specialist solicitors to acquire.

Appendix A

Professional Skills Course

The Professional Skills Course—General Introduction

The Professional Skills Course ('PSC') will be undertaken by all trainees during articles from 1994–1995 ie the first year after the introduction of the Legal Practice Course. The minimum time for the course is 20 days and the topics to be covered are:

Advocacy
Accounts
Investment Business
Professional Conduct
Personal Work Management

Each topic may be studied as a separate module and can be provided in-house within a firm or externally. The Law Society will look at a number of matters, including the course materials, qualifications of the tutor and arrangements for assessment, when considering whether or not to approve a course provider. It is anticipated that it will be possible to study some parts of the PSC (although not, of course, advocacy) by distance learning eg Accounts, Investment Business and some parts of Personal Work Management. All areas will have to be taken and passed by all trainees.

Advocacy

It is anticipated that the advocacy module will last a minimum of five days and it will be recommended that it is undertaken in the last year of articles. The Sub-Committee considering the content of the course have agreed that advocacy in both the criminal courts and civil courts (ie Queens Bench Division/County Court) must be covered with one other topic from a list to be provided. One day of the module may be devoted to an option proposed by the provider and approved by the Society.

The Sub-Committee recommended a requirement for small group work for parts of the course and proposed a tutor:student ratio of 1:8. It should be possible for the provider to make a case for a different ratio in its application to run the course.

The Sub-Committee also considered objectives for the advocacy module in the PSC. They were satisfied that the objectives as drawn applied to the Legal Practice Course and the PSC in that by the end of the training on both courses the trainee should be able to:

(1) Appreciate the purpose and importance of pleadings and other court documents and their relevance to the presentation of the case.

(2) Identify the material facts from the pleadings and other court documents.

(3) Understand the need for preparation and the best way to undertake it.

(4) Appreciate that it may be in the client's interest to resolve a dispute by settlement.

(5) Assess the strengths and weaknesses of each side's case.

(6) Understand and express the factual basis upon which legal argument is founded.

(7) Understand the ethics of advocacy and be able to apply them.

(8) Develop a case presentation strategy (having regard to the tribunal).

(9) Identify the admissible evidence to be used in the presentation of the case.

(10) Understand the importance of effective communication with the tribunal.

(11) Develop effective communication and presentation skills and techniques.

(12) Be able to analyse personal and other advocates' performances to assess effectiveness.

(13) Formulate and present a cohesive argument based upon facts, general principles and legal authority in a structured concise and persuasive manner.

These recommendations have been discussed by the Professional Skills Course Sub-Committee of the Training Committee which will be making its final recommendations to the Training Committee by the end of 1991. The Council will consider the proposals early in the New Year.

Appendix B

Syllabus for Test in Evidence and Procedure in the High Court

[References to Orders are to Orders of the RSC]

A. Procedure

1. *Commencement and Progress of Proceedings*

Allocation of business between High Court and county courts (High Court and County Courts Jurisdiction Order 1991 and relevant Rules and Practice Directions)

General provisions as to writs of summons, originating summonses, originating and other motions, and petitions (Ords 6 to 10)

Summary judgment (Ord 14 with emphasis on the effects of rr 3 & 4)

Causes of action, counterclaims and parties (Ord 15)

Third party and similar proceedings (Ord 16)

Originating summons procedure (Ord 28)

Interlocutory injunctions, interim preservation of property, interim payments, etc (Ord 29, County Court Remedies Regulations 1991, American Cyanamid case, Anton Piller orders, Mareva injunctions)

2. *Pleadings (Ords 18, 19 & 20)*

Rules of pleading

Set-off and counterclaim

Amendment

Striking out

Parties and pleadings

3. *Trial*

Proceedings at trial (Ord 35)

4. *Special RSC Provisions as to Particular Proceedings*

Commercial actions (Ord 72 & Guide to Commercial Court Practice)

County court proceedings transferred or removed to High Court (County Courts Act 1984 ss 41 to 42, Ord 78 & Ord 107, r 2 and relevant rules in CCR)

Family proceedings (provisions in the Family Proceedings Rules 1991 relevant to hearings in the Family Division)

Applying by motion in the Chancery Division

Possession actions in the Chancery Division

Proceedings against trustees

Contentious probate proceedings

5. *Divisional Courts, Court of Appeal*

Applications for judicial review (Ord 53)

Appeals etc to High Court (Ords 55 & 56)

Appeals to Court of Appeal (Ord 59)

B. Evidence

Discovery and inspection of documents (including applications under Supreme Court Act 1981 ss 33(2) & 34(2), Norwich Pharmacal case etc)

Interrogatories (Ord 26)

Admissions (Ord 27)

Rules as to evidence in Ord 38 (excl Pt II)

Affidavits (Ord 41)

Documentary evidence (proof of contents, proof of execution, admissibility of extrinsic evidence) (Cross Chp XIX)

Opinion (Cross Chp XIII)

Hearsay statements in civil proceedings (Cross Chp XV)

Rules of evidence applicable to family proceedings in the Family Division

Law relating to examination, cross-examination and re-examination of witnesses excluding law applicable exclusively to criminal proceedings (Cross Chp VII)

C. Rules of Conduct

Law Society Practice Rules and Code for Advocacy with special emphasis on rules and provisions relevant to acting as advocate in civil matters.

[NB. For applicants taking this test before June 1992, in relation to procedure and evidence, special emphasis should be placed on legislative and case law developments from 1988 onwards (ie Acts of Parliament, RSC amending instruments, and cases reported in the Official Law Reports and the All England Law Reports) affecting the topics listed in the above syllabus.]

Sources The Supreme Court Practice 1991 and Supplements; Cross on Evidence (7th ed 1990) (Tapper ed)

Appendix C

Syllabus for Test in the Higher Criminal Courts

[References are to Archbold, Pleading, Evidence and Practice in Criminal Cases (1992 Edition)]

A. Procedure

1. *Indictments* (relevant Sections in Archbold Book 1 Chp 1)

Preferring bill of indictment (Administration of Justice (Miscellaneous Provisions) Act 1933 s 2, Indictments (Procedure) Rules 1971

Form of an indictment (Indictments Act 1915, Indictment Rules 1971)

Joinder of defendants and offences

Duplicity

Discretion to sever (Indictments Act 1915 s 5(3))

Amendment

Defective indictments

2. *Criminal Jurisdiction of the Crown Court* (Sections in Archbold Book 1 Chp 2 as shown)

Appellate jurisdiction in criminal cases (Magistrates' Courts Act 1980 s 108) (Sect X)

Contempt (Sect XIII)

High Court jurisdiction in Crown Court Proceedings (Sect XIV)

Crown Court Rules 1982 (Sect XV)

Serious fraud cases (Sect XVI)

3. *Arraignment, Plea, Change of Plea* (relevant Sections in Archbold Book 1 Chp 4)

Method of arraignment

Guilty pleas, not guilty pleas, mixed pleas, ambiguity in plea

Prosecution offering no evidence

Sentencing accomplices

4. *Trial* (Sections in Archbold Book 1 Chp 4 as shown)

Limited discretionary power to prevent prosecution proceeding (Sect I (10))

Access to judge (Sect I (11))

View of *locus in quo* by jury (Sect 1 (12))

The role of prosecution counsel (Sect I (22))

Submission of insufficient evidence (Sect XV)

The defence case (Sect XVI)

Closing speeches (Sect XIX)

Verdict (Sect XXIII)

Procedure after verdict (Sect XXIV)

B. Evidence

(Chapters 4 and 10 to 16 in Archbold Book 1 as shown)

Duties of prosecution relating to the presentation of evidence and calling witnesses (Arch Book 1 Chp 4 Sect X)

Rules of evidence relating to the questioning of witnesses

Evidence usually tendered in presence of jury (Arch Chp 4 Sect XIII)

Private documents (Chp 10 para 10–64 *et seq.*)

The Hearsay rule (Chp 11)

Evidence of similar facts (Chp 13)

Evidence of identification (Chp 14)

Identification by recognition of the defendant (para 14–1 *et seq.*)

Identification under the similar facts principle (para 14–12 *et seq.*)

Possession of incriminating articles (para 14–17 *et seq.*)

Confessions and related topics (Chp 15 Sect II)

Admissibility of evidence obtained as a result of unlawful or unfair means (Chp 15 Sect III)

Discretion to exclude (Chp 15 Pt IV)

Corroboration (Chp 16)

C. Rules and Conduct

Law Society Practice Rules and Code for Advocacy with special emphasis on rules and provisions relevant to acting as advocate in criminal matters

[NB. For applicants taking this test before June 1992, in relation to procedure and evidence, special emphasis should be placed on legislative and case law developments from 1988 onwards (ie Acts of Parliament, statutory instruments, and cases reported in the Official Law Reports, the All England Law Reports and the Criminal Law Reports), affecting the topics listed in the above syllabus. In addition, attention should be given to the relevant Practice Directions appearing in that period.]

Source

Archbold, Pleading, Evidence and Practice in Criminal Cases (1992 Edition).

Appendix D

Objectives for Higher Civil Courts Advocacy Training Course

By the end of this course a solicitor should be able to:

(1) Draft pleadings and associated court documents such as requests for further and better particulars and replies thereto which address the relevant issues clearly and concisely.

(2) Prepare a contested interlocutory application, an action for trial in the High Court, an application for judicial review and an appeal for hearing in the Court of Appeal.

(3) Develop a case presentation strategy (appropriate to the type of tribunal).

