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

Annual Report for 1993–1994

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*
18th October 1994

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

This is the third annual report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct.

Since I took over from Lord Griffiths as Chairman of the Lord Chancellor's Advisory Committee on Legal Education and Conduct in October 1993 I have been struck by the confusion which exists about the status and role of the Committee. It is wholly independent of the Government, the Lord Chancellor's Department, the Bar and the Law Society. It was created by the Courts and Legal Services Act 1990 as a separate and independent statutory body. It has its own premises. It has its own staff, appointed by the Committee from the civil service and recruited directly. It has its own budget. It is beholden to nobody. The Committee's guiding principles are the provisions of the Courts and Legal Services Act 1990 and the public interest.

The Committee is in the business of rendering a public service. It issues formal reports and advice from time to time. It also acts pro-actively by inviting interested parties to discuss evolving policy decisions with the Committee. The most important decisions are taken by the full Committee. But it also acts through sub-committees, which are available at short notice for informal discussions with interested parties. Thus his Honour Judge Gower has chaired a sub-committee on the continuing problems regarding conditional fee agreements. And Dr Bob Hepple, the Master of Clare College, Cambridge, is now chairing a liaison committee to discuss problems regarding legal education and conduct which beset the Bar and Law Society. Interested parties are encouraged to avail themselves of such informal discussions with our sub-committees. In addition our splendid and highly qualified secretariat is always available to interested parties and the media for advice and guidance.

Johan Steyn.

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1: The Committee

Membership

1.1 The members of the Advisory Committee are 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 lawyers, 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 first membership was appointed as from 1 April 1991 for an initial period of 3 years, with the possibility of renewal up to the maximum 5 years' service permitted by the Act. The membership at the beginning of the year was:

The Right Honourable The Lord Griffiths MC (Chairman)	Lord of Appeal in Ordinary
Mrs Liliana Archibald	Chairman, Adam Brothers Contingency Ltd; Director, Holman Wade Insurance Brokers Ltd, 1989-92
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	Member of the Employment Appeal Tribunal; General Secretary, Electrical, Electronic, Telecommunication and Plumbing Union, 1984-92
Mr Brian Harvey	Solicitor; Recorder of the Crown Court
Mr John Hosking CBE JP	Chairman, Agra Europe (London) Ltd; Chairman of the Magistrates' Association, 1987-90
Mr Patrick Lefevre	Lay Worker, Brent Law Centre; Founding Director, Public Law Project
Mr Luke March	Director of Compliance, TSB Group plc
The Reverend Dr Colin Morris	Director, Centre for Religious Communication, Westminster College, Oxford; Controller, BBC Northern Ireland, 1987-90

Dr Claire Palley	Constitutional Adviser, Republic of Cyprus; Principal of St Anne's College, Oxford, 1984-91
Ms Usha Prashar	Civil Service Commissioner; Director, National Council for Voluntary Organisations, 1986-91
Mr Nicholas Purnell QC	Barrister; Chairman of the Criminal Bar Association, 1990-91
Mr Peter Scott QC	Barrister; Chairman of the General Council of the Bar, 1987
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	Retired Chief Inspector of Schools, Nottingham

Membership changes

1.3 During the summer, we learnt with regret that our first Chairman, Hugh Griffiths, intended to retire as a Lord of Appeal in Ordinary, and therefore as Chairman of the Advisory Committee, with effect from 30 September. We were privileged to benefit from his imaginative and forward-thinking contribution to our discussions, and the tactful good humour with which he presided over our work. We wish him and Lady Griffiths a long, happy and active retirement.

1.4 The Right Honourable Lord Justice Steyn was appointed to serve as Chairman from 1 October 1993. We were glad to welcome him.

1.5 Later in the year, we learnt that, whilst other members were re-appointed for a further two years, Liliana Archibald, Brian Harvey, John Hosking, Patrick Lefevre, Luke March, Colin Morris, Claire Palley and Peter Scott would not be continuing as members of the Committee. They represented a wide variety of experience and of views, and those of us who served with them would like to record our gratitude for their contributions to our thinking and the Committee's work.

1.6 In March 1994, the Lord Chancellor announced his new appointments to the Committee. They were:

Mr Lee Bridges	Principal Research Fellow, University of Warwick
Dr Bob Hepple	Master of Clare College, Cambridge; Visiting Professor of Law, University College, London; Barrister
Mr Neville Hunnings	Editor, Common Market Law Reports
Mr Ian McNeil JP	Chartered Accountant; President of the Institute of Chartered Accountants, 1991-92, and currently Chairman of the Disciplinary Committee; magistrate and Chairman, Hove Bench, 1988-89
Mr Charles Plant	Solicitor; Head of Litigation, Herbert Smith
Professor Peter Scott	Professor of Education, University of Leeds; Editor, Times Higher Education Supplement, 1976–1992
Mr David Steel QC	Barrister; Chairman, Commercial Bar Association 1989-1991

Mrs Mary Tuck	National Chair, Victim Support; Member of Parole Board; Head of Home Office Research and Planning Unit 1984-90

Staff

1.7 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).

1.8 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 1993-1994 are:

Mr A E Shaw (Secretary)
Miss B M Griffith-Williams (to January 1994)
*Professor P Hassett (to July 1993)
*Mr K M Economides (from August 1993)
*Miss R M Lyon
Ms P A Bell
Ms J Patterson
Mrs L Chittell
Mrs D Patrick (to November 1993)
* Staff directly recruited by the Committee.

1.9 We would particularly like to record our thanks to the two key members of staff who left us during the year. In July, Patricia Hassett returned to teach law at Syracuse University, New York State. She was succeeded by Kim Economides, from Exeter University. In January, Brenda Griffith-Williams returned to the Lord Chancellor's Department. Each gave us distinctive, and distinguished, assistance, and we wish them well.

Statutory functions

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

2: The Committee's Work, 1993-1994

2.1 This report covers the year from April 1993 to March 1994. The item to which we have always given greatest priority throughout this period has been the Law Society's application for extended rights of audience for solicitors. In July, we submitted advice to the Lord Chancellor and designated judges. In December, they asked for further advice on some aspects of the application, and we have made preparations for this work, but necessarily left its completion to the newly constituted Committee.

2.2 We have also given advice on a number of applications from both the Law Society and the Bar Council to amend their training regulations and rules of conduct in respect of the litigation and advocacy rights they currently grant to solicitors and barristers.

2.3 There has been a further round of discussions on the application from the Chartered Institute of Patent Agents for the right to conduct litigation in certain High Court proceedings. We began substantive consideration of the application from the Institute of Licensed Debt Practitioners for advocacy and litigation rights in uncontested county court debt proceedings.

2.4 Towards the end of the year, we received two further applications for new rights. The first was from the Institute of Legal Executives to be authorised to grant advocacy rights to the Institute's Fellows in their own right in specified areas of civil, criminal or coroners' court work. Secondly, we received an application for litigation rights in (broadly) construction and engineering cases in the county and High Courts from a new body, the Institute of Commercial Litigators.

2.5 About one-third of our time throughout the year has been given over to considering the initial stage of legal education, as part of the first stage (concentrating on training for barristers and solicitors) of our full-scale review of legal education.

2.6 We have continued to make preparations for our role in the new arrangements under the 1990 Act for probate work, which we now expect to be implemented in the summer of 1994.

2.7 All these areas of our work are discussed in greater detail in sections 3-11 below.

2.8 Our basic working pattern of two full days each month has continued, some of these days being devoted to briefing visits rather than full Committee meetings. In order to cope with our expanding work programme, however, much work has been delegated to sub-committees and small working groups meeting outside the regular Committee programme. Membership of the sub-committees and working groups is as follows.

Education Sub-Committee

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

Conduct Sub-Committee	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)
Probate Sub-Committee	Judge Gower (Chairman) Lord Griffiths (*ex officio*) Mr Hammond Mr Harvey Mr Hosking Mr Wilkins Miss Griffith-Williams (Secretary)
Education Review Planning Group	Professor Card (Chairman) Mr Lefevre Mr Wilkins
Working group on the education and training aspects of the Law Society's application	Professor Card (Chairman) Mr Scott/Mr Purnell Mr Ward Mr Wilkins
Working group on rights of audience for employed solicitors	Lord Griffiths (Chairman) Judge Gower Mr Harvey Mr Lefevre Ms Prashar Mr Scott/Mr Purnell Mr Smith

2.9 Members have continued to make briefing visits in connection both with specific applications and with the education review. Guest speakers have attended a number of our regular meetings to keep us informed on aspects of legal education and professional practice.

2.10 We are very grateful to all those who have helped to organise visits, offered us hospitality, responded to our various consultation papers and taken the time to talk to us about their work.

Accounts

2.11 The financial statement and accounts can be found at the back of this report. They record that this year we received some contingency funding for a possible increase in accommodation costs. In the event, we were able to avoid this increase, and return money to the Lord Chancellor's Department.

3: The Law Society's Application for Extended Rights of Audience for Solicitors

3.1 Our first annual report, for 1991-1992, records our work on the Law Society's application of April 1991 to extend the rights of audience it is authorised to grant to solicitors in the higher courts. Our advice to the Society on the first stage of the application is reprinted as Appendix B to that Report.

3.2 Having considered our advice, and discussed some aspects of the application further with us, the Law Society amended its qualification regulations and rules of conduct early in November 1992, and applied to the Lord Chancellor for those amendments to take effect. He referred the application to us later that month. The Law Society made applications to make further amendments in February and in March 1993. At the time of our last annual report, we had largely formulated that part of our advice to the Lord Chancellor which dealt with solicitors in private practice, and we were still considering with the Law Society what form of regulation would be needed for employed solicitors who wished to appear in the higher courts.

3.3 This was being done through a working group, chaired by Lord Griffiths. Its membership is given at paragraph 2.8 above.

Employed solicitors

3.4 In April 1993, the Law Society applied to the Committee to amend the Employed Solicitors Code and its guidance on practice rules governing employed solicitors to make provision for the exercise of higher court rights of audience. During April, the Employed Solicitors Working Party visited a range of legal departments in local government and business organisations. It met at the end of the month to prepare its recommendations to the full Committee on the Society's April application. On 10 May, we advised the Society on that application. Having considered that advice, the Society amended its rules of conduct and applied to the Lord Chancellor, who asked for further advice on 19 May.

Local government and business

3.5 Our advice of April 1992 did not rule out extended rights of audience for lawyers employed in local government or business. We considered, however, that substantial extra safeguards were needed, in addition to the existing rules of conduct, to establish an appropriate working structure. It would be necessary, first, to ensure that employed advocates did not also carry out functions which might conflict with their duties in the higher courts, and, secondly, to protect them against undue pressure from their employers or non-lawyer colleagues. It was also important to ensure that advocates appeared frequently enough to maintain the distinctive higher court skills.

3.6 Our subsequent discussions on employed solicitors have attempted to find ways in which these concerns might be met. The Society's applications of November 1992 and May 1993 restrict higher court advocacy rights for employed solicitors to those who meet certain conditions. Crucially, solicitors must work in

a separate legal department of at least three lawyers, with a head of department who has direct access to the highest level of decision-making authority in the organisation. We advised the Society that the head of the department should be employed exclusively on legal work, to avoid possible conflict with other managerial or policy duties. The Law Society did not accept this advice.

CPS and GLS

3.7 Our April 1992 advice also recorded that we rejected arguments that there was a constitutional principle against the CPS and GLS undertaking Crown Court advocacy. None of those who gave evidence to us, however, wanted to see a virtual state monopoly of prosecution advocacy in the higher criminal courts, and we agreed. We therefore advised that the procedures introduced by the Courts and Legal Services Act 1990 should be changed, to enable the Lord Chancellor and the designated judges themselves to control the proportion of any higher court prosecution advocacy which might be undertaken by Crown employees. This was to counter the suggestion that even a limited extension of these lawyers' advocacy rights might be the thin end of a wedge.

3.8 The Law Society's final proposals would allow the CPS and GLS to do all their higher court advocacy work in-house, if they so chose. We could not agree to this. Our view was that if these advocates were to have rights of audience in the higher court, it should be on the basis that the rights should be limited, and controlled by the Act framework. We also believed that it was not appropriate to decide the conditions under which solicitors employed by other prosecuting authorities might appear in the higher courts in isolation from the CPS. We saw further questions to be resolved before we could agree to this extension.

The July advice

3.9 On 2 July 1993, we submitted advice to the Lord Chancellor on all of the outstanding applications from the Law Society. The full text of that advice is appended to this report, as Appendix B.

3.10 We all accepted that the Society's proposals should identify those solicitors whose experience had equipped them to move on to advocacy in the higher courts, trained to a satisfactory level of competence in work which might be done by someone beginning to practise in those courts.

3.11 A majority of the Committee agreed that the Code for Advocacy which the Society proposed to apply to all solicitor advocates was appropriate. The code had been developed jointly with the Bar, and amended in response to our advice.