(4) Describe the major processes in contested interlocutory applications, a High Court trial, an application for judicial review and an appeal in the Court of Appeal.

(5) Identify the admissible evidence to be used in the presentation of the case and be able to make submissions to the judge on points concerning the admissibility of evidence.

(6) Examine, cross-examine and re-examine witnesses effectively and in accordance with the Rules of Evidence.

(7) Have a sound understanding of the Law Society Advocacy Code and courtroom formalities.

(8) Formulate and present a cohesive argument based upon facts, general principles and legal authority in a structured, concise and persuasive manner.

(9) Analyse personal and other advocates' performances to assess their effectiveness and identify the action necessary to deal with identified weaknesses.

Objectives for Higher Criminal Courts Advocacy Training Course

By the end of this course a solicitor should be able to:

(1) Draft an indictment in a Class 3 or Class 4 case in the Crown Court and be able to attack a defective indictment.

(2) Prepare for the prosecution or for the defence, a case for trial in the Crown Court, an appeal to the Divisional Court and an appeal from the Crown Court to the Court of Appeal.

(3) Develop a case presentation strategy having regard to the type of tribunal.

(4) Describe the major processes in a trial in the Crown Court, an appeal to the Divisional Court and an appeal to the Court of Appeal.

(5) Identify the admissible evidence to be used in the presentation of the case and be able to make submissions to the judge in the absence of the jury on points concerning the admissibility of evidence.

(6) Examine, cross-examine and re-examine witnesses effectively and in accordance with the Rules of Evidence.

(7) Have a sound understanding of the Law Society Advocacy Code and courtroom formalities.

(8) Organise and present a cohesive argument based upon facts, general principles and authority in a structured, concise and persuasive manner.

(9) Be able to analyse personal and other advocates' performances to assess their effectiveness and identify the action necessary to deal with identified weaknesses.

SCHEDULE

Higher Court Advocacy Qualifications: Advocacy and Litigation Experience Guidelines

Under Regulation X the Society may grant Higher Courts Qualifications to solicitors who satisfy the Society that they are suitably experienced. In deciding whether a solicitor is suitably experienced the Society will have regard to the guidelines contained in this Schedule.

General

In order to demonstrate the required experience, the solicitor must be, or have recently been, an active advocate. A solicitor who has undertaken no advocacy at all in the recent past is unlikely to be regarded as suitably experienced, even if that solicitor was a regular advocate at some time in the past. By the same token, a solicitor must have had current experience of handling litigation, including actual attendance at court, preferably acquired in handling litigation, in the court or courts in which audience rights are sought. But advocacy and litigation experience accumulated over a long career may well be a balancing factor in reaching the conclusion that a solicitor whose recent advocacy experience is less than might normally be expected may nevertheless be regarded as suitably experienced.

Frequency of experience

The Society would expect that a solicitor in active practice as an advocate would be making something like 22 to 25 appearances a year in court or before tribunals and the advocacy record should show details of these appearances over the previous two years. The record is intended to enable a solicitor to demonstrate the quality as well as the quantity of advocacy experience. Large numbers of simple short routine appearances will carry little weight. Cases in which the appearance has lasted for a number of hours or days will count for more.

There may be factors which mean that the number of appearances in the previous two years alone would not give a fair picture, and solicitors whose advocacy record in that period discloses a pattern which they regard as abnormal may wish to give details of more active periods of advocacy experience earlier in their careers. In some parts of the country where courts sit less frequently, the total number of appearances made by an active advocate may be less than a city centre counterpart. In some more specialised practices which concentrate on High Court as opposed to county court litigation, open court advocacy appearances will be fewer in number.

Discrimination

Individuals may have career breaks, job changes, illnesses or disabilities which may reduce the number of appearances they will have made in the period under consideration. The Society will be careful to avoid directly or indirectly discriminating against solicitors whose careers have been affected in this way.

Range of advocacy work

(a) *Criminal courts qualification*

A solicitor in regular criminal advocacy practice may be expected to have encountered the normal range of magistrates court criminal work and to have appeared in bail applications, adjournment applications, committals, summary trials and guilty pleas; and that the range of charges dealt with would encompass summary offences, either way offences and indictable offences. Solicitors whose

sole experience of advocacy was confined to guilty plea work or to road traffic or regulatory offences would not have the range of advocacy experience sought. Experience in juvenile court matters will naturally be valuable. The Society does not regard it as essential that an applicant for extended criminal rights should in addition necessarily have had advocacy experience in civil proceedings, but such experience is regarded as having particular value in broadening the solicitor's range of experience.

(b) *Civil courts qualification*

A solicitor who is an active advocate in civil proceedings may be expected to have conducted the full range of county court work, including interlocutory applications, pre-trial reviews, hearings involving final orders of judgments including contested trials. The work may be matrimonial, contracts and tort, housing, consumer or personal injury compensation. The Society would not expect advocates whose work was exclusively confined to a single area to have a sufficient range of advocacy experience. On the other hand advocates may have experience before tribunals, coroners courts, planning or other enquiries, or in chambers in the High Court. Any or all of these would be valuable supplements to an advocate's experience. However, a solicitor who had no, or only a little, experience of formal advocacy before the county court would not be regarded as suitably experienced. The Society does not regard it as essential that an applicant for extended civil rights should in addition necessarily have had experience in criminal proceedings, but such experience is regarded as having particular value in broadening the solicitor's range of experience.

(c) *All courts qualification*

A solicitor who has a general practice as an advocate will have a mix of experience in both criminal and civil courts and before tribunals. The range of experience encountered would not be expected to be confined to a single area of law (such as road traffic offences and compensation claims arising from road traffic accidents). The overall quantity of advocacy experience which might be expected of a solicitor practising in all courts may be less than the combined experience expected of a civil and of a criminal specialist.

Litigation experience in court

The Society regards it as essential that a solicitor should have had recent experience of having attended hearings of the court in which audience rights are sought. There is no substitute for the experience of having seen other advocates performing, and this will be of most value when the solicitor is instructing the advocate who is appearing, and is thus familiar with the way the case has been prepared. This will most easily be acquired while the solicitor is conducting litigation, and applicants should give details of their recent experience.

SCHEDULE

Higher Court Advocacy Qualifications: Advocacy and Litigation Experience Guidelines

1. Under regulation [ ] the Society may authorise solicitors to progress to the test and course which lead to Higher Courts Qualifications, if they satisfy the Society that the range, frequency, regularity and quality of their advocacy experience has been such as to qualify them for the higher courts qualifications. That will be done on the basis of a record of advocacy experience over the two years preceding the application for authorisation to proceed to the test and course. In deciding whether a solicitor is suitably experienced, the Society will have regard to the guidelines contained in this Schedule.

General

2. In order to demonstrate the required experience, the solicitor must be, or have recently been, an active advocate. A solicitor who has undertaken no advocacy at all in the recent past is unlikely to be regarded as suitably experienced, even if that solicitor was a regular advocate at some time in the past.

Frequency and regularity of experience

3. The Society would expect that a solicitor in active practice as an advocate would be making a minimum of 20 to 25 appearances a year in court or before tribunals. In order to maintain and develop advocacy skills, the Society would normally expect advocates to be appearing on a reasonably regular basis over the two year period.

Quality of experience

4. The record is intended to enable a solicitor to demonstrate the quality as well as the quantity of advocacy experience. Large numbers of simple, short, routine experiences will carry little weight. Cases in which the experience has lasted for a number of hours or days will count for more.

Range of advocacy work

(a) *Criminal courts qualification*

5. A solicitor in regular criminal advocacy practice may be expected to have encountered the normal range of magistrates' court criminal work, and to have appeared in bail applications, adjournment applications, committals, summary trials and guilty pleas. It would also be expected that the range of charges dealt with would encompass summary offences, either-way offences and indictable offences. Solicitors whose sole experience of advocacy was confined to guilty plea work or to road traffic or regulatory offences would not have the range of advocacy experience sought. Experience in juvenile court matters will naturally be valuable. The Society does not regard it as essential that an applicant for extended criminal rights should in addition necessarily have had advocacy experience in civil proceedings, but such experience is regarded as having particular value in broadening the solicitor's range of experience.

(b) *Civil courts qualification*

6. A solicitor who is an active advocate in civil proceedings may be expected to have conducted the full range of county court work, including interlocutory applications, pre-trial reviews, and hearings involving final orders of judgment, including contested trials. The work may be matrimonial, contracts and tort, housing, consumer or personal injury compensation. The Society would not expect advocates whose work was exclusively confined to a single area to have a sufficient range of advocacy experience. On the other hand, advocates may

have experience before tribunals, coroners courts, planning or other enquiries, or in chambers in the High Court. Any or all of these would be valuable supplements to an advocate's experience. A solicitor who had no, or only a little, experience of formal advocacy before the county court would not, however, be regarded as suitably experienced. The Society does not regard it as essential that an applicant for extended civil rights should in addition necessarily have had experience in criminal proceedings, but such experience is regarded as having particular value in broadening the solicitor's range of experience.

(c) *All courts qualification*

7. A solicitor who has a general practice as an advocate will have a mix of experience in both civil and criminal courts [and before tribunals]. The range of experience encountered would not be expected to be confined to a single area of law (such as road traffic offences and compensation claims arising from road traffic accidents). The overall quantity of advocacy experience which might be expected of a solicitor practising in all courts may be less than the combined experience expected of a civil and of a criminal specialist.

Other factors

8. There may be factors which mean that the number of appearances in the previous two years alone would not give a fair picture of the solicitor's experience and practice. Solicitors whose advocacy record in that period discloses a pattern which they regard as abnormal may wish to give details of more active periods of advocacy experience earlier in their careers. In some parts of the country where courts sit less frequently, the total number of appearances made by an active advocate may be fewer than those of a city centre counterpart. Where a solicitor believes this is the case, he should draw it to the Society's attention when submitting the record of experience.

9. In some more specialised practices which concentrate on High Court as opposed to county court litigation, open court advocacy experiences will be fewer in number. In such cases, the solicitor should draw the Society's attention to appearances in interlocutory work in chambers, and aspects of work as a litigator which are thought relevant to advocacy skills.

Discrimination

10. Individuals may have career breaks, job changes, illnesses or disabilities which may reduce the number of appearances they will have made in the period under consideration. The Society will be careful to avoid directly or indirectly discriminating against solicitors whose careers have been affected in this way.

Higher court experience

11. The Society regards it as essential that solicitors should have extensive first-hand experience of the style and standards of practice and advocacy expected in the court in which rights of audience are sought. There is no substitute for the experience of having seen other advocates performing. This is of most value when the solicitor is thoroughly acquainted with the way in which the case is being prepared. The most natural way of acquiring this experience is therefore best acquired by attending courts as the instructing solicitor. Solicitors who could show that they had participated in a scheme of structured observation (which includes being given access to case papers, and discussions of the way in which the case was being handled with the advocates and the judge involved), would meet this criterion.

Appendix C

The Lord Chancellor's Advisory Committee on Legal Education and Conduct

Rights of Audience of Employed Barristers:
Advice to the Lord Chancellor on the
Question Raised by the Director of Public Prosecutions
and the Head of the Government Legal Service

8th Floor
Millbank Tower
Millbank
London SW1P 4QU

3 April 1992

Contents

Summary

The Question

The Lord Chancellor has sought the Advisory Committee's advice on a question raised by the Crown Prosecution Service (CPS) and the Government Legal Service (GLS) under section 31 of the Courts and Legal Services Act 1990. The question is whether rule 402.1(c) in the Code of Conduct of the Bar of England and Wales is deemed to have been approved by the framework set up under the Act, as if it were a new rule being submitted for approval.

The Bar's Rule

Rule 402.1(c) effectively limits employed barristers' rights of audience so that they cannot appear as advocates on behalf of their employers in most cases in the higher courts. The CPS and GLS want to be able to use their in-house lawyers as prosecuting advocates in a limited number of the less serious of their Crown Court cases. The Committee has considered the question in relation to all employed barristers, who are affected equally by the rule.

The Committee's Approach

The Committee agrees with the policy of the CPS, the GLS and other employers that barristers and solicitors on their staff should be treated equally in relation to rights of audience. The position of employed solicitors is considered separately in the Committee's advice to the Law Society on its application to be authorised to grant rights of audience in the higher courts to suitably qualified solicitors.

In relation to both, the Committee wishes to stress that advocacy in the higher courts is one of a range of lawyers' specialisations. The skills it requires are not inherently superior to other legal skills, and should not be seen as conferring a higher professional status.

The statutory objective of the Act requires the Committee to consider whether the proper and efficient administration of justice would be maintained if employed barristers had rights of audience in the higher courts. The Committee believes that the two most important questions in this context are:

(i) whether barristers appearing in court on behalf of their employers could demonstrably achieve the degree of objectivity and impartiality needed by advocates presenting cases in the higher courts; and

(ii) whether employed barristers would have the opportunity to appear in the higher courts sufficiently frequently to ensure that their advocacy skills were maintained at the standard required by the longer and more complex cases which are dealt with at that level.

Potential for conflict

In the Committee's view, the circumstances in which many employed barristers work, and the variety of their functions, make it difficult for them to demonstrate the necessary objectivity and impartiality.

Lawyers in commerce and industry may hold senior positions in their firms, and share responsibility for the company's actions and policies. Those in local government are often involved in policy formulation and implementation, and may be subject to pressure to conform to a local authority's political objectives. Government lawyers prosecuting on behalf of, for example, the Inland Revenue or the Department of Social Security will almost inevitably be identified in the public perception with the purposes and policies of their departments.

The Committee would not wish to extend rights of audience for barristers in any of these categories of employment unless there were limitations on the other functions within an organisation that could be carried out by an employed barrister who wished to appear in court.

Lawyers in the CPS and the Serious Fraud Office (SFO) are in a different position, since their organisations have been established to act only as independent prosecuting authorities and have no conflicting objectives.

Frequency of appearance

The Committee believes that the proper and efficient administration of justice would not be maintained if rights of audience in the higher courts were given to groups of people, all or most of whom were likely to use those rights only rarely. A number of private sector employers have told the Committee that they would not make much use of in-house advocates in the higher courts. Similarly, the evidence put to the Committee suggests that most lawyers in local government and in the GLS would have little opportunity to appear in the higher courts. Those employed by the CPS and SFO are in a different position, because the prosecution of offences is the central focus of their work.

The CPS

No-one has argued that the CPS should have a monopoly of prosecution advocacy in the Crown Court. The Committee would oppose such a monopoly because that would polarise the experience of prosecution and defence advocates (and judges), and could lead to greater confrontation. A mix of prosecution and defence work helps the development of criminal advocates' skills and encourages a balanced approach to the presentation of evidence.

The Committee sees some attraction in a mixed system, with most Crown Court cases prosecuted by independent advocates, but with the option for the CPS of prosecuting a limited number of less serious cases in-house. The Committee appreciates the CPS's arguments that this would enable the Service to improve its standards of case preparation and decision making, enhance morale, and ease recruitment problems.

The Committee believes that the CPS must demonstrate a high standard of achievement in its present functions before an extension of rights of audience can be justified. The Committee has heard evidence that, despite great progress, the CPS has not yet fully overcome initial difficulties in terms of resources, manpower and organisation, and may not yet be in a position to take on the additional responsibilities of providing advocacy services in the higher courts.

The Committee has also noted that a number of submissions to the Royal Commission on Criminal Justice recommend radical changes which would alter the role of the advocate in the Crown Court. If accepted, these would affect the way in which the CPS might exercise rights of audience.

A further point which has been put to the Committee is that a limited extension of the CPS's rights of audience would inevitably be the thin end of the wedge, leading eventually to a monopoly. The Committee notes that any Crown Court advocacy rights granted to the CPS would be exercised in accordance with guidelines laid down by the Attorney General, which would not be binding on his successors. The Committee believes it would be more appropriate for the exercise of Crown Court advocacy rights by the CPS to be controlled by the framework set up under Part II of the Act (which includes the Lord Chancellor and the four designated judges as well as the Committee itself). There is, at present, no certain way in which that could be achieved.

Conclusion

Having taken all these matters into consideration the Committee has concluded that it would not be right at present to give extended rights of audience in the higher courts to barristers employed in the CPS, the SFO, the GLS, in local government or in commerce and industry. The Committee's advice to the Lord Chancellor is therefore that the Bar's rule 402.1(c) should be deemed to have been approved.

SECTION I: FORM AND SCOPE OF THE QUESTION

1. The issue of rights of audience for employed lawyers has come before the Advisory Committee in the form of a question raised by the Crown Prosecution Service (CPS) and the Government Legal Service (GLS) under section 31 of the Courts and Legal Services Act 1990. The question, which has been referred to the Committee by the Lord Chancellor, is whether rule 402.1(c) of the Bar's Code of Conduct is deemed to have been approved by the framework set up under the Act, as if it was a new rule being submitted for approval under the procedure set out in the Act. Annex A to this advice gives details of the Committee's work on the question.

2. Rule 402.1(c) provides that, subject to certain conditions about the completion of pupillage, an employed barrister may 'appear as counsel in any court in circumstances where immediately before 7 December 1989 barristers in independent practice did not have an exclusive right of audience on behalf of. . . his employer or another employee of his employer or (if the barrister is employed by a trade association) an individual member of the association'.

3. In the submission of the CPS and GLS, revocation of rule 402.1(c) would remove the restrictions on employed barristers' rights of audience, enabling them to appear in all courts on behalf of their employers. The Bar Council, in its evidence to the Advisory Committee, has taken a different view, suggesting that, on the true construction of the Act, this rule in fact gives employed barristers their rights of audience and that revoking it would deprive them of the limited rights of audience they currently enjoy. The Bar Council has also suggested that it is inappropriate for a substantive question of rights of audience to be decided through the procedure set up under section 31 of the Act. The Bar points out that the general scheme of the Act requires changes in rights to have the approval of the Lord Chancellor and each of the four designated judges, while under section 31 rules can be found not to have deemed approval by either the Lord Chancellor or a single judge not being satisfied. Such a question, in the Bar's view, could properly be dealt with only by means of an application from the Bar Council itself, under section 29 of the Act, to amend its rules of conduct.

4. The Advisory Committee has noted the Bar's objections to the use of the section 31 procedure, and concluded that questions of statutory construction and procedure should be decided by the Lord Chancellor and the designated judges. The Committee's advice therefore deals with the question of rights of audience for employed barristers on its merits.

5. The question before the Committee is concerned with the rights of audience of barristers employed in the CPS and GLS. The Bar's rule, however, makes no distinction between different categories of employment. The Committee has therefore decided that the question must be considered in relation to all employed barristers.