3.12 Overall our advice was therefore that the regulations governing higher courts rights of audience for solicitors in private practice could be approved. We had, however, to advise that the application in its present form should not be approved, because it did not contain all the provisions relating to employed solicitors that we considered necessary.

The decision

3.13 In December, the Lord Chancellor and the designated judges announced that they had approved, and given effect to, the application insofar as it related to solicitors in private practice. They deferred their decision on employed solicitors, and asked us to reconsider and complete our advice on employed solicitors in criminal proceedings.

3.14 We accordingly asked the Law Society, CPS and GLS whether there were comments or additional information they would wish us to consider before

preparing further advice. Having considered this material, we took the view that it was not possible to complete that advice before the change in membership. Our Chairman therefore met the parties to the application and explained to them that the changes over the year would mean that the majority of the Committee which gave final advice would be differently constituted, and that it would be sensible to plan on the basis that the new members would want to consider all the issues afresh. It was agreed that further submissions should be prepared, to be submitted to the newly constituted Committee.

4: Authorisation Applications Already Received

Chartered Institute of Patent Agents

4.1 In September 1991, the Chartered Institute of Patent Agents submitted an application to become authorised to grant to its members the right to conduct litigation in patent proceedings and certain other intellectual property matters in the High Court. Our last annual report records that we have considered this application in some detail. Towards the end of the year, we suggested to the Chartered Institute that it might consider limiting the scope of the application to proceedings within the jurisdiction of the Patents Court, to simplify the task of devising an appropriate training programme.

4.2 Following an indication from the Chartered Institute that it would be prepared to proceed on this basis, its representatives met with Professor Card to discuss in greater detail its present training arrangements, and how they should be extended to provide suitable training for litigation work in this area of the High Court. We now await further proposals from the Chartered Institute.

The Institute of Licensed Debt Practitioners

4.3 In October 1992, we received an application from a new body, the Institute of Licensed Debt Practitioners in England and Wales, to be authorised to grant rights of audience and the right to conduct litigation in uncontested proceedings for the recovery of debt in the county courts. In August, the Chairman met Institute representatives to discuss the application, and how we might brief ourselves to undertake work on the application. Between September and January, we undertook a wide range of briefing visits, to acquaint ourselves with the ways in which debt cases are now dealt with individually and in bulk. We visited large and small county courts, and the Summons Production Centre. We saw several firms of solicitors with extensive practices in debt work. Finally, we visited a range of debt management firms employing current or potential members of the Institute. During this period, the Education Sub-Committee discussed the education and training proposals in the application, to establish how clearly those proposals were focused on members' actual work.

4.4 We met Institute representatives in February, to discuss a number of emerging concerns about the application. We stressed the importance of an efficient and flexible disciplinary mechanism, to enforce the rules of conduct and to deal with complaints against members. It would be important to ensure that those appointed to carry out disciplinary functions are robust and independent. It would also be important to ensure that the Institute would be able to meet the significant costs involved.

4.5 Debt management companies often proceed on the basis that they will charge no fee if no money is recovered, and take a percentage of the amount recovered if they are successful. Such agreements would be champertous in relation to cases where proceedings had been issued, and although no longer criminal, nevertheless illegal and unenforceable. We stressed the importance of prohibiting such arrangements if the application were to succeed, and Institute representatives agreed to the addition of such a rule.

4.6 We also raised a number of more detailed points on the application.

4.7 We have discussed the application again at two of the remaining meetings before the end of this reporting year.

5: New Applications for Authorisation

5.1 After a helpful series of discussions with our secretariat, we received in November an application from the Institute of Legal Executives to be authorised to grant extended rights of audience in particular types of proceedings to Fellows of the Institute who are suitably qualified and experienced. The Institute proposed three separate certificates, authorising Fellows to appear:

(i) in open court in county courts on all matters within the general jurisdiction of a district judge; in magistrates' courts in (broadly) civil matters, including licensing and betting and gaming; and before tribunals;

(ii) in the county courts before district judges and in the (magistrates') family proceeding courts in a wide range of specified matrimonial proceedings; and

(iii) before coroners' courts.

5.2 In December, we issued a consultation paper asking for views on the application generally, and for comments on a number of specific points, to be received by April.

The Institute of Commercial Litigators

5.3 We received in December an application from a new body, the Institute of Commercial Litigators, which sought to be authorised to grant to Fellows of the Institute litigation rights in the High Court or county courts as appropriate in a range of actions including actions of a commercial nature arising in contract, tort and commercial law, apart from personal injuries actions (including Commercial Court actions, but excluding the Admiralty Court), in winding up of companies and bankruptcy, and Official Referees' business; and all associated appeals.

5.4 We met representatives of the Institute for a preliminary meeting in January, to find out more about the construction, engineering and surveying firms that had joined to form the Institute, and about the purpose of the application. We pointed out that the statement of the rights sought was potentially very broad, and then invited the Institute to consider a redefinition which stated more clearly the intention to practise in matters connected with the construction industry and engineering. We also pointed out a number of more minor matters which might help to clarify the application.

5.5 We received a revised application in March, and issued a consultation paper asking for general comments on it, as well as on a number of specific areas, by June.

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

6.1 Throughout the year we have continued to receive a number of applications from the Bar and the Law Society 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 within the framework set up under schedule 4, so far as they relate to the advocacy or litigation rights granted by the body in question.

6.2 The procedure for dealing with these applications is essentially the same as that which applies to substantive applications for new or extended rights of audience or litigation rights. It comprises a number of stages: initial consideration of draft regulations or rules by the Advisory Committee, followed by a formal submission from the authorised body to the Lord Chancellor, who must in turn seek the advice of the Advisory Committee and of the Director General of Fair Trading. The Lord Chancellor then sends copies of the advice to the applicant body, which has 28 days in which to make representations on the advice. At the end of the 28 day period, and taking account of the advice and any representations he has received, the Lord Chancellor considers whether the application should be approved. He then informs the designated judges of his decision, and they in turn consider whether or not the application should be approved. The application succeeds if the Lord Chancellor and each of the designated judges agree that it should.

QUALIFICATION REGULATIONS: THE BAR

ICSL selection

6.3 In our annual reports for 1991-1992 (paragraphs 4.4-4.5) and for 1992-1993 (paragraphs 6.5-6.7) we reported on the General Council of the Bar's decision to introduce a selection procedure at the Inns of Court School of Law (ICSL) because demand for places was exceeding capacity, culminating in the approval of a rule to introduce a selection procedure to cover the three academic years beginning in 1994-95. Although no actual application in relation to these matters arose during this year, this is probably a convenient place to report on further discussions on the application of this rule.

6.4 In November, we met the Chairman and Secretary of the Council of Legal Education (CLE), and the Dean of the ICSL to discuss progress on the course generally. This was a helpful meeting, which stressed the innovative character of the course, and pointed to a number of areas in which improvements were being planned, particularly in relation to assessment and teaching methods.

6.5 As the year progressed, the Committee were increasingly involved in suggestions that the assessment methods used at the ICSL were directly or

indirectly discriminatory. We had been aware of a number of complaints made in relation to the assessments for the 1991-92 course, which eventually led to the institution of proceedings for judicial review. Many of the students involved wrote to our Secretary, who met a group of them.

6.6 In May 1993, the CLE appointed an independent Committee of Inquiry under the chairmanship of Dame Jocelyn Barrow to examine all the issues raised by the disparity in pass rates between ethnic minority and white students on the Bar vocational course. Our Secretary gave evidence to the Inquiry in July 1993. Dame Jocelyn's Committee published an interim report in September 1993. We discussed this, and suggested a number of topics to be considered in work leading up to the final report. We made arrangements to discuss the final report with Dame Jocelyn before it was published in April 1994. It was already clear that the report would be a major piece of work, which would inform the Committee's work on training for the Bar and the review of legal education generally.

6.7 At the end of March 1994, the Bar published a substantial consultation paper on the future of training for the Bar. Although we do not normally comment substantively on consultation papers which are likely to form the basis of an application, we thought it would assist the Bar to have some general guidance on two topics. First, we reiterated our view stated during work on the present selection processes that we favoured the development of arrangements which would permit the Bar vocational course to be taught at more centres than the ICSL. Secondly, we made it clear that we see considerable advantages of principle and of practice in a large measure of common vocational training for barristers and solicitors.

Common Professional Examination

6.8 At the end of March 1993, the Bar and the Law Society submitted a joint application to amend their Directions to the Common Professional Examination (CPE) Board. The amendments dealt with two principal topics. First, they recognised the acquisition of university status by those former polytechnics where the CPE course was being taught. Secondly, they reflected a move to part-time, rather than external, study. The Committee approved the amendments.

Admissions and training

6.9 In May 1993 the Bar made an application to make a range of amendments to the Consolidated Regulations of the Inns of Court, and the CLE's Bar entry qualifications. The amendments covered a range of topics, including applications to become barristers by qualified legal practitioners from jurisdictions outside England and Wales, and from solicitors; pupillage; conditions for call (including amendments to the Dining Regulations); and arrangements for part-time qualifying law degrees. Although we encouraged the Bar to continue moves to make dining requirements the focus for training opportunities, we approved the amendments subject to some minor improvements.

Distinguished academics

6.10 In February the Bar applied to amend its training regulations to simplify the provision in relation to calling distinguished academic lawyers to the Bar. We approved these amendments.

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QUALIFICATION REGULATIONS: THE LAW SOCIETY

CPE students and articles of training

6.11 In July the Law Society applied to amend its Training Regulations 1989 and 1990 to bring to an end arrangements which permitted students who had completed the CPE to serve in articles before proceeding to the Final Course. The Society argued that these arrangements were no longer appropriate following the introduction of the Legal Practice Course, and of the Professional Skills Course to be taken during the training contract. The Committee agreed, and approved the amendments.

The Qualified Lawyers Transfer Regulations

6.12 The Law Society also applied in July to amend its Qualified Lawyers Transfer Regulations to update, following a review, the training requirements for foreign lawyers who wish to be admitted as solicitors. The 1990 Regulations followed changes introduced by the Courts and Legal Services Act 1990, which made the arrangements under which lawyers from other jurisdictions could be admitted as solicitors matters for the Law Society's general powers to make regulations about solicitors' education and training. They also incorporate the Society's arrangements to implement the EC Directive on the mutual recognition of higher education diplomas, to enable lawyers qualified in other EC jurisdictions to practise here.

6.13 When introducing the 1990 Act, the Lord Chancellor explained that the Law Society planned to introduce a coherent and consistent regime for the admission of both EC lawyers and those qualified in the jurisdictions for which provision was made in existing legislation. The Law Society would then proceed to review the list of jurisdictions. The first aim was achieved by the 1990 Regulations. The application represented the first stage of the accomplishment of the undertaking to review the position more generally, and included some more general improvements.

6.14 There were three broad groups of amendments:

(i) those dealing with jurisdictions currently included in the Regulations comprise the introduction of a general discretion to impose a requirement for practical experience in a lawyers' office, and make specific changes in respect of four jurisdictions;

(ii) those including India, all of Canada, Singapore, Malaysia, the United States of America, and the West Indies within the Regulations; and

(iii) those introducing a provision for senior academic lawyers to be admitted as solicitors, and a discretion to admit distinguished practitioners who did not fit categories already prescribed in the Regulations; and those making more minor relaxations in relation to the admission of barristers qualified in Northern Ireland, in Scotland and in England (as well as clarifying the appeal provisions).

These were clearly important issues. A small group of us met the Law Society to discuss the application in August, and we subsequently approved the amendments.

Certificate of Completion of the Academic Stage

6.15 In November the Law Society applied to amend its Training Regulations 1990 to bring its provisions on the Certificate of Completion of the Academic

Stage into line with the Bar's. The Society's rules allowed potential trainees to apply for a certificate of completion up to five years after obtaining their degree. That certificate remained in force for three years, giving a total theoretical maximum of eight years from completing a law degree to commencing a vocational course. The respective figures for the Bar are seven years and two years, giving a theoretical maximum of nine years. The Society wished to have the same arrangements. We saw obvious logic in both branches of the profession having similar regulations on this issue, and approved the amendments.

RULES OF CONDUCT: THE BAR

Discrimination, standards and miscellaneous

6.16 In May, the Bar Council applied to make a range of amendments to the Bar's Code of Conduct. The amendments extended and clarified the rules and guidance on the conduct of professional work in relation to criminal cases. Arrangements were made for attendance at pleas and directions hearings, and for the special handling of video recordings of child witnesses. The rules governing the timely return of instructions or briefs to professional clients or to other barristers acceptable to professional clients were strengthened. The Bar's rules prohibiting discrimination were also extended to include sexual orientation, disability and marital status. The Committee approved these amendments.