6. The CPS, the GLS and other employers have told the Committee that they treat their legal staff on an equal footing, regardless of whether they are barristers or solicitors, in relation to advocacy and other functions. They would want to continue on this basis in relation to advocacy in the higher courts, and the Committee agrees that is the right approach.

7. The question raised by the CPS and GLS, however, relates to a rule of conduct of the Bar, and so this advice deals only with employed barristers. The question of extended rights of audience for employed solicitors has arisen at the same time, since the Law Society's application to be authorised to grant rights of audience in the higher courts deals equally with all suitably qualified solicitors, whether employed or in private practice. The central issues arising from the two submissions are, inevitably, similar, and much of what is said in this advice could

be taken as applying to employed lawyers generally. Some further points which relate specifically to employed solicitors are set out in Part 4 of the Committee's advice to the Law Society on its application dated 3 April 1992.

Rights sought

8. The submission from the Head of the Government Legal Service and the Director of Public Prosecutions seeks unrestricted rights of audience in the higher courts for barristers employed in the CPS, the Serious Fraud Office and the Government Legal Service. The submission makes it clear, however, that these rights would be exercised only to the limited extent outlined below.

Crown Prosecution Service

9. The submission from the Head of the GLS and the Director of Public Prosecutions (DPP) seeks full rights of audience in the Crown Court for barristers in the CPS. In practice, however, it envisages that only experienced advocates would appear, in a limited number of cases not exceeding three days in length. The CPS argues that it does not wish, and would not be able, to match the range of experience and expertise available in the independent Bar, from which it has a free choice. It therefore needs to continue to draw most of its advocacy services from the Bar.

Serious Fraud Office

10. The Serious Fraud Office (SFO) is seeking to exercise rights of audience only in very substantial cases, where there would be two or more independent counsel in addition to an in-house junior. The in-house advocate would be the team member known as the case controller, who has principal responsibility for the overall management of a case but is not involved in the investigation.

Government Legal Service

11. The GLS, which employs some 1000 lawyers in total, covers the entire range of legal work, from the drafting of statutory instruments to conveyancing, from criminal prosecutions to judicial review of ministerial decisions. Many barristers will move between different types of legal work during their careers.

12. The GLS makes it clear, however, that any increased rights of audience would only be exercised in relation to prosecutions in the higher courts. The Committee has received evidence that the CPS and GLS are broadly satisfied with the arrangements for providing representation in the higher civil courts, and their submission says that neither 'has any present intention to exercise rights additional to those exercised currently in civil proceedings'.

13. The GLS was asked to estimate the amount of prosecution work it might undertake. It suggests that the likely caseload would not exceed some: 100 appeals from the magistrates' courts; 1000 guilty pleas; and 100 contested cases (mainly cases involving the importation of drugs). There would be a small number of pre-trial reviews and other interlocutory hearings. No department would use its own advocates for contested cases expected to last more than three days.

Local government and the private sector

14. Barristers employed in local government and in the private sector are represented, respectively, by the Bar Association for Local Government and the Public Service (BALGPS) and the Bar Association for Commerce, Finance and Industry (BACFI). Neither of these bodies has itself raised a question about the Bar's rule on rights of audience for employed barristers, but both have submitted written and oral evidence to the Advisory Committee in support of the arguments advanced by the CPS and GLS.

15. BACFI and BALGPS seek unrestricted rights of audience for their members, but the latter believes that they are more likely to be used in prosecution work than in cases in the higher civil courts. BALGPS points out that the current rule setting out employed barristers' rights of audience is

comparatively recent, and that before it was introduced in February 1989, local authorities were very reluctant to employ barristers because they would not have the same rights of audience as solicitors.

Europe

16. Section 20 of the Act requires the Committee, where it considers it appropriate, to 'have regard to the practices and procedures of other member States in relation to the provision of legal services'. It has been brought to the Committee's attention that among member states of the European Community legally qualified persons employed to provide legal services for public and private sector employers are distinguished from legally qualified persons engaged in the private practice of law. In states with a 'Latin' civil law tradition (such as Belgium, France, Italy, Luxembourg, and Portugal), employed lawyers are not treated as members of the legal profession at all. The Committee does not regard that as a precedent which could helpfully be followed in the wholly different tradition in England and Wales.

17. In the other main group of states (Denmark, Germany, Ireland, the Netherlands, and the United Kingdom), employed lawyers are seen as members of the legal profession, but may be differentiated from lawyers in private practice. Denmark and Ireland, for example, accept the possibility of employed lawyers exercising rights of audience on behalf of their employers. Germany and the Netherlands, on the other hand, prohibit employed lawyers from representing their employers in courts when legal representation is required.

18. Most Continental countries, whether or not they treat privately employed lawyers as full members of the legal profession, do have state prosecution services with wide rights of audience. Unlike the legal system in England and Wales, however, the systems in those countries are essentially inquisitorial. The different role of the prosecution advocate in an adversarial system has been central to the Committee's consideration of rights of audience for the CPS.

SECTION II: THE COMMITTEE'S RESPONSE: GENERAL ISSUES

The general principle and its requirements

19. Section 17 of the Act establishes the criteria which, as a general principle, are to determine whether or not a person should be granted rights of audience. The requirements of the general principle relate first to education and training, and secondly to professional conduct.

Education and training requirements

20. The general principle requires that anyone who is to be granted a right of audience must be 'qualified in accordance with the educational and training requirements appropriate to the court or proceedings'.

21. Employed barristers have all been called to the Bar, having complied with the training regulations valid at the time of their call. In order to excercise rights of audience in the lower courts, an employed barrister must have completed 6 months' pupillage with a barrister in independent practice, and:

(i) have completed a second 6 months of pupillage, either with a barrister in independent practice or through an employer's in-house scheme which is approved by the General Council of the Bar (one such scheme is run by the Crown Prosecution Service); or

(ii) be engaged in a second 6 months of pupillage under the supervision of a recognised pupil-master (as in (i)); or

(iii) have been an employed barrister for a period or periods amounting to not less than 5 years. (This applies only to those who became employed barristers before 1 January 1989.)

22. These provisions, which are set out in rule 402.2 of the Bar's Code of Conduct, are deemed by the Act to have been approved under it in relation to employed barristers' current, restricted rights of audience, as described in paragraph 2 above. The Committee takes the view that employed barristers should not be allowed to appear as advocates in the higher courts unless they have, as a minimum, completed a full year's pupillage, either wholly in independent practice or partly through an employer's in-house scheme. The Committee considers that a newly qualified barrister should not progress to appear as an advocate in the higher courts without experience of advocacy in the lower courts, and preferably further training. The Committee does not consider that 5 years experience as an employed barrister is of itself a satisfactory qualification for rights of audience in the higher courts, since it may not involve much, or any, practical experience of advocacy.

23. The Committee notes that further in-house training of advocates is provided by both the CPS and the GLS. There is no requirement for further training of barristers employed in local government or the private sector, and provision will vary according to the arrangements made by individual employers, over which there is no central control.

Rules of conduct required by the general principle

24. The general principle requires a person who is granted a right of audience under the Act to be a member of a professional body with rules of conduct which are, in relation to the court or proceedings, 'appropriate in the interests of the proper and efficient administration of justice', and which include a non-discrimination rule. The professional or other body must have an appropriate mechanism for the enforcement of its rules of conduct, and be likely to enforce them.

25. The Committee sees the advocate's role in our adversarial system as being a public one, which depends on the skill, judgment and integrity of an individual. Advocates owe duties to the courts, and thus in effect to the public, as well as to their own clients. In civil cases these responsibilities include disclosure to the other parties of material including documents damaging to the case of the advocate's own client, deciding the contents of written pleadings, and making submissions to the court. Advocates must not knowingly mislead the court about the facts and must draw the court's attention to any relevant precedent or statute, even if it is damaging to the case they are presenting. In criminal cases, an advocate's responsibilities, which are conditioned by the principle that it is for the prosecution to prove its case, vary according to whether the advocate is appearing for the prosecution or the defence. This is discussed in greater detail elsewhere, but for present purposes it is sufficient to say that the proper discharge of a criminal advocate's responsibilities, whether prosecuting or defending, is of high importance for the proper and efficient administration of justice. Because of their direct experience of putting arguments before the courts, advocates' assessment of the strengths or weaknesses of arguments or evidence has a special authority, and the court and the public should be entitled to rely on advocates not wasting time with unsustainable arguments or proceeding for vexatious or oppressive reasons with cases that have no chance of success. The judge will seek to take a more active part in any case where it appears that the quality of representation offered by one side is out of balance with that on the other, or that elements are missing, but that in no way diminishes the responsibility of the advocates. If judicial intervention is necessary, it is likely to prolong significantly the time needed for the trial and interfere with the proper and efficient administration of justice.

26. The court and the public therefore need to be sure that the advocate's decisions are based on an impartial assessment of the merits of the case, not on the advocate's own interests; and that the advocate has been free of pressure from the client or a third party which might interfere with accepting full responsibility for the way in which the case is presented in court.

27. Employed barristers are members of the Bar, and are bound by the sections of the Bar's Code of Conduct which apply to them. Rule 202 of the Code, which applies to all practising barristers whether employed or in independent practice, embodies the advocate's overriding duty to the court:

> ' A practising barrister has an overriding duty to the Court to ensure in the public interest that the proper and efficient administration of justice is achieved: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.'