RULES OF CONDUCT: THE LAW SOCIETY

Conditional fees

6.17 In our first Annual Report (paragraphs 4.6-4.9), we reported that the Law Society had applied to amend the Solicitors Practice Rules to remove the complete prohibition on solicitors entering into any form of contingency fee arrangements, and to enable solicitors to enter into conditional fees under the terms of section 58 of the Courts and Legal Services Act. 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. We also responded to the Lord Chancellor's consultation on the form of the conditional fee scheme.

6.18 A draft Order and draft Regulations were issued by the Lord Chancellor's Department in May 1993, and the Society renewed its application. The scheme embodied in the draft legislation made two significant changes to the proposals in the earlier consultation paper. First, the scope had been widened to include insolvency-related cases and European Court of Human Rights cases, as well as personal injury. It did not, as we had suggested, include defamation. The second change was to increase the maximum permitted uplift that lawyers were to be entitled to add to normal fees from 10% to 20%.

6.19 The changes the Law Society sought did nothing more than enable solicitors to make conditional fee agreements in the terms for which the Act provided. Subject to a minor technical amendment, we therefore approved it.

6.20 We had, however, a number of concerns about the implementation of the scheme which we put to the Society on the basis that it might wish to introduce formal guidance for the profession which would require approval under Schedule 4 to the 1990 Act. We suggested there should be guidance on the interpretation of the Order and Regulations, which might take the form of a model conditional fees agreement. We thought that agreements should explain the circumstances in which the fee would become payable, and make it clear that the mark-up might

have to be paid out of the client's own pocket. The baseline for the mark-up should also be specified in the agreement, and solicitors might need to be reminded that it applied only to fees and not expenses. This in turn raised the issue of barristers' fees, and how conditional agreements were reached between litigator and advocate.

6.21 We separately advised the Lord Chancellor's Department on the terms of the draft legislation. We were concerned that there were a number of points in the drafting which needed clarification, and stressed the need for conditional fee agreements to be clear, readily comprehensible to lay people, and unambiguous. In the interests of both representatives and litigants, we suggested that the Regulations should give clear indication of what was required of a valid conditional fee agreement.

6.22 We were concerned to safeguard the interests of litigants who might be at risk of being unable to recover their costs from an opponent who had entered into a conditional fee agreement. We therefore suggested a requirement for a representative acting under a conditional fee agreement to give notice of that fact to the other party or parties. We later added to this, to suggest that the court, as well as the other party or parties, should be informed of the existence of a conditional fee agreement. We recognised that both these suggestions raised wider issues about the conduct of litigation, and in particular the extent to which it was proper for a party's financial circumstances to be disclosed. The Committee recommended that they should be considered in consultation with the judiciary and practitioners.

6.23 We also suggested that the Department might consider publishing an explanatory leaflet on the scheme for wide distribution, which would obviously have to be discussed with the professional bodies.

6.24 Our advice on the application was given on the basis that the maximum permitted uplift would be 20%. In August, we were informed that the Lord Chancellor had decided to increase this to a maximum of 100%. We were considerably concerned that uplifts of this size should be permitted at the introduction of the conditional fee scheme. We advised the Lord Chancellor that the safeguards we had suggested would assume an even greater significance if lawyers were permitted to charge double fees.

6.25 We were particularly concerned that a 100% uplift would substantially reduce the damages received by many plaintiffs, who were likely to be most vulnerable in personal injury litigation, where cases were often settled or damages reduced by a finding of contributory negligence. We therefore suggested that consideration should be given to restricting the uplift to a stated proportion of the damages recovered.

6.26 We were also concerned about the possibility of an increase in the amount of speculative and vexatious litigation, which is perhaps the main problem cited in the use of contingency fees elsewhere. We therefore advised that the operation of the scheme should be fully and effectively monitored. Such monitoring would need to begin at once, to enable before and after comparisons. We suggested a number of areas to be included in research, including the possibility of any weakening of the rule that costs follow the event, since this would now be the main safeguard for litigants whose opponents were proceeding under a conditional fee agreement.

6.27 The Lord Chancellor's response pointed out that the 100% uplift was of course a maximum, and it would be open to clients to negotiate a lower figure. He was not attracted to the idea of relating the uplift to the proportion of damages recovered.

6.28 We issued a press notice in November dealing with some of these concerns. We had encouraged the Bar to make arrangements for the implementation of the scheme, and to discuss it with us in the same month.

6.29 At the end of the year we were awaiting further drafts of the Order and Regulations from the Lord Chancellor's Department.

Anti-discrimination

6.30 In October, the Law Society applied to amend its rules of conduct to introduce new anti-discrimination measures. These measures included a new Practice Rule, prohibiting discrimination on the grounds of race, sex, disability or sexual orientation; a revised Code of Practice, dealing with discrimination in the most common areas of a solicitor's practice; and a model Anti-discrimination Policy for adoption by firms, which includes targets for the employment of ethnic minorities. In November, the Society sought guidance from the Committee about the issue of discrimination on the grounds of religion or creed. This issue was not discussed in the round of consultation which had preceded the application, or in the measures themselves. The Society took the view that it could not be included without a further round of consultation with the profession. We also received representations from the Association of Christian Law Firms and the Federation of Christian Lawyers, as well as a number of individual firms, protesting against the inclusion of the prohibition of discrimination on grounds of sexual orientation (which had been added to the proposals as a result of the response to the Society's consultation of the profession).

6.31 We are required by the Courts and Legal Services Act to have regard to the desirability of equality of opportunity between persons seeking to practice any profession, pursue any career or take up any employment, in connection with the provision of legal services. Our approach to the application was based on the principle that anti-discrimination measures should seek to ensure that people are allowed to enter the profession, and to succeed within it, on the sole basis of how good they will be, or are, at the job, and not on other grounds. That in turn requires arrangements for the choices which need to be made between people for the purposes of recruitment, career development and promotion to be made on criteria based directly, and only, on ability to perform the tasks of the job in question.

6.32 On the issue of religion, we advised the Law Society that a commitment not to discriminate on grounds of religious belief is an essential element in the mutual respect for individual conscience and privacy that members of an ethically founded and civilised society owe to each other. We would therefore not wish the application to proceed until the Law Society had considered what general anti-discrimination measures on this issue would be appropriate for the solicitors' profession. We urged the Society to make progress as quickly as possible.

6.33 The draft rules included an absolute prohibition of discrimination on grounds of race, sex or sexual orientation. In relation to disability, however, only unfair or unreasonable discrimination on grounds of disability was prohibited. We advised the Society that this distinction was unnecessary and inappropriate. The need to ensure that employers make fair and reasonable choices, and do not prefer or penalise individuals on irrelevant or unjustifiable or unfair grounds, is at the root of all measures for the avoidance of discrimination.

6.34 It is our general approach that sexual orientation should be included in any anti-discrimination policy and provisions to which it is relevant. Subject to the two points mentioned above, we otherwise generally approved of the draft rules. We did, however, remind the Society of the need to monitor the implementation of the anti-discrimination provisions, if it were to be in a position to see how things are working and to encourage further progress. At the end of the year we awaited the second stage of the application.

7: Professional Standards

7.1 The report[1] of the Royal Commission on Criminal Justice, under the chairmanship of Lord Runciman was published in July. The report is very wide-ranging. Although much of its subject-matter lies outside our remit, there is a great deal of direct or indirect relevance to our work. In particular, we are concerned by the sharp and informed criticism made in the report (and its associated research studies) about the standards of service of both branches of the legal profession. These will inform our work in many areas in the future, and we have stressed to both professional bodies their importance.

7.2 We discussed the Royal Commission's report on a number of occasions after its publication, and then drew up a note of the principal areas within our remit which we sent to the Bar, Law Society, Crown Prosecution Service and Lord Chancellor's Department. We then began a cycle of meetings to discuss the next steps. We met the Bar, Law Society and CPS in November, following which a note of suggested further action was prepared. We met representatives of the Association of Chief Police Officers in January. At the end of the year we had made arrangements for a discussion with the Lord Chancellor's Department. We had also made arrangements for a further tripartite discussion with the Bar, Law Society and CPS to discuss the research study *Standing Accused*.[2] This study, which draws on and takes forward research for the Royal Commission, makes wide-ranging criticism of both solicitors' and barristers' working practices, which we will consider in depth.

Bar Standards Review Body

7.3 In December the Bar Council announced the appointment of a Bar Standards Review Body under the chairmanship of Lord Alexander of Weedon QC to consider what measures were needed to improve standards and quality of service, in the light of the Royal Commission's recommendations and public expectations generally. A group of us met the Review Body in February. At the end of the year it was expected that the Review Body would shortly issue a consultation paper, making a range of recommendations.

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[1] Cm. 2263, London HMSO.

[2] *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain,* Mike McConville, Jacqueline Hodgson, Lee Bridges, Anita Pavlovic, Oxford, 1994.

8: Probate

8.1 In our last Annual Report, we reported on the establishment of the Probate Sub-Committee to make preparations for the implementation of the provisions in the 1990 Act which permitted applications from professional or other bodies to become "approved bodies" for the purpose of authorising their members to act as probate practitioners. That culminated in the issue in February 1993 of a consultation paper setting out our preliminary views on the training and conduct requirements we expected to see included in applications for "approved body" status.

8.2 We received 17 responses to the consultation paper. Some criticised the proposals as not being sufficiently stringent, in relation to training or to standards of services. We could not accept these criticisms, which seemed to us not to take adequate account of the legislative background. Section 54 of the Courts and Legal Services Act 1990 will enable (among others) banks, building societies and insurance companies to prepare papers for probate without any requirements for training or conduct above and beyond their existing forms of regulation. We felt that we had to take account of this fact when considering what criteria we would apply in advising the Lord Chancellor on applications for status as an approved body. We also have to take account of the comparatively few criteria which approved bodies are required to apply to those of their members they authorise to prepare papers for probate. We took the view that, for example, the purpose of the Act would be defeated if new probate practitioners were required to have a breadth of legal knowledge equivalent to that of a solicitor, particularly as they are not permitted to handle contentious probate proceedings. Nevertheless we expect the training and conduct regulations of approved bodies to aim at achieving standards as high as reasonably possible consistently with the provisions and purposes of the Act. Their members will be in competition with other probate practitioners. High standards of service on their part are likely to be reflected in a general improvement. All our proposals have aimed to provide the maximum consumer protection appropriate within the general framework of the legislation.

8.3 Apart from this general view, much of the comment we received was constructive and helpful. Our suggestion that probate practitioners should be trained in drafting and executing wills was largely approved, and a number of specific proposals or examples of appropriate training submitted. We consider that our approach must be flexible in order to take account of the varied previous training and experience that we would expect practitioners to have received.

8.4 Among the other topics on which we received helpful comments were the disclosure of criminal convictions and bankruptcy, the operation of complaints procedures, and indemnity insurance arrangements.

8.5 In the light of our discussions on the consultation exercise, we have prepared a note of guidance giving an indication of what we will look for in considering what advice to give on application. This was sent out to prospective applicants, and to other interested parties, in November. At the end of the year, the scheme had not yet been implemented. We understood that this is to happen in the summer.

9: The Standing Conference on Legal Education

9.1 The Standing Conference on Legal Education exists to encourage links between the teaching and practising branches of the legal profession, and the Committee. It met on two occasions during the year, and discussed a wide range of issues.

9.2 In particular, the Standing Conference has been an important focus of our consultations on the review of legal education, on which we report elsewhere (paragraphs 10.2-10.3).

9.3 We have been grateful for the assistance the members of the Standing Conference have given us with our work, and believe that the Conference has a valuable wider role. We were therefore pleased to learn of the Conference's decision that they would like our Secretary to act as the Secretary for the Standing Conference as well. This arrangement will apply from the next meeting.

10: The Review of Legal Education

10.1 We are required by the Courts and Legal Services Act 1990 to keep under review the education and training of those who offer to provide legal services, and to consider a range of specific topics. We reported last year on our decision that we should start our work on this aspect with a thoroughgoing review of legal education, beginning with a three-year stage concentrating on barristers and solicitors, and moving on to consider other primarily legal professions, and the members of other professions whose main functions are not the provision of legal services, but for whom the law forms an integral part of their training and work. That report also includes details of a wide, general consultation seeking views on the more important trends and developments in legal education, and our initial discussions and briefing visits.

10.2 We started this year by considering the responses we had received to the consultation exercise. We decided that the most helpful way to examine the responses in detail was to invite a range of those who had responded to discuss the issues with us. We therefore invited the members of the Standing Conference on Legal Education and a range of other people involved in legal training to a conference which we held at the beginning of July. The basis for the conference was a summary which we had prepared of all the consultation responses. A full conference report was also prepared. Both are publicly available.

10.3 The conference sessions focused on two broad areas: the content of the initial stage of legal training, and on how the stage should be delivered. We had sought, as far as possible, to avoid appearing to predetermine at least some of the approaches in these topics. We were therefore very considerably heartened by the extent to which the conference showed a widespread willingness for a collaborative approach to the issues, and a very large degree of consensus on what the important issues were. When we discussed the outcome of the conference, and of our round of briefing visits, it was clear that an overwhelming majority suggested the following topics for consideration during the review:

(i) Should there be a prescribed common core? If so, who should prescribe it; and how is it to be updated and developed? What are the implications for teaching methods and quality control?

(ii) Should any core be set in terms of: areas for study; principles; the skills needed at particular stages of development; or outcomes or competencies?

(iii) Particular core issues:
- (a) the development of a framework of fundamental principles and concepts;
- (b) the reduction of rote learning;
- (c) the place of theoretical and contextual work (jurisprudence, legal history, comparative law, sociology and politics) in the core;
- (d) the place of EC law; and
- (e) developing the distinctive conceptual and ethical approach of a lawyer.

(iv) The relationship(s) between the common core and (particularly obviously vocational) options. In particular, would a properly focused and rigorous training in principles of legal thinking enable a move away from trying to produce generalist lawyers, without producing non-adaptive specialists? Are there special concerns about modularisation?

(v) The shape and content of graduate conversion courses.

(vi) The role of assessment methods (especially as a quality control on teaching standards) and marking conventions.
(vii) The value of clinical teaching, and how it might be funded.
(viii) The interface with vocational training, and in particular the approach to integrated teaching (and what might be the right stage to decide which branch of the profession to join - including the possibility of wider common vocational training).
(ix) The value of integrated degrees, and their funding implications.
(x) The funding of law schools.
(xi) Student funding.

10.4 We took forward our work on the review in a number of ways. First, we completed a round of briefing visits. The first of our working groups, which concentrated its attention on law degrees from the academic, non-vocational point of view, visited the Cardiff Law School. The second group, which set out to consider law degrees from the point of view of providers of professional and vocational courses, visited Nottingham Trent University. The third, which considered the continuing education needs of the legal profession, and how these needs are affected by current developments in earlier stages of legal education, visit barristers' chambers and solicitors' firms.

10.5 We continued a wide-ranging programme of discussions with interested bodies. During this process we met the Chairman of the Committee of Heads of University Law Schools, representatives of the Higher Education Funding Councils for England and for Wales, the retiring Director-General of the Confederation of European Bars and Law Societies, consultants with experience of expressing professional training syllabuses in terms of competencies, and a range of assessors from the Funding Council's recent quality assessment of university law schools.

10.6 We also considered a wide range of factual and written evidence. We would like here, in particular, to say how grateful we were to the research projects which had been conducted by the Society of Public Teachers of Law and the Association of Law Teachers, whose factual information was the foundation of all of our work. We also examined closely the work of our predecessors in this field, the Ormrod,[1] Benson,[2] and Marre[3] Committees. We also felt it was important to be aware of the developments in other jurisdictions, and therefore considered the Armitage Report on Legal Education in Northern Ireland[4] and the Hughes Royal Commission on Scotland.[5] Finally, we examined the Pearce Report on Australia,[6] the Arthurs Report on Canada,[7] and MacCrate Report on the United States of America.[8]

10.7 We also decided we needed some further information on teaching and assessment methods in undergraduate law degree courses. In November we asked all law schools for broad information on their arrangements. The return rate was very high, and we are most grateful for the assistance which this information gave us.

10.8 We took decisions about the way in which we wished to conduct the review. We regard progress towards improvements in legal education, whether in universities or in the continuum of training for the profession, to be a collaborative enterprise. That approach involves us being as open as possible about how we see

[1] *Report of the Committee on Legal Education* (1971), Cmnd. 4594, London, HMSO.
[2] *The Royal Commission on Legal Services* (1979), Cmnd. 7648, London HMSO.
[3] *A Time for Change: Report of the Committee on the Future of the Legal Profession* (1988), London: The General Council of the Bar and the Law Society.
[4] *Report of the Committee on Legal Education in Northern Ireland* (1973), Cmnd. 579, London HMSO.
[5] *Report of the Royal Commission on Legal Services in Scotland* (1980), Cmnd. 7846, London HMSO.
[6] *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987).
[7] *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (1984), ISBN: 0–662–52436–5.
[8] *Legal Education and Professional Development – An Educational Continuum* (1992), ISBN: 0–89707–774–1.

the issues and the way forward, and inviting the best-informed comment to improve the results. This requires consultation and collaboration.

10.9 First, we decided that it would be sensible to set up a small group of those directly involved in initial-stage teaching, but including those with experience of specifically vocational training as well, with whom we could discuss our thinking as it developed. We therefore invited Professor Terrence Daintith (Director of the Institute of Advanced Legal Studies, London), Ms Ann Halpern (Legal Education and Training Group), Dr Bob Hepple (successively Professor of Law at University College, London, and Master of Clare College, Cambridge, who joined us as a member of the Committee from April 1994), Professor Richard Painter (University of Staffordshire), Professor Martin Partington (Bristol University), and Professor William Twining (University College, London) to form a Consultative Panel for the review.

10.10 Secondly, we decided it would be helpful to prepare a consultation paper setting out views on the initial stage, the response to which could inform both our work on later stages and the final recommendations. This consultation should be followed by a second round, in which we would take a year to produce views on vocational and continuing training, again to be set out in a second consultation paper which we plan to issue in June 1995. We aim to publish a major report at the end of 1995.

10.11 At the end of the year, the Education Review Planning Group had met five times, the two sub-committees set up to take forward detailed work on the review had met four times (in addition to regular discussions of the review at full Committee meetings), and the Consultative Panel had met three times. We had approved an outline of the consultation paper which it was planned to issue in the summer.

Major issues

10.12 There are two major issues which have increasingly concerned us over the year. First, in our last Annual Report we recorded our concern at the accumulating evidence of students' ever greater difficulties in obtaining finance for fees and living expenses, and in particular of sharp drops in the availability of local authority discretionary awards for vocational courses in law.

10.13 This problem has, if anything, become worse over the year. We urge those responsible, in both central and local government, to treat the effective non-availability of such grants as a matter of sharp and urgent concern.

10.14 We have heard some arguments that the profession itself should pay more for the vocational training of those who wish to enter it. A number of sections of the profession undoubtedly make great efforts towards this which we applaud and encourage. But there are limits to what such efforts can be expected to achieve, particularly in relation to those who wish to become solicitors. Firms, of course, are only likely to support students on the vocational course if they agree to join them for practical training and to stay on in practice. Many of the larger firms specialise almost exclusively in business or commercial matters. They cannot, or do not, offer much opportunity for general training in the areas of law most relevant to the needs of the wider population, such as personal injuries, matrimonial, housing, welfare and criminal law. Such services have generally been provided to local communities by the national network of smaller firms, many of which have been badly affected by the recession, and few of which are able to make a substantial input to supporting students on the vocational stage. We therefore see a significant threat to the widespread availability of general legal services if discretionary awards continue to be as rare as they now are, and the burden of training for the profession continues to be concentrated on larger firms.

10.15 Moreover both branches of the profession have made real efforts over recent years to make the law a career as open as possible to people with diverse backgrounds. The unavailability of awards is a direct threat to this progress. It would be wrong to move towards a situation in which entry to the legal profession would be the preserve of children of the wealthy.

10.16 The second issue, which we will consider carefully in the next stages of the review, is the increasing numbers of people who are successfully completing both barristers' and solicitors' vocational courses but who fail to complete their qualification because places are not available in pupillage or in training contracts. Both new vocational courses offer intensive and high-quality teaching, and are accordingly expensive. Under present circumstances those who have been through them are likely to have incurred substantial overdrafts. We fully share the Bar's and the Law Society's concern at their plight, and will be considering the issues particularly carefully in the next stage of our review.

11: Research

Information on legal education

11.1 This year saw the publication of two major studies of research into legal education. In July we received the report of Phase I of the Association of Law Teachers' research project on legal education, a general survey of law teaching in further and higher education (apart from the "old university" sector).[1] We had made a contribution to the costs of this survey, and we have been consulted on the contents to ensure that it was as helpful to us as possible. We have used it extensively in our work.

11.2 Shortly after it we received the final text of the study by Professor John Wilson, Emeritus Professor of Law at the University of Southampton.[2] This work was produced with assistance from the Society of Public Teachers of Law (SPTL). It presents equally indispensable material about the "old universities".

11.3 We would like to express our gratitude to both bodies for the help these publications have afforded us in our work.

Minimum library holdings

11.4 In January, we agreed to assist the SPTL with a grant from our research budget towards a fundamental review of the Society's Statement of Minimum Holdings for Law Libraries. The Statement's original purposes were to provide an authoritative guide to law library development, to indicate an adequate standard of provision, and to facilitate access to university funds for this purpose. A recent revision has been published, but the Society had reached the view that rapid and radical changes in legal education meant that a further simple updating would not assist its usefulness. The Society therefore proposed a review to be carried out by an experienced researcher/librarian, reporting to a representative consultative group. The project would involve a survey of library provision and practice, including information from practising lawyers, which would lead to a new Statement.

11.5 From our work on the review of legal education, we had identified a number of areas where such information would be of considerable use to us, immediately and in the longer term. We therefore agreed to provide a grant of £7,000.

Rights of audience

11.6 Work is continuing on proposals to monitor the effects of granting rights of audience to solicitors in private practice, and we expect to tender for a research project in the summer.

[1] *A Survey of Law Teaching 1993*, by Phil Harris and Steven Bellerby, with Patricia Leighton and John Hodgson, 1993, Sweet and Maxwell, London.

[2] A Third Survey of University Legal Education in the United Kingdom, *Legal Studies*, July 1993, Vol. 13 No. 2.

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

Financial statements
for the year ended

31 March 1994

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

Receipts and payments account for the year ended 31 March 1994

	Note	1994		1993	
		£	£	£	£
HMG Grants received:					
Grant received from Class X Vote 1			850,000		745,000
Less:					
Expenditure					
Committee members' remuneration	3	108,649		107,336	
Staff costs	5	245,255		274,498	
Other operating payments	6	339,132		346,717	
Furniture, machinery and computer		11,472		11,526	
Total expenditure			704,508		740,077
Excess of receipts over payments for the financial year 1993/94			145,492		4,923

Approved by the Lord Chancellor's Advisory Committee on Legal Education and Conduct.

For and on behalf of the Committee

A E Shaw
Secretary
29 June 1994

The notes on pages 36-38 form part of these financial statements.

252449 C2

Statement of cash balances at 31 March 1994

	1994	1993
	£	£
Cash and bank balances		
Balance at the beginning of the financial year	6,814	1,891
Excess of receipts over payments for the Financial Year	145,492	4,923
Balance at end of the financial year	152,306	6,814

The notes on pages 36-38 form part of these financial statements.

Notes forming part of the financial statements for the year ended 31 March 1994

1 Accounting policies

The financial statements have been prepared on a receipts and payments basis in accordance with a direction (annexed to these accounts) given on 24 June 1994 by the Lord Chancellor under 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:

There have been no changes to the accounting policies adopted in the year.

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 1 August 1994.

3 Grant received

Due to the excess of receipts over payments in the year (the reason for which is explained in paragraph 2.11 above), an amount of £128,500 has effectively been repaid to the Lord Chancellor by reducing the grant paid to the Committee in April 1994.

4 Committee members' remuneration

	1994	1993
	£	£
Fees	108,649	107,336
The emoluments of the Chairman	—	—
The emoluments of the highest paid member	9,186	8,634

Other members' emoluments fell into the following ranges:	**Number**	**Number**
£Nil – £5,000	1	1
£5,001 – £10,000	14	14

There are no pension costs for Committee members.

5 Staff costs

	1994	1993
	£	£
Wages and salaries	186,234	206,605
Social security costs	16,062	15,173
Other pension costs	16,769	23,078
VAT	26,190	29,642
	245,255	274,498

Chessington Computer Centre hold a salary deposit of £20,046. This amount has been paid in previous years and will be deducted from a final salary payment in the event of A.C.L.E.C. ceasing to use their services.

The Secretary to the Advisory Committee's total remuneration, including bonus and taxable benefits was £46,257.

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:

	1994 Number	1993 Number
£30,001 – £40,000	2	2

The average number of employees during the year was made up as follows:		
Office and management	8	8

6 Other operating payments

	£	£
Agency staff	8,395	2,061
Recruitment	11,196	7,013
Training	1,396	2,836
Research	7,000	7,320
Maintenance, heating and lighting	24,255	35,299
Office supplies, printing and stationery	4,562	4,308
Postage and telephones	8,966	8,998
Office machinery, rental and maintenance	5,257	1,665
Travel and subsistence	24,598	28,672
Conferences and catering	7,410	5,121
Books and newspapers	5,858	3,073
Miscellaneous	4,808	1,755
Rent and rates	224,109	237,450
Audit	1,322	1,146
	339,132	346,717

7 Pensions

The Advisory Committee operates a staff pension scheme for directly appointed staff. It is, by analogy with the Principal Civil Service Scheme, non-contributory, except that members of the scheme contribute 1.5% of gross salary towards widows'/widowers' benefits.