28. Other provisions in the Code of Conduct forbid a practising barrister to ' permit his absolute independence and integrity and freedom from external pressures to be compromised ' (Rule 205 (a)), or ' compromise his professional standards in order to please his client the Court or a third party ' (Rule 205(c)); and require him to consider whether it is consistent with the proper and efficient administration of justice, and in the best interests of the client, for the advocate to be instructed or continue to be instructed in a particular matter. The factors to be taken into account in reaching that decision include the advocate's relationship with the client.

29. Annex H to the Bar's Code of Conduct sets out written standards for the conduct of professional work which apply in addition to the basic rules in the main text of the Code. Except where this would be inappropriate, it relates equally to employed barristers and those in independent practice. It includes a section on the particular responsibilities of prosecuting counsel, which requires all barristers conducting prosecutions to have regard to the guidelines set out in the report of Mr Justice Farquharson's Committee on the Role of Prosecuting Counsel.

30. Prosecutors employed by the CPS are bound by the DPP's Code for Crown Prosecutors, which is also followed by other Government and local authority prosecutors. The DPP's code sets out the principles to be applied in determining whether proceedings should be instituted, whether they should be discontinued, and what charges should be preferred, and in representations about mode of trial. It imposes a duty on prosecutors to ensure that:

(i) a case is being conducted fairly and impartially in the best interests of the administration of justice;

(ii) there is a realistic prospect of a conviction; and

(iii) it is in the public interest to continue the case.

31. In so far as they apply to employed barristers, the Bar's rules are deemed to have been approved under the Act only in relation to advocacy in the lower courts. The Committee has therefore had to consider whether they would also be appropriate in relation to the higher courts, having regard, on the one hand, to the special position of employed barristers appearing for a single client (their employer), and, on the other hand, to the additional substance and complexity of higher court cases.

32. In the Committee's view, there is a particular need for the court to rely on the impartiality of an advocate's decisions in proceedings in the higher courts. The consequences for a defendant in the Crown Court are potentially far greater if the prosecutor fails to comply with the special standards required of prosecution counsel. As the High Court becomes an increasingly specialist jurisdiction, the complexities of fact and law increase, and it therefore becomes even more important for the court to be able to rely on the fullness and accuracy of what counsel says. Finally, the consequences and cost of failure in a case in the higher courts are so much more serious that it becomes far more important to have in place independent safeguards against cases being proceeded with vexatiously or oppressively.

Independence

33. There are two respects in which it has been argued that it is more difficult for employed lawyers to establish beyond doubt that they have the necessary independence to carry out the advocate's duties. First, it is said that employed barristers might be subject to personal or institutional pressure which would influence the way in which they exercise their professional judgment. That might take the form of direct influence or pressure from the employer to take a particular course of action, or face dismissal or reduced prospects of interesting work, promotion or pay. Employees may also be subject to indirect pressure to react in certain ways from what they know of the views and expectations of colleagues.

34. On the other hand, the Committee accepts the evidence from employed lawyers that they value and protect their professional independence, which is much strengthened by the fact that they are subject to a professional code of conduct enforced by an independent professional body. Moreover, the Committee has seen evidence that employers are aware of the importance of allowing employed lawyers to exercise objective professional judgment if they are to do their job properly. Some employers are able to strengthen that by giving the legal departments in their organisations some measure of autonomy or functional separation, and enhanced status.

35. The Committee acknowledges, however, that pressures can also be brought to bear on lawyers in independent practice by the threat of withdrawing business, whereas those in employment benefit from the protection of the employment protection legislation, with its ability to challenge unfair dismissal in a public tribunal (although that is of little use, at least in the short term, if the employer's reaction takes the form of giving the employee less interesting work, or no promotion).

36. The Committee's own assessment is that the professional regulation that applies to employed lawyers, taken with the employed lawyers' professional integrity and employers' awareness of the need for objectivity, provides a very substantial defence against specific and identified individual pressures. While accepting that, and the general personal integrity of employed lawyers, the Committee considers that there remains a risk of diffused pressure from the expectations and ethos of a lawyer's employer and colleagues.

Potential for conflict

37. In the Committee's view, the potential threat in the employed environment from such diffused pressure is likely to be greater if advocates have to exercise their judgment as to the proper course of action in a situation where they have a range of possibly conflicting aims and objectives to achieve. These conflicting objectives are more likely in bodies which exist for other purposes than the proper conduct of legal proceedings, since there will be, for example, commercial or political imperatives to consider. The greater the degree of separation which the legal department is given within an organisation, of course, the less the risk from such institutional conflicts.

38. The conflicts may also be personal, since many employed lawyers have a range of functions in which specifically legal duties may well not be the major part. They are often senior members of their organisation, and have their part in its collective leadership. The Committee recognises that the legal skills they can bring to their work will often have a central part to play in the formulation of organisational strategy. But where an individual has to carry out a range of functions, there is a real possibility that appearance as an advocate might raise questions in the mind of the court or the public as to whether the proper detachment could be exercised when putting before the court issues, arguments and decisions which the advocate personally has initiated or participated in.

Non-discrimination rules

39. Different non-discrimination rules apply to employed barristers and those in independent practice. All practising barristers, whether employed or not, are subject to the general non-discrimination provision in Rule 204 of the Bar's Code:

> 'A practising barrister must not in relation to any other person (including a lay client or a professional client or another barrister or a pupil or a student member of an Inn of Court) on grounds of race ethnic origin sex religion or political persuasion treat that person for any purpose less favourably than he would treat other such persons.'

40. Only barristers in independent practice are, in addition, governed by the 'cab-rank' form of the non-discrimination rule expressed in Rule 209 of the Code:

> 'A barrister in independent practice must comply with the "cab-rank rule" and accordingly . . . he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded:
>
> (a) accept any brief to appear before a court in which he professes to practise;
>
> (b) accept any instructions;
>
> (c) act for any person on whose behalf he is briefed or instructed;
>
> and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause or conduct guilt or innocence of that person.'

41. The Bar Council, in its submissions to the Advisory Committee on employed barristers' rights of audience, has suggested that no advocates should have rights of audience in the higher courts unless they are subject to the 'cab-rank' rule as it applies to barristers in independent practice. The Committee does not accept this.

42. A cab-rank rule only makes sense in relation to the mode of business of barristers in independent practice, as the Bar's own Code of Conduct recognises by confining the rule's application to such barristers. Employed barristers who have only one client, or who appear for fellow employees or their employer's members, are simply not available to act for the general public. That applies in both lower and higher courts. The Committe does not, therefore, think that the absence of a cab-rank rule is any reason to refuse to widen the rights of audience of employed barristers.

The statutory objective and its requirements

43. The statutory objective, set out in section 17 of the Act, is 'the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice'.

44. The Committee accepts that extending employed barristers' rights of audience would create a new way of providing advocacy services in the higher courts. This has, however, to be balanced against the need to maintain the proper and efficient administration of justice. In striking that balance, the Committee believes that one major factor is the doubts it has discussed in paragraphs 33–38 as to whether employed lawyers could maintain, and be seen to maintain, the level of objectivity and impartiality required by an advocate presenting cases in the higher courts.

Frequency

45. The Committee's second major concern is that the proper and efficient administration of justice would not be maintained if rights of audience in the higher courts were given to groups of people, all or most of whom were likely to exercise those skills only rarely. This is because the Committee regards advocacy in court, especially in longer and more complex cases, as a skill which is only effectively developed by practice. Moreover, courtroom advocacy skills are fugitive unless regularly used. Failing to develop them to the right level, or allowing them to become rusty, would be particularly serious in the higher courts. The Committee is obliged to deal with this issue on a ' worst case ' basis, because the procedures for dealing with a question raised under section 31 of the Act require it to advise that the Bar's rule should be either revoked or approved as it stands. Revocation of the rule would give the same rights of audience to employed barristers with extensive advocacy experience as to those whose work involved no advocacy at all.

46. The Committee has consulted some private sector employers of barristers on the CPS's and GLS's submission. None of those who responded expected to make much use of in-house advocates if they obtained rights of audience in the higher courts, but some thought it might be helpful to use them for emergency interlocutory proceedings in the Chancery Division. Employed barristers, having the same rights of audience as solicitors, can already appear in most High Court interlocutory work.

Professional status

47. Several of the submissions received by the Committee indicate that employed barristers see acquiring rights of audience in the higher courts as a badge of progress within their profession, and therefore as a means of enhancing their status, even if they would be unlikely to exercise the extended rights frequently. They argue that it is illogical and demeaning for barristers with experience of independent practice to lose their higher court advocacy rights if they take up employment, and that this disparity between the two sectors of the Bar makes those in employment appear to be second-class barristers in the eyes of the public and (at least in some cases) their employers.

48. The Committee appreciates this point of view, but does not see it as sufficient reason for extending employed barristers' rights of audience. The Committee gives priority to the arguments about possible conflicts of role and about frequency of appearance. The Committee does not believe, however, that acquiring and maintaining advocacy skills in the higher courts should command any particular status, or that the ability to exercise them gives any branch of the profession some kind of competitive edge. In the Committee's view, advocacy requires a discrete set of skills, which are primarily acquired through experience and which are blunted by disuse. There is, moreover, a practical limit to the number of skills which individuals can acquire, and in which they can expect to maintain simultaneous proficiency. Advocacy in the higher courts is one of a range of lawyers' specialisations. The skills it requires are not inherently superior in quality to others which are exercised by employed barristers, although like all skills they need constant practice if they are to remain at the level of proficiency required by the higher courts.

49. The Committee has considered the groups of employed barristers who might be affected by the CPS's and GLS's question in the order:

—the private sector
—local government
—the Government Legal Service
—the Crown Prosecution Service
—the Serious Fraud Office.