6 Post year end payments

Payments in respect of directly recruited staff salaries and members' fees for March totalling £11,776.18 were paid on 11 April 1994 and seconded staff salaries for March in the sum of £11,586.68 were paid on 5 May 1994. These sums are not included in these financial statements.

Subsequent to the year end the Committee reached agreement with the Inland Revenue to pay income tax and National Insurance of £23,500 in respect of previous years. The underpayment arose due to a reassessment of advice given to the Committee by the Lord Chancellor's Department in respect of Members' Expenses.

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 35 to 38 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 1994 and of 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 Auditors
London

29 June 1994

Annex

The Lord Chancellor, with the approval of the Treasury, in pursuance of paragraph 9(2) of the Courts and Legal Services Act 1990, hereby gives the following direction:

1. The statement of accounts which it is the duty of the Lord Chancellor's Advisory Committee on Legal Education and Conduct to prepare in respect of the financial year ending 31 March 1994 and in respect of any subsequent year shall comprise:

a) a Foreword;
b) a receipts and payments account; and
c) a statement of balances

including such notes as may be necessary for the purposes referred to in paragraph 2 below. The Advisory Committee should observe all relevant guidance given in "Government Accounting" and the Treasury booklet "Trading Accounts: A guide for Government Departments and Non-Departmental Government Bodies" as amended or augmented from time to time.

2. The statement of accounts referred to above shall present fairly the receipts and payments account of the Advisory Committee and of its year-end balances. The accounts shall also reflect best commercial accounting practices insofar as these can be applied to the account of the Committee.

3. The statement of accounts mentioned in paragraph 1 above shall include the information set out in schedule 1 to these directions.

4. The statement of accounts shall be sent to the Lord Chancellor by the 30 June after the financial year to which the accounts relate whether or not it has been audited by that date.

5. This Direction (excluding Schedule 1) shall be reproduced as an appendix to the accounts.

6. This Direction supersedes the Direction issued on 21 October 1992.

MACKAY OF CLASHFERN C
Lord Chancellor

24 June 1993

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 Community 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

Advice to the Lord Chancellor on The Law Society's application for authorisation to grant extended rights of audience to solicitors

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ANNEX A: CHOICE OF ADVOCATE AND EMPLOYED SOLICITORS
(letter from the Law Society dated 8 April 1993)

ANNEX B: AMENDMENT TO LEGAL AID RULE
(letter from Lord Chancellor's Department dated 10 March 1993)

ANNEX C: GUIDANCE ON INTERPRETATION OF "FEE OFFERED"
(letter from the Law Society dated 12 March 1993)

ANNEX D: EMPLOYED SOLICITORS
(letter from the Advisory Committee dated 18 September 1992)

ANNEX E: ADVICE ON EMPLOYED SOLICITORS
(letter from the Advisory Committee dated 10 May 1993)

SUMMARY

1. This is the Advisory Committee's advice on a series of applications from the Law Society seeking to:

—enable solicitors to qualify as advocates in civil proceedings, criminal proceedings, or all proceedings, in the higher courts, and to regulate solicitors' activities in those courts; and

—impose the additional safeguards the Committee has advised are needed if employed solicitors are to appear in the higher courts.

2. In its final form, the application is very different from the Society's initial submission to the Committee of April 1991. That reflects both the Committee's advice of April 1992, and continuing discussions with the Society. These focused particularly on education and training, and on employed solicitors.

Education and training

3. The arrangements now proposed by the Society seek to:

—identify solicitors whose advocacy experience in the lower courts is of the appropriate range, frequency, regularity and quality to equip them for the higher courts;

—test their knowledge of the law of evidence and procedure applied in the higher courts; and

—teach them the additional skills they will need to start work in the higher courts.

4. In the Committee's view, the aim of advocacy training should be to enable practitioners to reach a satisfactory level of competence in work which might be done by someone beginning to practise in the relevant court or proceedings. The Committee has discussed in detail the Society's proposals for a test and course which would be appropriate to trainees' seniority and experience. The Committee is now satisfied that the final proposals should produce solicitor advocates competent to start work in the higher courts.

Rules of conduct

5. In its initial application, the Society put forward a version of a common advocacy code developed jointly with the Bar. The Committee approves the principle of working towards a common code of conduct for all advocates, particularly in relation to the actual conduct of cases in court. A fully common code is not, however, an essential requirement: some divergences may be needed because of different working practices.

6. The Committee recommended a number of specific amendments to the Code for Advocacy, each of which the Society has now adopted. Before giving its advice to the Society, the Committee considered with particular care whether the non-discrimination rule applying to solicitor advocates should take the form of the Bar's "cab-rank" rule, which requires barristers to accept all cases on a "first come, first served" basis. The Committee concluded by a majority that the Law Society's non-discrimination rule, which follows closely the wording of the Courts and Legal Services Act, was sufficient. The Committee was, however, concerned by suggestions that this might lead to a general shortage of advocacy services, because of concentrations of solicitor advocates in a small number of firms.

7. The Committee regards it as an important part of its functions to ensure that the effects of any extended advocacy or litigation rights are adequately monitored. The Committee therefore accepted a proposal from the Law Society to participate in an annual review of trends and developments in the market for advocacy services and consider whether the Society should take any further steps to promote access to advocates. The Committee has entered into discussions with the Law Society,

the Bar and other interested parties with a view to setting up an appropriate procedure. It will be considering the availability of solicitors who undertake legal aid work particularly carefully during this process.

Employed solicitors

8. The Law Society's initial application made no distinction between employed solicitors and those in private practice. The Committee was also asked by the Lord Chancellor for advice on a question raised by the Crown Prosecution Service (CPS) and the Government Legal Service (GLS) as to whether the Bar's rule restricting employed barristers' rights of audience to the lower courts should continue to stand. The Committee considered the issue in relation to all advocates, whether barristers or solicitors, and in all areas of employment.

9. In its advice of April 1992, the Committee did not rule out extended rights of audience for lawyers employed in local government or commerce and industry. Substantial extra safeguards would, however, be needed, in addition to the existing rules of conduct, to establish an appropriate working structure. It would be necessary, first, to ensure that employed advocates did not also carry out functions which might conflict with their duties in the higher courts, and secondly, to protect them against undue pressure from their employers or non-lawyer colleagues. It was also important to ensure that advocates appeared frequently enough to maintain the distinctive higher court skills.

10. The majority of the Committee also saw no constitutional principle against the CPS and GLS undertaking Crown Court advocacy. No one who had given evidence to the Committee, however, wanted to see a virtual state monopoly of Crown Court prosecution criminal advocacy, and the Committee agreed. To counter the suggestion that even a limited extension of Crown lawyers' advocacy rights might be the thin end of a wedge, it advised that the procedures introduced by the Courts and Legal Services Act 1990 should be changed to enable the Lord Chancellor and the designated judges to control the proportion of any higher court prosecution advocacy which might be undertaken by CPS and GLS employees.

11. Since that advice, the Committee has been discussing with the Law Society how the Committee's concerns might be met. The Society's applications of November 1992 and May 1993 restrict higher court advocacy rights for employed solicitors to those who meet certain conditions. Crucially, solicitors must work in a separate legal department of at least three lawyers, with a head of department who has direct access to the highest level of decision-making authority in the organisation. The Society has not, however, accepted advice that the head of department should be employed exclusively on legal work, thus avoiding possible conflict with other managerial or policy duties.

12. The Law Society's final proposals would allow the CPS and GLS to do all their higher court advocacy work in-house, if they so chose. The Committee cannot agree to this. If CPS and GLS advocates are to have rights of audience in the higher courts, it considers that the exercise of these rights should be limited, and controlled on a statutory basis.

13. The Committee also believes that the conditions under which solicitors employed by other prosecuting authorities, including local authorities, might appear as advocates in the Crown Court should not be decided in isolation from the position of the CPS. There are further questions which must be resolved before the Committee could agree to this extension.

Conclusion

14. The rules and regulations governing higher court rights of audience for solicitors in private practice could be approved; those governing employed solicitors require amendment and should for the present be limited to higher court rights of audience in civil cases. As the application does not contain all the provisions relating to employed solicitors which the Committee considers to be necessary, the Committee must advise that it should not be approved in its present form.

1: INTRODUCTION

1.1 On 3 April 1991 the Advisory Committee received an application from the Law Society to extend the rights of audience which it is authorised to grant to solicitors. The Society sought to be able to grant to suitably qualified and experienced solicitors the right to appear as advocates in the higher civil or criminal courts, or in all higher courts. The Committee published its advice to the Society on the application in April 1992, together with advice to the Lord Chancellor on a question raised by the Director of Public Prosecutions and the Head of the Government Legal Service, under a separate provision of the 1990 Act, as to whether employed barristers' rights of audience should continue to be restricted to the lower courts. Both pieces of advice were reprinted in the Committee's Annual Report for the year 1991-92 (HC 268, 1992).

1.2 The Committee advised the Society that its draft qualification regulations and rules of conduct for higher court advocates should be amended in a number of ways in order better to further the statutory objective or comply with the general principle.

1.3 Having had regard to the Advisory Committee's advice, and following further discussion with the Committee on some aspects of the application, the Law Society amended its qualification regulations and rules of conduct early in November 1992 and submitted an application to the Lord Chancellor for those amendments to take effect. The Lord Chancellor referred the application to the Advisory Committee for advice later that month. The Law Society has made three subsequent applications to amend the rules in its November application. Each of these applications has been in response to discussions with the Advisory Committee, and is integral to the proposals taken as a whole. Except where it is relevant to make a distinction, this advice relates to the finally amended version of the Law Society's Training Regulations and Rules of Conduct.

1.4 Parts 2 and 3 of this advice deal, respectively, with the Society's new qualification regulations and rules of conduct. The issues raised by the question of employed solicitors' rights of audience are considered separately in Part 4.

1.5 Except as otherwise indicated, the conclusions and recommendations in this advice reflect the Committee's consensus view. Three notes of dissent on access to legal services, and on rights of audience for employed lawyers, are included at the end of the report.

The Committee's overall approach

1.6 The Courts and Legal Services Act 1990 has as its statutory objective "the development of legal services in England and Wales ... 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."

1.7 The Committee approached the Law Society's initial application in the belief that it was implicit in the 1990 Act that wider rights of audience would be granted to any member of a body which could satisfy the standards of training and conduct laid down in the Act. The Committee's overall approach in giving advice is discussed in paragraphs 1.3 - 1.15 of its published advice.

1.8 The Committee has adopted the same approach in preparing advice on the application of the statutory objective and general principle to this application. In particular, during its work on the original application, the Committee heard arguments that the introduction of a category of solicitor advocates with higher court rights of audience might be contrary to the statutory objective, by creating a shortage of competent, independent advocates available to the general public. Such a shortage might be caused, for example, by the concentration of specialist

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advocacy services in particular fields of the law in a small number of the larger solicitors' firms.

1.9 The Committee is not satisfied that this will happen. The Committee would, however, regard any restriction in the availability of advocacy services to the public as a very serious development. As it made clear in its advice to the Law Society, the Committee recognises its responsibility to ensure, so far as possible, that any changes resulting from an extension of solicitors' rights of audience are managed and monitored so that the proper and efficient administration of justice can be maintained. The Committee gave its advice on the Law Society's initial application on the understanding that the Society had agreed to co-operate fully in the management and monitoring of change.

Legal Aid

1.10 One of the central areas the Committee will consider during this process of review will be the availability of solicitors undertaking legal aid work. The Committee wishes to reiterate what it said in its advice to the Law Society on this issue, which is of the greatest importance for clients:

> "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."

2: QUALIFICATION REGULATIONS

2.1 The Law Society's proposals for the education and training of the solicitors to whom it proposes to grant rights of audience in the higher courts are set out in its applications to the Lord Chancellor of November 1992 and February 1993. These proposals have been extensively developed in discussions between the Law Society and the Committee: education and training are areas in which the Society's current proposals differ widely from those put forward in the Society's initial application of April 1991.

The aims of training and the course

2.2 Two principles have guided the Committee in its discussions with the Society on the education and training requirements for rights of audience. First, it believes that although the basic skills required for competence as an advocate can be acquired, and their development and improvement accelerated, by specific training, regular and frequent practice as an advocate in the relevant courts or tribunals is necessary to develop a general competence and to acquire specialist skills. Such practice is also necessary to maintain the advocate's skills. The overall 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 court or proceedings concerned. The development of excellence, and of particularly specialist knowledge and skills, must be mainly a matter for development through experience, supported by continuing education.

2.3 Secondly, the Committee believes that this overall aim is best implemented by seeking to identify those solicitors who are qualified to progress to work in the higher courts by the quantity and the quality of their training and experience of advocacy in the courts and tribunals where solicitors already have rights of audience. The proposals for actual training should therefore concentrate on what is needed to enable reasonably experienced lower court advocates to identify and learn the different skills they will need to apply and develop in practice in the higher courts. The teaching methods for this "conversion course" should be appropriate to solicitors of this level of seniority, should draw on the fact that applicants will be appearing regularly in cases in the lower courts (which may be of considerable weight or complexity) and should recognise the practicalities of professional life.

BACKGROUND

Original proposals

2.4 In its application of April 1991, the Society proposed to grant to all solicitors on admission rights of audience in all committals for sentence and appeals from a magistrates' court to the Crown Court; in all civil proceedings in the Crown Court; in Crown Court cases where the defendant pleads guilty; and (broadly) in most interlocutory business in the Chancery Division. The Society proposed no changes to its existing training regulations for the exercise of these new rights.

2.5 Secondly, the Society applied to be able to grant to suitably experienced and trained solicitors the right to appear in all criminal proceedings in the Crown Court and elsewhere; all civil proceedings in the High Court and elsewhere; or in all proceedings in all courts. Those applying for these qualifications would be required to demonstrate a suitable period of experience in practice as a solicitor; suitable experience of advocacy; satisfactory knowledge of the evidence and procedure in the higher courts; and satisfactory completion of a training course.

2.6 The experience criterion would be met in most cases by requirements that applications could only be made three years after admission, and that applicants should have appeared in contested cases for a minimum number of days during the two years before the application for higher rights. Solicitors seeking full rights would have appeared for at least 15 days each in the county courts and in the magistrates' courts. Solicitors seeking rights only in civil, or only in criminal, cases would have appeared for at least 20 days in the county courts, or in the magistrates' courts respectively. In a few cases, the experience requirement would be met by showing a substantial experience of advocacy and a familiarity with the higher courts (which might include having participated in a period of observation in the higher courts for a period which would not need to exceed 10 days).

2.7 These solicitors would need to pass a multiple choice test lasting about an hour in the evidence and procedure of the relevant court or courts. Those passing the test would then have to complete satisfactorily a skills based training course which would last about a week for those who sought rights of audience in all courts, or about three days for those seeking rights only in criminal or only in civil cases.

2.8 The Society proposed that it should be able to exempt from all of these requirements those with satisfactory relevant experience (for example, former barristers, judges appointed to the higher courts, and criminal practitioners with sufficient experience at any of the five Crown Court centres where solicitors already have full rights of audience).

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THE COMMITTEE'S VIEWS

2.9 The Committee reported on much of its earlier discussions with the Society in the advice it published in April 1992; relevant references to detailed discussions in that advice are given in the following paragraphs.

Rights on admission

2.10 It is only in the new Legal Practice Course, introduced in the academic year 1992/93, that solicitors must undertake compulsory training in advocacy in order to qualify. Having reviewed the areas of work concerned, the Advisory Committee advised the Law Society that additional rights should not be sought for those who had no advocacy training. (Paragraphs 2.10-2.34 of the 1992 advice.) The Society has removed this proposal.

The experience requirement

2.11 The essence of the Society's proposal for solicitors seeking general rights of audience in the higher courts is that it should identify those whose work since qualification, and particularly in the years immediately before their application, has fitted them to proceed, as a natural development, to seek rights of audience in the higher courts. The Committee accordingly advised the Law Society that it should adopt a more flexible and detailed approach to considering applicants' previous experience than that set out in the first application (paragraphs 2.42-2.60). Rather than simply totting up the number of appearances, the Society should consider the range, frequency, regularity and quality of candidates' advocacy experience. That should be done on the basis of a record of actual experience over the two years before the application (which would mean that qualifying experience would begin at least one year after admission). Candidates would clearly need guidance on the kind of experience which they would need in order to satisfy the Society. For some time before the Committee's first advice was submitted, the Society and Committee discussed how that guidance should be framed, and the Committee published in its advice to the Society a draft of guidelines based on those discussions (paragraphs 2.46-2.52 and Annex E). Schedule II of the Higher Courts Qualification Regulations 1992 reproduces that draft, with only minor amendments.

2.12 The Committee also advised the Society that it would be desirable to make arrangements to judge the quality of applicants' performance and advocacy skills in the lower courts, and their capacity to benefit from experience. It recommended that applicants should be asked to provide the names of two referees with first-hand experience of the applicant's advocacy work, who would be able to judge its quality (paragraphs 2.54-2.60). The Society has given effect to this advice in Schedule II of the Regulations, by requiring references from people with first-hand experience of the applicant's work. The referees should have sufficient standing as members of the judiciary, the court service or the legal profession to enable them to offer informed opinions.

2.13 The Advisory Committee accepts the Law Society's view that there will be some applicants whose training and recent relevant experience (as former barristers, as judicial officers in the higher courts, or as having relevant experience overseas) make it unnecessary for them to submit a record of advocacy experience in the general form, or to take the test and course. Such exceptional candidates are provided for by Regulation 4(a) and Schedule I. The exemptions for these candidates should not be automatic and general. Under paragraph 2 of Schedule I, the Society reserves the right to require these candidates to take further steps such as gaining more advocacy experience, submitting references, or passing the test or course.

2.14 **The Advisory Committee's advice to the Lord Chancellor and designated judges is that these arrangements will enable the Law Society to identify those candidates whose previous training and experience in advocacy work have been sufficient to enable them to proceed to take the test and course.**

The subsequent application

2.15 Since giving its advice in April 1992, the Committee has been discussing the detailed implementation of the Law Society's proposals for the test and course. Following the conclusion of those discussions, the Society applied to the Committee on 15 January for advice on draft regulations for the test and course. The Committee gave the Society its advice on 5 February, and having considered that advice the Society made amended qualification regulations and applied to the Lord Chancellor for the regulations to have effect.

2.16 The Lord Chancellor's Department sought the Committee's advice on this application on 22 February. The Committee's advice on this area focuses primarily on the changes the Society has made in response to the Committee's earlier advice. As supplementary material, the Law Society has prepared a version of the Higher Courts Qualification Regulations 1992 which incorporates the amendments in this first subsequent application. A copy is submitted with this advice, together with some further supplementary material, including Law Society Regulations which do not constitute qualification regulations or rules of conduct under the terms of the 1990 Act, but which it is necessary to see in order to understand how the Society proposes to regulate the administration of the test and course.

The test

2.17 Solicitors who meet the Society's experience requirement are likely to have extensive knowledge of the litigation aspects of the procedure in the higher courts. An advocate's knowledge needs to have a rather different emphasis. The Advisory Committee took the view that the test of evidence and procedure in the higher courts should have two aims. First, it should find out whether candidates have instantly accessible knowledge of the wide range of evidential or procedural matters that higher court advocates have to deal with almost as a matter of instinct. Secondly, the test should examine whether candidates can identify and resolve more complex evidential or procedural questions.

2.18 The Society's original proposal was for a multiple choice test, lasting about an hour. Whilst the Committee agreed that multiple choice tests may be suitable for testing a wide range of factual knowledge, it argued that they were rather less suitable for testing more complex drafting and analytical skills. The Society's revised proposals therefore substituted a one and a half hour test, divided between multiple choice, short answer and practical problem questions based on extracts from relevant documents. The Society also provided the Committee with model test papers.

2.19 On the multiple choice section, the Committee's discussions of the drafts centred on ensuring that there were enough questions, with enough choices within each one, to be a sufficiently demanding test of candidates' ability. In particular, the Committee was concerned to ensure that this part of the test was conducted without standard reference works available to candidates. The Society has agreed to this change.

2.20 The Committee accepted, however, that reference books should be available to candidates when dealing with the test's short answer questions, as they would be in the court room. Here, the principal concerns were to ensure that the essential aspects of what has to be a very wide syllabus were covered, and that the questions were pitched at a level of knowledge high enough to ensure that

successful candidates would be able to handle cases in the higher courts. In particular, they should be designed to test candidates' abilities to identify potential problems within situations, as well as to find the right answers. The Committee is satisfied that the revised provisions meet these tests.

2.21 The Committee also discussed with the Society at some length the right structure of marks for a test with three separate sections, and has approved an overall pass mark of 55%.

2.22 The Society had originally intended to issue a separate syllabus for each test shortly before it was taken. The Committee argued that this would limit the time available for preparation, and might open the way to an undesirable element of "question-spotting". The Society has dealt with this potential problem by including the general syllabus within the regulations. It will, however, also need to indicate whether, for example, legislation in progress will be dealt with in the test, and which areas of specialist practice are to be included. This will be done by announcements before each test.

2.23 The Committee notes that the Society does not provide for courses specifically intended to assist solicitors to prepare for the test, but envisages that external providers may run intensive refresher courses for candidates. It would expect to consider any such developments with the Society in the light of experience.

2.24 **The Advisory Committee's advice to the Lord Chancellor and designated judges is that the Society's final proposals for the test of procedure and evidence in the higher courts now provide for a test which will identify those candidates whose knowledge is sufficient to proceed to take the course instructing them in the advocacy skills required in the higher courts. Inevitably, a complicated test of intellectual skills at this level cannot be put properly to the proof until papers have been designed and administered, and the results assessed, over several years. It is the Advisory Committee's view that the Society's provisions for a Board to administer the test, under the general supervision of its Higher Courts Qualifications Committee, and subject to assessment and validation by a fully independent Advocacy Training Adviser, will allow the fairness and accuracy of successive tests to be examined, and progressive improvements made. (These arrangements are further discussed in paragraphs 2.43-2.45, below.)**

The course

2.25 The Law Society's first proposals were for a skills based course, which should last a minimum of thirty hours of teaching for those who sought rights in all higher courts, or eighteen hours for those who sought rights only in criminal or only in civil cases. The Committee took the view that these periods were not likely to be sufficient to cover the variety of skills that would be needed to enable even experienced practitioners in the lower courts to appear successfully in the higher.

2.26 The Committee also doubted that practice in the higher civil and criminal courts was sufficiently similar to justify the course which prepared candidates to appear in both being significantly shorter than the total of the separate courses. This also constituted a significant encouragement to solicitors to qualify in both jurisdictions, whilst intending to practise solely or mainly in one. The Advisory Committee considered this likely to increase the risk of advocates appearing in areas where they do not have sufficient expertise.

2.27 The Law Society's revised proposals of October 1991 were considerably extended. Only separate courses for the higher civil courts and higher criminal courts would be offered. Each course would last a minimum of thirty hours

teaching time, with a further ten hours of preparation time for each part. Those who wished to qualify for both jurisdictions would therefore need to study for some eighty hours.

2.28 The course would assume extensive practical experience of advocacy in the lower courts, and detailed knowledge of the higher courts' procedure (since candidates could only proceed to the course having passed the test). The course could therefore be designed to concentrate on the special features of evidence and advocacy before a jury in criminal cases, and the skills of dealing with evidential points and matters of law in both criminal and civil cases and in both civil and criminal appeals. These skills were set out in course objectives, now incorporated into the Society's regulations.

2.29 The Advisory Committee took the view that the Law Society's further proposals were likely, when suitably revised and implemented, to provide an adequate basis for training those with substantial advocacy experience, and with the detailed evidential and procedural knowledge demonstrated by the test, in the specific advocacy skills required for practice in the higher courts. It so advised the Society (paragraphs 2.70-2.72 of the 1992 advice), and has since discussed the proposals in great detail through working parties formed by the Committee and the Society.

Format of regulations

2.30 Throughout those discussions, the Committee has taken the view that qualification regulations for the advocacy course should not seek to set out in minute detail how the courses should be run. This is a new area of training, meeting a wide variety of needs. The Law Society intends to run the first courses itself, and should be at liberty to develop them in ways that meet the approved objectives in the most effective way. Thereafter, the Society intends that these courses, like its other educational arrangements, should be run by external course providers, subject to the Society's usual regulations for course validation, set out in section 10 of the annexed supplementary material. Course providers will need to know what will be expected of them if they are to secure validation, but must themselves be able to develop their courses in ways which best meet candidates' needs.

2.31 The Committee has therefore agreed with the Society that the most appropriate way of prescribing the course would be to set out in regulations the course objectives, and the minimum teaching time that will be required to meet them, together with basic administrative regulation. This framework can then be supplemented by a model course, which will illustrate how the Society itself would propose to run courses, and the minimum standards it would expect of external providers.

Course objectives

2.32 The Advisory Committee has carefully considered the course objectives set out in regulation 1 of the Higher Courts (Advocacy Training) Courses Rules. It has, in particular, considered suggestions that the course should specifically be required to cover a number of skills which solicitors may, or may not, have developed through previous experience. These might have included, for example, legal research, fact management skills, opinion writing, and skill in the drafting of pleadings. First the Committee believes that the regulations should aim to help the Society, potential providers and candidates by setting out clearly the court functions which candidates will have to perform effectively to succeed on the course. That is best done by concentrating on central functions.