SECTION III: THE PRIVATE SECTOR

Standards of professional conduct

50. The range of duties carried out by employed barristers in the private sector varies very widely. For a substantial proportion, providing legal services is not their principal function. Many hold posts, such as company secretary, which combine a range of functions, legal and non-legal. Many hold senior positions, including directorships, in their firms, and therefore share responsibility for their firm's actions and policies. Indeed, lawyers who act as directors have an identical position under the Companies Act to all other directors.

51. As explained in paragraphs 33–38 above, the Advisory Committee considers that there must be obvious doubts that an employed lawyer with a range of different functions can be, and can be seen to be, sufficiently objective, impartial and free from conflicts of interest to carry out the advocate's duties in the higher courts. It might be thought that decisions on how the case should be handled had been influenced, for example, by the barrister having participated in the commercial or policy decisions being questioned, or in their implementation. It is possible that doubts of this nature could be reduced or removed by restricting the functions to be carried out by barristers who wished to appear in court. If this approach were to be adopted, rights of audience could only be granted to barristers who could show that their organisation was structured so as to prevent advocates being subject to direct or indirect pressure from their employer or colleagues, particularly by potential advocates' direct involvement in policy making or implementation, and that they had not been influenced in handling the case by their own perception of their organisation's other objectives. That would demand a radical restructuring of many, and perhaps all, legal departments in this area. It would probably also radically reduce the use that could be made of employed barristers in their organisations. There must be considerable doubt that employers, and indeed barristers themselves, would regard the cost of that as worthwhile.

Frequency of appearance

52. The evidence which the Committee has received indicates that a very small proportion of private sector employed barristers are using their existing rights of audience and might make occasional use of extended rights, whereas the majority do not appear in court, and would be unlikely to do so if their rights were extended. The Advisory Committee recognises that this situation might change, for example if private sector employers decided to make more use of advocacy services from their in-house lawyers for reasons of cost-effectiveness. Even if that happened, the Advisory Committee would not consider it appropriate for them to appear in the higher courts unless the organisations in which they worked were appropriately structured.

SECTION IV: LOCAL GOVERNMENT

Standards of professional conduct

53. In considering whether it would be appropriate for barristers employed in local government to exercise rights of audience in the higher courts, the Advisory Committee has first addressed the question whether, given the range of duties which a modern local authority is required to carry out, and the barrister's place within such authorities, it is possible for the employer to provide the safeguards necessary to enable in-house barristers to achieve and maintain the appropriate standards of professional conduct.

54. At one time, the functions of a local authority's chief official and senior legal adviser were usually combined in the post of County Clerk or Town Clerk. Increasingly, those functions are separated, so that many councils have separate Chief Executives and Directors of Law. Nevertheless, even in those cases where local authorities have separated these functions, councils' senior lawyers, like all

other senior local authority officials, are commonly closely involved in a broad capacity in the political process of policy formulation and implementation, as well as recommending policies on enforcement. In particular, many of the civil cases with which local authorities have to deal are centrally concerned with the legality of the authority's regulations and decisions. Often, these have been made on the policy recommendations of the authority's own lawyers.

Public and administrative law

55. One area is likely to create particular problems. Applications for the judicial review of local authorities' policies and decisions are an important aspect of public and administrative law, although the number of cases involved overall is small (and is concentrated amongst the larger metropolitan authorities). This area of the law is increasingly complex and specialised but also one in which individual decisions may have national implications or involve very large sums of money, and so be intensely controversial. Success in a particular judicial review can therefore become a major political objective of the authority concerned.

56. It is difficult to see how proper impartiality and objectivity could be demonstrated to the public satisfaction when advocates who had been involved in policy formulation, or in deciding how that policy should be implemented, were appearing in court effectively to defend their own propositions and actions. To achieve that, it would be necessary to demonstrate at the very least an effective separation of policy-making, executive and court-related duties within authorities, and the establishment of mechanisms which would guarantee that improper 'political' pressure was ineffective.

57. This might not be an insuperable problem, for some authorities at least. The volume of litigation which some authorities need to conduct is such that they may have a number of effectively full-time advocates dealing with particular aspects of their work, who may form virtually separate advocacy departments. In other areas of work, or other authorities, greater mixtures of advocacy and other work may be found.

58. The Committee has heard of a number of developments which may encourage further separation of functions, such as the appointment of monitoring officers. The Audit Commission's report on the provision of legal services within local authorities, and the Government's proposals for extension of compulsory competitive tendering (CCT) procedures into this area, are likely at the least to lead to clearer indentification of the legal and non-legal services provided by employees. The Committee thinks it likely that developments in this area in the next years will have a significant influence on whether it would be appropriate for some groups of lawyers employed by local authorities to have extended rights of audience.

Frequency of appearance

59. The Advisory Committee has heard evidence that few of the barristers employed by local authorities would exercise rights of audience in the higher courts sufficiently often for them to maintain the skills necessary for advocacy at that level, although some local authority lawyers appear quite frequently in the lower courts and tribunals. As in the case of the private sector, the Committee accepts that this might change, particularly in response to the Audit Commission's work and CCT.

Conclusion

60. The Advisory Committee has nevertheless concluded that it is not at present in the interests of the proper and efficient administration of justice for barristers employed in local government to have rights of audience in the higher courts.

SECTION V: THE GOVERNMENT LEGAL SERVICE

Standards of professional conduct

61. All Government departments are required to observe the Philips principle of the separation of investigation from the decision to prosecute. Indeed, the Committee notes that Lord Keith commented that the Revenue departments 'go one better, with general separation of investigation, advice on sufficiency of evidence and conduct, and the decision to order proceedings'. The Attorney General made it clear when introducing the Code for Crown Prosecutors in Parliament that all GLS lawyers, and others conducting prosecutions, would follow the Code.[1]

62. The Committee is not, however, convinced that these safeguards are sufficient to establish that the advocates the GLS employs could be seen as having the detachment required to carry out the public duties of an advocate in the higher courts.

63. The Advisory Committee has received evidence that barristers employed in the GLS value their professional independence, and will resist any attempts to encroach upon it. The Committee entirely accepts that. Nevertheless, the Committee sees an inevitable tendency for an in-house advocate appearing for a Government department such as the Inland Revenue or the Department of Social Security to be identified with the purposes and policies of the department. That, at least, is likely to be the perception of the general public.

64. Moreover, Government departments have a range of policy aims and objectives, of which the fair and effective conduct of prosecutions will be only one (if always an important one). Such variations in aims and objectives make it more difficult for any institution to demonstrate that the prosecutor's prime aim is always and only a fair and effective prosecution, and that prosecutors are supported by the institutional and peer support for robustly independent decisions which would follow from that ethos. Such difficulties increase very considerably when lawyers are not engaged as prosecutors full-time, but have other duties as well.

Frequency of appearance

65. The Committee also notes that the number of advocates who it is proposed should actually exercise increased rights in each department is very small. There is a comparatively restricted number of cases which it is thought they would wish to undertake. The Advisory Committee has made clear its reservations about granting wider rights of audience to a wide class of advocates when it expects only a small number of them to exercise those rights, and even then infrequently.

Conclusion

66. For the foregoing reasons, the Advisory Committee does not think it appropriate for barristers employed in the Government Legal Service to have extended rights of audience.

SECTION VI: THE CROWN PROSECUTION SERVICE

A state monopoly

67. The starting point for the Advisory Committee's consideration of rights of audience for the CPS has been a consensus in the evidence which it has received that there are considerable advantages in the present arrangements which would be lost if the CPS exercised a complete monopoly of advocacy in the Crown Court. The principal arguments are these:

—It is desirable that advocates should have a balanced mixture of defence and prosecution experience in order to develop a balanced approach and advocacy skills.

[1] Hansard, 25 June 1986, col. 159–160 (Written Answers).

—It is better if judges are appointed from those who have had such a balanced mixture of defence and prosecution experience.

—The future of the Bar, and the proper and efficient administration of justice, would be imperilled if the CPS had a monopoly of prosecution advocacy work.

68. The Advisory Committee accepts these arguments. In particular, the Committee sees force in the arguments that appearing in both defence and prosecution work is of considerable assistance in the development of a criminal advocate's skills. This factor must inevitably be most important when dealing with the more serious cases.

69. Secondly, the Committee believes that a mix of prosecution and defence work helps the advocate to appreciate the concerns of the other side, and develop a balanced approach to the presentation of evidence. This, too, must be a more important factor when more serious cases are involved.

70. Thirdly, the Committee accepts that any move towards a polarised profession in which there are exclusively defence and exclusively prosecution advocates is likely to have more diffused adverse effects on the proper and efficient administration of justice. The way in which cases are presented to the court is likely to become more polarised. Much more importantly, it would no longer be possible to appoint judges with wide, concurrent experience of appearing for both sides in criminal cases.

71. On the basis of these arguments, the Committee advises that the proper and efficient administration of justice would not be maintained if the prosecution of criminal cases in the higher courts were to be exclusively conducted by the CPS.

A mixed system

72. The CPS itself does not, however, look for such a monopoly. The Advisory Committee notes that the CPS's application envisages the Service doing only a comparatively small proportion of their advocacy work. This is because the CPS believes that it will always need full-time, consultant advocates to deal with the most difficult cases, because the advocacy skills needed at the highest levels are developed and maintained only by constant practice at that level. The application therefore acknowledges the need to preserve a wide pool of advocates of varied expertise from whom the most senior specialists can develop. The CPS proposes that its barristers should formally have full rights of audience in the Crown Court, but that those rights would be exercised only in a limited number of cases, none of which would exceed three days in length.