2.33 Moreover, candidates' skills will vary very widely according to the pattern of their practice. Some will have extensive first-hand knowledge of detailed work on statute and case law during their work as litigators. Others, like other advocates

in the lower courts, will have detailed familiarity with authoritative text books. These varieties of previous experience could only be reflected in very detailed regulations, which the Committee believes would not be helpful. Rather different concerns are raised by preparing solicitors to draft pleadings in the higher civil courts, which is not a task in which many can expect to have acquired expertise. The Committee has made specific proposals for the design of the course in this respect.

Assessment

2.34 The Committee discussed the proper form of assessment for courses in some detail. It has agreed with the Law Society that it would not be appropriate to try to lay down an elaborate scheme of assessment in the regulations. This is in part because courses will be run by external providers, who should have the opportunity to prepare the most effective form of assessment for the detailed design of the courses they propose, which will be subject to the Society's validation procedures. The Committee also bore in mind that, whilst course assessors would have to take into account a wide range of intellectual and personal characteristics (often developed over a number of years in practice as a solicitor), the only essential consideration was a final rounded judgment as to whether the candidate was now sufficiently far advanced to be able to start work as an advocate in the higher courts. The Committee therefore approves the format of regulation 4.

2.35 It also notes with approval that the Society intends to give each candidate on the courses it runs a report identifying more specifically the strengths and weaknesses found in performance, in order to assist improvement. Similar arrangements should apply for courses run by external providers.

2.36 **The Advisory Committee therefore advises that the format in which the regulations have now been made is appropriate for their task.**

Course design

2.37 During discussions, the Committee made a large number of detailed suggestions to the Society about the design of the course. A course of the short length proposed will be intensive, and depend on successful teaching. It is important that candidates should have the right opportunity to prepare for what will be a demanding course, and that preparatory reading for both parts of the course should be effectively directed and integrated into the work which will be done.

2.38 The Committee notes with approval that the staff: student ratio is not to exceed 1:8, and has satisfied itself that it will be possible to arrange the sessions proposed within this level of resourcing.

2.39 It is important to ensure that assessed work is properly spread through the course, and falls predominantly towards the end, to enable candidates to benefit from instruction, and to enable assessors to see what candidates can do.

2.40 It is essential for advocates in the higher civil courts to be able to draft pleadings properly, and to grasp the connection between properly drafted pleadings and effective presentation. In this regard, the Committee has told the Society that it would expect the minimum provision to be a teaching session on the drafting of pleadings, early in the course, one assessed exercise in drafting pleadings to be completed during the interval between the two parts of the course, and another assessed drafting exercise to take place under examination conditions during the second part.

2.41 Ethical considerations are of great importance in learning an advocate's skills, and the Society has accepted that it is better to deal with these questions

integrally throughout the course, rather than trying to teach them in a separate session.

2.42 **The Committee believes that the Law Society's final proposals adequately provide what is needed in all of these respects. Its advice to the Lord Chancellor and designated judges is that the Society's qualification regulations for the test and course should have effect.**

Validation and monitoring

2.43 The Society's Higher Courts Qualifications Casework Committee will, as section 5 of the supplementary material makes clear, be responsible for overseeing and reviewing the implementation of these proposals. Where courses are run by outside providers, there will be separate arrangements for validating and monitoring each course, and these are set out in section 10 of the supplementary material. These arrangements have not been included in the application, because they do not constitute qualification regulations within the terms of the 1990 Act. It is the Committee's view that they represent a satisfactory mechanism whereby the Society will be able to discharge its responsibility for running and monitoring the test and course properly.

2.44 Throughout its discussions, the Committee has also been concerned to make sure that the Society will have the benefit of properly independent and informed advice on the validation of each test and course. As section 7 of the supplementary material makes clear, this will principally be done through the new post of the Society's Advocacy Training Adviser. During our discussions, the Society has agreed to arrangements that will ensure that the Adviser is completely independent of the process of devising and operating each test and course, after the first tests and courses have been planned and run.

2.45 The Committee has also pointed out that it will be desirable to have adequate arrangements for monitoring the extent to which the test and course actually meet the training needs of solicitors when they begin to appear in the higher courts. The Society has accepted the thrust of the Committee's comments about the desirability of research on this topic. The Committee will consider developments on this aspect at an appropriate stage.

3: RULES OF CONDUCT

3.1 The general principle in section 17 of the Act requires the Advisory Committee to be satisfied that an applicant body'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". As was explained in its advice to the Law Society, the 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.

A common code for advocates

3.2 Before looking in detail at the draft rules of conduct submitted with the Law Society's application, the Committee considered whether there should be a common code of conduct for all advocates in the higher courts. As is noted in its advice to the Law Society, the Committee recognised the practical advantages of common rules governing the conduct of cases and behaviour in the face of the court, which would avoid the courts being troubled by varying or inconsistent systems of regulation. For that reason, the Committee noted with approval the draft common code for advocates issued by the Law Society and the Bar in March 1991, on which the Society's Code for Advocacy is largely based.

3.3 There are, however, some important divergences between the Law Society's and the Bar's versions of the common code, in the regulation of matters not directly concerned with performance in court. The Committee considered such divergences justifiable, given the different structures of the professions, and concluded that a common advocacy code was not required by the general principle or the statutory objective of the 1990 Act.

3.4 Some respondents to the Committee's consultation exercise on the application urged a fundamentally different approach from that proposed by the Law Society on a number of matters which are central to the regulation of rights of audience in the higher courts. The most important of their arguments were that:

- (i) there should be a rule requiring cases to be prepared for trial by a different person from the advocate who presents it to the court;
- (ii) the Law Society's non-discrimination provision applying to advocacy in the higher courts should be in the form of the Bar's "cab-rank" rule so that advocates should be obliged to take work on a "first come, first served" basis, and solicitors practising as higher court advocates should be obliged to appear as referral advocates and to accept instructions in cases where the litigation work was undertaken by others; and
- (iii) solicitors should be obliged to undertake legally aided work.

3.5 The Committee gave careful consideration to all these points. For the reasons set out in part 3 of its published advice, it finally advised the Law Society that amendments to the Society's draft rules were not required. This was a majority view.

3.6 The Committee's decision was much influenced by a proposal from the Law Society 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?"

3.7 In paragraph 3.44 of its advice to the Society, the Committee set out its view that the process of review should be an annual one, but that it was unlikely that the full impact of extended rights of audience would be ascertainable after so short a time as three years. The Society's present application therefore does not provide for a time-limit.

3.8 The annual consultation process will enable any changes in the market for advocacy services to be properly monitored and discussed with all interested parties (including the Bar and the judiciary), and effective regulatory measures to be developed to deal with any problems. The Committee has now begun discussions with the Law Society and other interested bodies on the appropriate form of monitoring.

3.9 **On these grounds, and those set out in relation to the individual points in the advice to the Law Society, the Committee's advice to the Lord Chancellor is that there is no need to seek further regulation before the Law Society's rules can have effect.**

3.10 There were, however, a number of points on which the Committee advised the Society that the draft rules of conduct submitted with its application should be amended in order to meet the principles set out in paragraph 3.1 above. The Committee's advice on particular rules, and the amendments put forward by the Law Society in its new application, are summarised below.

Choice of advocate

3.11 The Committee's advice on the Society's proposed choice of advocate rule was that further provision should be made for advice to clients on the implications, including cost, of choosing a particular advocate (paragraph 3.16 of the April 1992 advice).

3.12 The Society responded in its November 1992 application by producing the following additional guidance on the rule, to be included in *Client Care - a Guide for Solicitors*:

> "You should advise the client when it is appropriate to instruct counsel.
> Practice rule (choice of advocate) requires solicitors to consider and advise clients whether it is in their best interests for the solicitor's firm or some other advocate to provide any advocacy required. The rule lists some of the circumstances which would be relevant to the decision.
> There are two aspects which will be of particular concern to the client - which advocate to choose, and cost. Care should be taken that clients have and understand the information on which to base their decision. Where appropriate, the client will need to be aware of the relative cost of the advocacy being provided by the firm or by an outside advocate.
> The scope of any discussion with the client, and the extent to which it should be recorded in writing, will depend on the circumstances. For example, in the magistrates' court advocacy often has to be arranged at short notice and the choice of advocate often has to be arranged at short notice and the choice of advocate may in practice be limited. Where advocacy in the county court or in the higher courts is likely to last more than half a day, it would normally be appropriate for the discussion and decision to be recorded on file or in a letter to the client."

3.13 While accepting that different considerations might apply to magistrates' court advocacy and to the less complicated county court cases, the Committee was concerned that information and advice on the choice of advocate in the

3.22 **The Committee has considered these amendments, and by a majority advises the Lord Chancellor that the Law Society's rules of conduct do not need to be further amended in order better to comply with the general principle or further the statutory objective, and that they should therefore take effect.**

Enforcement of rules

3.23 The general principle also requires the Advisory Committee to consider whether the Law Society has an effective mechanism for enforcing its rules of conduct, and is likely to enforce them. The Committee received evidence from the Law Society, the Solicitors Complaints Bureau and the Legal Services Ombudsman on the Society's complaints procedures and disciplinary machinery.

3.24 **The Committee's advice to the Lord Chancellor is that these are sufficient for the enforcement of the proposed rules, and that the Society is likely to enforce them.**

4: EMPLOYED SOLICITORS

4.1 This section of the advice refers to the Law Society's application to the Lord Chancellor of November 1992, as amended by a supplementary application of May 1993.

Initial stages

4.2 The Law Society's initial application of April 1991 was submitted on the day the Advisory Committee was established. Within a few weeks the Lord Chancellor referred to the Committee a question raised by the Crown Prosecution Service (CPS) and Government Legal Service (GLS) as to the validity of the Bar Council's rule of conduct restricting employed barristers' rights of audience to the lower courts. The Committee decided that this question needed to be considered in relation to all employed barristers (not only those in the CPS and GLS), and by seeking to apply the same broad principles to all employed advocates, whether barristers or solicitors.

4.3 Before starting work on either the Law Society's initial application or the question raised by the CPS and GLS, the Committee deliberately spent some considerable time on an initial briefing programme of visits and discussions. The programme included visits to solicitors' offices, barristers' chambers and CPS offices, and observation of advocacy in a range of different courts and proceedings. This provided an essential introduction to the legal system for the majority of members, who are not lawyers. It also enabled the lawyers on the Committee, who are senior specialists in their own fields, to see how the courts dispose of a wide range of day-to-day business.

4.4 The Committee's advice to the Law Society on extended rights of audience for solicitors, and its advice to the Lord Chancellor on the question of employed barristers, were both published on 3 April 1992. The advice to the Lord Chancellor, which set out the Committee's detailed views on employed advocates, made it clear that a majority of the Committee considered there were a number of difficulties to be resolved before it would be right to extend employed lawyers' rights of audience.

4.5 In relation to lawyers employed in the GLS, local government and in the private sector, the first difficulty is conflict of functions: because of the wide range of tasks (legal and non-legal) which employed lawyers may carry out for their employers, the Committee considers there is a significant risk of confusion of roles. Some advocates acting on behalf of their employers may be perceived as so closely identified with the interests and policies of the employer, or with the circumstances of the case, that they seem to be acting as both clients and lawyers. In the Advisory Committee's view, this is important because the court (and, to some extent, the public) needs to be clear whether a case is being presented by an independent advocate or, in effect, by a litigant in person. The court is entitled to assume that lawyer advocates appear in an independent capacity, and present the case with the detachment necessary to balance the advocate's duties to the court with those to the client.

4.6 The Committee's second concern is frequency of appearance: again, because of the diversity of employed lawyers' functions within their organisations, the Committee doubts whether many of them would have the opportunity to appear sufficiently frequently in the higher courts to maintain relevant advocacy skills.

4.7 The Committee recognised that its concerns about conflict of functions and frequency of appearance did not apply to barristers or solicitors employed by the CPS, which is an independent prosecuting authority established solely for the prosecution of offences. For reasons set out in detail in the April 1992 advice, the Committee was, however, concerned to ensure that any extension of the CPS's advocacy rights should not prove to be the thin end of a wedge leading ultimately

to a monolithic state service responsible for all prosecution advocacy in the higher courts.