73. The Committee has therefore given careful thought to the desirability and feasibility of creating a 'mixed' system, where most prosecution advocacy in the Crown Court would continue to be undertaken by independent advocates, but the CPS would have the option of presenting a limited number of the less serious cases in-house. Such a limitation might, for example, be expressed in terms of a percentage of the Service's overall workload in the Crown Court.

74. In the Committee's view, it is important that, before any such extension were granted, the Service as a whole should have achieved and be maintaining a high standard in its present functions of preparing and presenting cases in the magistrates' courts and preparing Crown Court cases. The Committee notes that the CPS is a new element in the administration of justice. It has carefully considered accounts of the difficulties which the Service experienced in its first years, in terms of resources, manpower and organisation, and in establishing itself in relation to the police and the courts. The CPS has made great progress in overcoming those difficulties. The Service, however, remains below its complement in a number of areas, and evidence received by the Committee has raised doubts as to whether the CPS could now take on the additional responsibilities of providing advocacy services in the higher courts whilst maintaining the proper and efficient administration of justice.

The arguments for a mixed system

75. It is against this background that the Committee has considered the arguments put forward by the CPS itself in favour of a limited extension of its rights of audience.

76. The principal arguments are these:

—The lawyers employed by the CPS are full members of their professional bodies, well trained and effectively regulated. They are as independent as any other members of their profession.

—It is illogical, and incompatible with the general principle, for them to lose rights of audience the day they join the Service, and regain them the day they leave.

—The CPS could give a better standard of service in the courts, particularly by avoiding returned briefs being given to substitute counsel of a lower level of experience than the one originally chosen for a case.

—The CPS's decision-making would improve if those who did the work, or supervised it, had first-hand experience of presenting cases in court.

—The morale of existing staff, and the quality of recruits, could be improved if the CPS could offer the prospect of progressing to appear in the higher courts.

—It would cost the tax-payer less if the CPS was able to use its own advocates in at least some cases.

The arguments against a mixed system

77. As against this, it has been put to the Committee that even a limited extension of the CPS's rights of audience would not maintain the proper and efficient administration of justice. The principal arguments advanced against any extension are these:

—There is a fundamental constitutional principle that the advocates who prosecute in serious criminal charges should not be employees of the Government department which has taken the decision that the prosecution should proceed.

—CPS advocates could not be sufficiently independent to carry out their duties as prosecutors.

—A mixed system would be against the public interest, because some defendants would be prosecuted by independent advocates and some by CPS staff.

—Any extension would be the thin end of the wedge leading inevitably either to a total CPS monopoly, or to a drop in recruitment to the private Bar and loss of existing barristers which would in the long run amount to the same thing.

The Advisory Committee's views

78. The Advisory Committee has examined carefully the arguments put forward on both sides. It considers that the most fundamental are those which relate to the claimed constitutional principle and to the advocate's independence.

A constitutional principle?

79. First, despite its opposition to a CPS monopoly of prosecution advocacy, the Committee does not agree that the question whether CPS employees should have rights of audience in the higher courts is a matter of constitutional principle. Parliament has given Crown Prosecutors the rights of audience now enjoyed by solicitors to enable them to present prosecution cases in the magistrates' courts, and has left the question whether they should do so in the Crown Court open to change by the arrangements for determining rights of audience, now the framework set up under the 1990 Act.

80. Apart from matters of constitutional principle, it has, nevertheless, been a tradition in England and Wales that state prosecutors do not present cases in the higher courts.[1] In contrast, in a number of Commonwealth countries with legal systems very like that in England and Wales, advocates employed by the state are permitted to appear in all courts.

Independence

81. As explained in paragraphs 33–38 above, the Committee has heard evidence that there is a real risk that any employed advocate will be subject to a range of pressures. This has been a major factor in the Committee's view that employed barristers should not generally have rights of audience in the more serious and complex cases. The CPS's position is, however, clearly more complicated than that of other organisations where employed barristers work. Most importantly, the CPS has been established to achieve a single set of objectives, providing a fair but effective prosecution system. The direct and indirect pressures which might apply to employees will, at least, not come from conflicting objectives.

82. Moreover, as the only substantial source of prosecution briefs, the CPS is a major factor in the market for advocacy services in the criminal courts. Independent barristers who derived a significant proportion of their practice from prosecution work might well feel, not having the protection of the employment legislation, that they could be put under pressure by the CPS to work in certain ways.

83. The Advisory Committee does not believe that it is inherently impossible for employed prosecutors to maintain sufficient independence to carry out their duties fairly. In both common and civil law jurisdictions, employees of prosecution services very often appear in serious cases. In particular, the Advisory Committee has had evidence from the Crown Agent in Scotland on the Procurator Fiscal system there. On the basis of that evidence, the Committee accepts that it is possible to manage a prosecution system, whose advocates appear in all but a very small proportion of the cases that would here be heard by the Crown Court, on the basis of an ethic of fairness to all the parties involved in a prosecution, successfully avoiding unhealthy prosecution-mindedness. The Committee notes, however, that the office of Procurator Fiscal has had many years in which to develop that ethic. Historically the office is senior in age and status to the police, and there is active involvement and supervision of the more difficult cases by senior members of the Bar seconded to the service in a way which it would be difficult to replicate in the larger jurisdiction of England and Wales.

CPS organisation

84. The Committee considers there are three factors in the way the CPS is organised which considerably assist it in developing as a fair and independent prosecution system. First is the fact that it exists only to be an independent prosecuting service. Secondly, the independence of the Attorney General, to whom it answers, from direct political pressure in relation to prosecutions has long been recognised. Thirdly, the Prosecution of Offences Act 1985 gives the Director of Public Prosecutions and individual Crown Prosecutors individual statutory responsibilities for the cases which they conduct. This puts them in a different position from the Civil Service in general, which 'as such has no constitutional personality or responsibility separate from the duly constituted Government of the day . . . The duty of the individual Civil Servant is first and foremost to the Minister of the Crown who is in charge of the Department in which he or she is serving'.[2]

[1] The Law Officers of the Crown, including the Attorney General, do sometimes appear in court in cases of exceptional public interest.

[2] The Duties and Responsibilities of Civil Servants in relation to Ministers: Note by the Head of the Home Civil Service; Hansard, 2 December 1987, col. 572–5.

The assessment of Crown Prosecutors

85. The Committee has considered with particular care the argument that the rate of successful prosecutions will be used by the Service and by prosecutors as a central, or sole, indicator of performance, with the result that prosecutors will strive too hard for conviction and be tempted not to reveal evidence favourable to the defence. The Committee has considered the range of factors which are used to assess Crown Prosecutors' performance and suitability for promotion. These include intellectual penetration, good judgment, capacity for management and effective team relations, as well as competence. The outcome of the cases undertaken by an individual is inevitably to be taken into account in assessing the last of these factors, in particular, but the Committee accepts that the CPS does not believe that conviction rates, as opposed to the efficient management of cases, can be used even as a crude yardstick of success for its employees.

86. For all these reasons, the Committee does not accept the arguments that CPS employees could not be, and be seen to be, sufficiently independent to carry out the duties of advocates in the higher courts.

87. The CPS was, however, established on the basis that appearing in the higher courts would not be part of its functions. The Committee is seriously concerned by some of the evidence it has received on the present performance of the CPS, which suggests that the Service as a whole is not yet at a stage where it could demonstrate to the satisfaction of the public, the courts and others involved in the criminal justice system that it was ready to take on new responsibilities in the higher courts.

88. The Committee has considerable sympathy with the CPS's arguments that rights of audience in the Crown Court would improve decision-making, enhance morale and raise the standard of recruitment to the Service. The Committee does not, however, consider that these reasons alone would at the present time be sufficient to justify an extension of rights.

89. The Committee also sees force in the CPS's contention that it would be able more effectively to deal with the problem of returned briefs if it had the option of presenting some cases in-house. It is unlikely, however, that the use of in-house advocates on the limited scale envisaged by the CPS would have a significant impact on this problem, to which, in the Committee's view, a more radical solution needs to be found.

Fairness to defendants

90. The Committee finds it difficult to see the force of the argument that it would be unfair for some defendants to be prosecuted by independent advocates and others by the CPS, given that barristers appearing in the Crown Court as Crown Prosecutors would be governed by appropriate professional standards and codes of conduct. The Committee has, moreover, seen no evidence of problems in this respect in the magistrates' courts, where prosecution work is shared between CPS advocates and private barristers or solicitors working as agents for the CPS.

The future of the Bar

91. The Committee does not accept that a limited extension to the CPS's rights of audience would necessarily have a seriously damaging effect on the Bar. That could only happen if there was a collapse of confidence in practice at the criminal Bar as a worthwhile career on the part of present or potential members. It is clear that considerable caution is needed in determining what kind of extension should be permitted, and how it should be controlled, without causing an unduly adverse effect on the structure of the Bar, on its future, and therefore on the availability of advocacy services, at least in the short term.

The ' thin end of the wedge '

92. The Committee accepts that it is not the CPS's present intention to use its in-house advocates for more than a small number of the less serious Crown Court cases. Both the Bar and senior members of the judiciary have, however, expressed great anxiety that this would be the ' thin end of the wedge ', leading inexorably to a virtual monopoly by the CPS of all Crown Court prosecution advocacy.

93. The major problem, in the Committee's view, is the absence of any really effective mechanism to ensure that the CPS could not, either immediately or in the future, exceed whatever limit had been set on the number of cases in which it could appear in the Crown Court. The CPS itself proposes that its in-house barristers' rights of audience would be exercised in accordance with guidelines to be laid down by the Attorney General. The approach adopted by a particular Attorney General would not, however, be binding on his successors. Indeed, the Committee notes that when the CPS was set up, it was on the basis of a statement from the then Solicitor General that rights of audience in the Crown Court would continue to be confined to an independent Bar which prosecutes and defends.[1]

94. In the Committee's view, it would be more appropriate, and in keeping with the spirit of the new legislation on legal services, if the exercise of any extended rights of audience granted to the CPS could be controlled by the framework set up under Part II of the Courts and Legal Services Act. This would, in particular, provide the important reassurance that any rights of audience granted to CPS advocates could only be exercised within limits approved by the senior judiciary, as well as the Lord Chancellor and the Advisory Committee itself.

95. There is, however, no certain way in which that can be achieved within the procedures which the Act now lays down. The Committee believes that it would be inappropriate to extend the rights of audience of CPS barristers in the absence of machinery by which the limits to be imposed on the amount of work done by the CPS can be brought under the control of the statutory framework, with its careful balance of Government, the judiciary, and independent advice.

The Royal Commission on Criminal Justice and the future of the CPS

96. There is another important factor. Any question relating to rights of audience is to be determined by the framework established under the Courts and Legal Services Act. Shortly after the Committee started work, however, the Government announced the appointment of the Royal Commission on Criminal Justice, whose terms of reference clearly raise fundamental issues for the future system of prosecutions in this country. For example, the particular nature of the advocate's duties to the court is shaped by the adversarial nature of the proceedings. If the courts were given enhanced inquisitorial duties of some kind, that might radically change the role of the advocate.

97. The Royal Commission is also specifically directed to consider the role of the prosecutor. The Advisory Committee has noted reports that a number of the more substantial submissions to the Royal Commission have argued for the CPS's powers and authority in relation to the police to be augmented, and for the Service to be involved in cases at an earlier stage than happens at present. If such changes were to find favour, the issues over rights of audience would become significantly different and perhaps more complex.

Conclusion

98. On all these grounds the Committee has concluded that at the present time it would not be right to extend the CPS's rights of audience into the higher courts.

[1] Hansard, 16 April 1985, col. 215–216.

SECTION VII: THE SERIOUS FRAUD OFFICE

99. The SFO is not a statutory body, and its employees do not enjoy the special status of those civil servants who have specific statutory duties. The SFO deals, however, with a comparatively small number of cases, representing some of the most serious and complex criminal work. That work is closely supervised by its Director, who has independence equivalent to that of the DPP. The Committee accepts also that the special nature of the SFO's work means that the experienced lawyers who work within it have had to develop new ways of working to deal with the ever-increasing size and complexity of the cases.

Independence

100. For the same reasons as in the case of the CPS, the Advisory Committee sees no overriding objection of principle to allowing barristers employed by the SFO to present cases in the Crown Court, and is satisfied that individual SFO lawyers can act with the appropriate independence and objectivity. The SFO is, however, directly involved in the investigation of cases as well as with the later stages of preparation and presentation in court, although internal organisation of the office ensures that, within the team working on a particular case, an investigating lawyer does not make the decision to prosecute or become involved in the detailed preparation of the case for trial.

Quality of service

101. In the SFO's submission, the quality of service would be improved if they could use in-house junior counsel in the way proposed, because in-house advocates would be able to appear in pre-trial reviews and preparatory hearings, which often cause practical problems for independent counsel. It is also pointed out that the use of in-house advocates would improve the quality of case presentation, since they have more detailed knowledge of particular cases, and are more familiar with the evidence.

Conclusion

102. The minor change proposed by the SFO would in practice make very little difference to the present arrangements, where an SFO case controller usually sits in court behind counsel as 'instructing solicitor'. The Committee does not, in any event, think it right to deal with this by giving SFO lawyers wider rights of audience than those enjoyed by the CPS.

SECTION VIII: SUMMARY AND CONCLUSION

103. The Advisory Committee believes that the maintenance of the proper and efficient administration of justice requires cases in the higher courts to be presented by advocates who are fully and demonstrably capable of handling a case objectively and fairly, and are not unduly influenced by pressure to please their clients. In the case of advocates who are representing their employers, the Committee is not persuaded that the appropriate degree of impartiality and detachment can be established and demonstrated unless there are substantial safeguards in addition to those provided by the advocates' code of professional conduct. These would probably need to take the form of considerable restrictions on the other functions within an organisation that could be carried out by an employed barrister who wished to appear in court. On the evidence presented to it, the Committee has concluded that there are not sufficient safeguards in relation to barristers employed in local government or the private sector.

104. The Government Legal Service does have the additional safeguards provided by the Code for Crown Prosecutors and a special relationship with the Attorney General, but there is still a substantial risk that barristers employed in Government departments will be, or be seen to be, identified with the policies of their departmental Minister.

105. Both the CPS and the SFO are in a different position. These organisations are dedicated to the prosecution of offences, with no conflicting policy aims and with appropriate safeguards to protect the independence of individual prosecutors.

106. In considering what is needed to maintain the proper and efficient administration of justice, the Committee's other main concern has been to ensure that advocates granted rights of audience in the higher courts would appear there sufficiently frequently to maintain their skills at an appropriate level. The evidence received by the Committee suggests that not all barristers in local government, the private sector or the Government Legal Service have the opportunity to appear in court regularly. Those in the CPS and SFO are, again, in a different position.

107. For these reasons, the Committee does not believe that barristers employed in the private sector, in local government or the Government Legal Service should at present be allowed to appear as advocates in the higher courts. For the reasons explained in paragraphs 67–98 above, the Committee also thinks it inappropriate at present to give rights of audience in the Crown Court to barristers in the CPS and SFO.

108. It therefore follows that, had the Advisory Committee been considering rule 402.1(c) of the Bar's Code of Conduct as a new rule, it would now have concluded that the rule was appropriate in accordance with the general principle and statutory objective. The Committee's advice is therefore that the rule should be deemed to have been approved.

Procedure

109. It follows from the Committee's conclusions on employed advocates that the possibility of allowing them to exercise some rights of audience in the higher courts at some time in the future is not to be precluded. Although it appears to the Committee that section 31 of the Act will not permit a further question to be raised about the Bar's rule 402.1(c) once it is deemed to have been approved, there are several ways in which the question of rights of audience for employed lawyers could effectively be reopened.

Annex A

THE ADVISORY COMMITTEE'S WORK ON THE QUESTION

Meetings

1. Since 26 April 1991, when the Lord Chancellor referred the question raised by the CPS and GLS to the Advisory Committee, the Committee has discussed the question at 10 of its full-day meetings, and at a two-day residential conference.

Visits

2. All Committee members have visited a CPS Branch Office, and have observed proceedings at a magistrates' court in which CPS lawyers were conducting the prosecution. The courts and offices visited were: Brighton, Luton, Manchester, Nottingham magistrates' court, West London magistrates' court and Inner London CPS. As detailed in the advice on the Law Society's application, members also visited Crown Court centres on a number of occasions.

Consultation

3. The Committee issued a press notice on 30 May 1991 inviting comments on the submission from the CPS and GLS. Over 60 consultation papers were sent out, and replies were received from the following individuals and organisations:

(a)	Judiciary	1. Council of HM Circuit Judges 2. A group of judges sitting regularly at the Central Criminal Court 3. A Metropolitan Stipendiary Magistrate
(b)	Legal Profession and Representative bodies	4. The General Council of the Bar 5. The Law Society 6. The Bar Association for Commerce, Finance and Industry 7. The Bar Association for Local Government and the Public Service 8. Fleet Street Lawyers' Society 9. Gianni Manca (immediate past President of the Consultative Committee of the Bars and Law Societies of the European Community—CCBE) 10. Association of First Division Civil Servants 11. Trades Union Congress
(c)	Employers of Lawyers	12. British Gas 13. ICI Group 14. British Broadcasting Corporation 15. British Railways Board 16. Lloyds of London 17. Association of District Councils 18. Association of British Insurers 19. Legal Aid Board
(d)	Law Teachers	20. Committee of Heads of Polytechnic Law Schools 21. Professor Bailey (University of Nottingham) 22. Professor Michael Zander (London School of Economics)
(e)	Consumers	23. Legal Action Group

4. There was a clear split between respondents who favoured extending employed lawyers' rights of audience in the higher courts, and those who were fundamentally opposed to any extension. Among the latter there was particularly strong opposition to CPS advocates in the Crown Court. The main issues of principle raised in responses were:

—independence and conflicts of interest;

—the danger of ' prosecution mindedness ' and the need for a balanced mix of defence and prosecution work; and

—the effect on the independent Bar of CPS lawyers acquiring a virtual monopoly of Crown Court prosecution work, and of in-house lawyers generally taking on more advocacy.

5. The Committee also sought and received written evidence on prosecution rights of audience in a number of Commonwealth jurisdictions, and Scotland. In the case of the latter, the Chairman and Secretary visited offices of the Procurator Fiscal Service in Edinburgh.

Oral evidence

6. The Committee received oral evidence on the question raised by the CPS and GLS from the following bodies:

The CPS and GLS

The Bar Association for Commerce, Finance and Industry

The Bar Association for Local Government and the Public Service

The General Council of the Bar

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