4.8 In order to maintain the proper and efficient administration of justice, the Committee took the view that, before taking any decision on whether the CPS and GLS could exercise rights of audience in the higher courts, it would need to be satisfied that arrangements could be made whereby the number of cases to be presented in the Crown Court by in-house CPS advocates could be limited to a relatively small percentage of the Service's overall Crown Court workload. Any such percentage would have to be set, and the CPS's exercise of extended advocacy rights monitored, within the framework set up under the Courts and Legal Services Act 1990. The Committee noted that the GLS, whilst seeking rights to prosecute in the higher courts, undertook, if such rights were granted, to limit the exercise of those rights to whatever quota might be imposed on the CPS, and indicated that it did not intend to exercise rights of audience in the higher civil courts.

4.9 The Committee also thought that it would be unwise to make any fundamental changes to the CPS's organisation or functions before the Royal Commission on Criminal Justice had reported. The Committee would also want to be satisfied that the CPS had achieved sufficiently high and nationally consistent standards of service to be able to take on the additional work. In the case of the GLS, the Committee made it clear that it would, in addition, need to be satisfied that lawyers in the Crown service could be seen to be sufficiently independent of their departments' policy interests to function with the impartiality expected of higher court advocates.

4.10 For all these reasons, the Committee's advice to the Lord Chancellor was that the Bar's rule restricting employed barristers' rights of audience should be deemed to have been approved under the 1990 Act. As that advice made clear, the Committee's concerns applied equally to both employed solicitors and employed barristers. The Law Society's application, however, did not discuss the position of employed advocates, nor did it propose any separate regulation to apply specifically to higher court advocates who were employed solicitors. On that basis, the Committee advised the Society that employed solicitors should not at present be eligible to apply for either of the Society's higher court advocacy qualifications, or to exercise extended rights of audience in the higher courts.

The options for progress

4.11 Following publication of the Committee's advice, the Law Society said it found it unacceptable to proceed on the basis of an application relating only to solicitors in private practice. The Society did, however, acknowledge that there were real difficulties underlying the Committee's concerns about conflict of functions and frequency of appearance, and started discussions with the Committee about how these might be met.

4.12 One possible approach which the Committee initially found attractive was to conduct a study of the actual functions currently carried out by all employed solicitors, and to seek to determine which functions were, and which were not, compatible with the role of an advocate in the higher courts. This might be seen as a development of the approach in Rule 5(2) of the Solicitors Practice Rules 1990, which prohibits solicitors from participating in or controlling any business, except a solicitor's practice, offering any of the services (listed in the rule) which are central to solicitors' functions. This approach would, however, involve an extensive survey of the profession, and some difficult analysis.

4.13 The Society argued that this would be inappropriate in principle, might not yield usable results, and would be excessively time-consuming. The Committee accepted the last of these arguments, and indicated to the Society that a different way of proceeding might be tried. That would be to seek to identify

those solicitors for whom there is little or no risk of conflict because their work is only legal in nature. The Committee set out its tentative views as to how this approach might be developed in a letter to the Society dated 18 September 1992. A copy is attached as Annex D.

4.14 In its September letter, the Committee identified one obvious group of solicitors to whom the central criterion might apply - namely that there was little or no risk of a problem, because their work was only legal in nature. That was solicitors whose work was done wholly within a genuinely identifiable and separate legal department.

4.15 It would, however, be necessary to establish whether the department in question was free-standing within its organisation. To do this, a number of criteria would have to be considered. These would, for example, include whether the department:

(i) had responsibility only for advising on the legality of actions and policies (as opposed to their desirability on other criteria), and for providing consequential support such as the conduct of litigation;
(ii) had a position and status within the organisation which supported the legal department's independence and protected its members against pressure; and
(iii) had clearly defined lines of access to senior management for use if there were serious doubts about the legality of a proposed course of action.

4.16 It would be necessary to be clear that employed solicitors worked in departments which met acceptable criteria at the time of their application for higher court advocacy qualifications, that changes did not occur during the course of employment which made it inappropriate to continue to exercise extended rights of audience, and that those who held higher court qualifications (whether acquired in employment or in private practice) did not exercise them if they moved into posts where that was inappropriate.

4.17 These suggestions were set out in some detail in the letter at Annex C, which specifically excluded discussions on CPS or GLS lawyers. The approach put forward in the letter was a very tentative one, which the Committee had expected to develop in continuing discussions with the Law Society. The Society, however, submitted its November application to the Lord Chancellor without further consultation with the Committee on employed solicitors.

The November application

4.18 There are two respects in which the Society's approach to employed solicitors in the November application differs from that in its initial application of April 1991. First, the **Code for Advocacy**, which applies to all solicitor advocates, is strengthened by a number of amendments, and its particular application to employed advocates is spelt out both in the accompanying guidance and in the commentary on the application. Secondly, the application made new amendments to the **Employed Solicitors Code**, which restrict the circumstances in which employed solicitors may appear as advocates in the higher courts on behalf of their employers.

4.19 The relevant Code for Advocacy provisions are:

—Solicitor advocates are required not to accept a brief if they have a connection with the client which would make it difficult for them to maintain professional independence.

—Solicitor advocates must not accept a brief if they have been responsible for deciding on a course of action the legality of which is in dispute.

—Guidance accompanying the Code for Advocacy suggests that the legality, or lawfulness, of an action would be regarded as being in dispute when any aspect of it was subject to challenge in litigation as being wrong in law, for example in breach of contract or of a civil obligation.

—Solicitors who are company directors are forbidden to appear as advocates in proceedings to which their company is a party.

4.20 The most important of the new conditions in the Employed Solicitors Code are:

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

—The structure of the solicitor's employment must be such that he or she is employed "solely or primarily as a lawyer".

—The solicitor must have had no responsibility for making executive decisions in relation to actions which are the subject matter of the litigation.

—Solicitors who wish to exercise higher court rights of audience must notify the Law Society when they first take a post in the employed sector or join an employer who has not previously employed a higher court advocate, or when their employment has changed; and certify to the Society that they can comply with the provisions of the Code.

—Employers of higher court solicitor advocates must either publicly declare, or include a statement in the solicitor's contract of employment or terms of appointment, that solicitors are employed to provide legal services and are independent professionals; that this will be reflected in their management; and that employed solicitors will have recourse to the highest level of authority if they have any reason to doubt the propriety of any action, with recourse being available to the Law Society or a court of competent jurisdiction.

—In the case of the CPS and GLS, the employer must have specified written criteria governing the choice and use of advocates in the higher courts, which the Lord Chancellor and designated judges had approved after seeking the advice of the Advisory Committee and the Director General of Fair Trading.

4.21 The Committee recognised that this package of measures was a serious attempt to meet the complex concerns which it had put to the Law Society. It forms the basis of the present application. Nevertheless, the majority of the Committee considered the Society's proposals fell short of what was required to minimise any risk of conflict of functions. This was principally because the application did not follow the Committee's suggested approach of requiring employed solicitors who exercise rights of audience in the higher courts to work in separate, free-standing legal departments. The Committee informed the Society that it could not at that stage advise the Lord Chancellor that the application should be approved, and invited the Society to continue discussion on the areas where progress seemed possible. Extended advocacy rights for the CPS and GLS were not on the agenda, because the majority of the Committee did not believe that a rule along the lines of that proposed by the Law Society could work without primary legislation.

4.22 The Society accepted this invitation, and met a working group of the Committee on three occasions to see whether an acceptable form of regulation could be devised to enable solicitors employed in local government and in commerce and industry to exercise higher court rights of audience. The Committee also visited a number of organisations which employed solicitors.

4.23 During these discussions, the Committee's working group asked the Law Society to make some estimate of the likely demand for extended rights of audience in the employed sectors. The Society replied that about 40% of solicitors in local government, that is just under 1,000, appeared to do sufficient advocacy which might meet the experience test. In the commerce and industry sector, about 8%, or 200, might have sufficient experience. In the Society's view, only a small proportion of those would actually seek to qualify for extended rights of audience. The Society indicated that there might be a particular demand among local authority solicitors to appear in child care cases, where they had lost some of their existing rights under the Children Act. However, in its final application to the Lord Chancellor the Society identified local authority criminal cases, and in

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particular appeals from the magistrates' courts to the Crown Court, as one of the most important areas of demand for higher court advocacy rights.

4.24 On 8 April, in a letter attached to this advice at Annex A, the Society proposed some further amendments to the Employed Solicitors Code which incorporated a number of the ideas developed in discussion with the Committee's working group. The Committee sent its advice to the Society on this supplementary application on 10 May (Annex E). The Society, having considered the Committee's advice, made its new rules on 13 May and submitted an application to the Lord Chancellor, which he has now referred to the Committee for advice. The following paragraphs outline the substance of the new rules, with a summary of the discussions that led up to them, and set out the Committee's advice on the application as amended. (A copy of the May application is submitted with this advice.)

Legal departments

4.25 The Committee pointed out to the Society that the clearest way to avoid possible conflicts was to restrict the right to appear, initially at least, to those employed solicitors whose work was wholly legal in nature. The Society's November application had sought to do this by restricting the right to appear to circumstances in which "the structure of the solicitor's employment is such that the solicitor is employed solely or primarily as a lawyer." This would not deal with a major concern which was raised in the Committee's advice of April 1992. Employed advocates may be subject either to direct pressure from their employers to take a particular course of action, or to indirect or diffused pressure to react in certain ways from what they know of the views and expectations of their day-to-day colleagues. The Committee believes that there is a significantly reduced risk of either kind of pressure being successful if employed solicitors are working in a separate community of lawyers within the organisation, each of whom will be aware of the possible tensions between the organisation's aims and objectives and the standards required of professional practice.

4.26 For this reason, the Committee argued that it was preferable to limit the exercise of rights of audience to solicitors working within a separate legal department within the organisation. The legal department should comprise only lawyers, members of professions closely linked to lawyers, and support staff. The Society accepted this approach and has satisfactorily incorporated it in its application of May 1993.

Size of department

4.27 Clearly, it is also central to this approach to seek to ensure that the legal department consists of sufficient individuals to maintain a distinctive existence within the organisation, and enough qualified lawyers to provide a genuine measure of mutual support. The Committee considered a number of ways in which this might be done, and took the view that the simplest way would be to require a minimum number of lawyers within the department. It therefore proposed to the Society that there should be at least three lawyers in any legal department whose members were to exercise rights of audience in the higher courts. The Society has adopted this rule in the form the Committee requested, stipulating numbers as an "establishment" of three lawyers (because numbers may change on a temporary basis with normal staff turnover), and by reference to the equivalent of three full-time posts.

Structure of department

4.28 The Committee advised the Society to consider an additional safeguard. A number of larger organisations employing a significant number of lawyers choose not to gather them all into a central location. By locating smaller groups of lawyers with client companies or departments within the organisation, better appreciation of technical subject matter and better working relationships are fostered. The Committee would not wish to hinder such developments. Nevertheless, the larger the groupings of lawyers which constitute the legal department, the stronger are the chances of maintaining and developing a proper professional ethos and standards, and the greater the status of the legal department is likely to be within the parent organisation.

4.29 For this reason, the Committee advised the Law Society to consider whether, as an additional safeguard, a rule should be introduced requiring a legal department offering higher court advocacy services to be a single department within the parent organisation, whether or not it operated through sub-units. Alternatively, in view of the difficulty that might present for very large organisations, the Committee suggested that the Society might prefer a more wide-ranging form of words to be used as guidance rather than a rule.

4.30 The Society has not adopted either of these suggestions in its latest application. In view of the acknowledged difficulties, the majority of the Committee would not wish to insist on this point. The Committee is, however, still concerned about the exercise of higher court advocacy rights by solicitors working in fragmented legal "departments" which may not carry sufficient weight to ensure that the lawyers' point of view is adequately represented in the organisation as a whole. For the present, at least, the Committee is content to accept that the rest of the Employed Solicitors Code, as amended, should be sufficient to minimise the risk. Of central importance are the minimum size requirement, the requirement for the head of department to have direct access to the highest level of decision-making authority, and the "solicitor/client" relationship. The Committee will, however, wish to monitor carefully the effect of any extension of employed solicitors' rights of audience, and this is a point on which it may wish to give further advice to the Law Society in due course.

Head of department and dispute resolution

4.31 The final element in this combination of measures seeks to ensure that a legal department offering higher court advocacy services is managed by a lawyer whose responsibility it is to maintain professional standards and a professional ethos, and to ensure that the department has the opportunity to put its views about the legality and propriety of proposed courses of action or ways of handling a case to the highest relevant authority in the organisation when there are disputes.

4.32 The Society has accepted the Committee's advice that the head of a legal department should have direct access to the highest level of decision-making authority in relation to any case. This provision has been buttressed by a requirement that employers who wish their employees to exercise rights of audience in the higher courts must commit themselves, by a public declaration or an inclusion in all lawyers' contracts, to recognise that lawyers are independent professionals, and that the Law Society (and, where appropriate, the courts) can be approached for decisions on matters of solicitors' conduct, with any decision being binding on the employer as well as the solicitor. Such a commitment would not of itself suffice to protect lawyers' professional independence, but the Committee believes that it would have a valuable part to play in conjunction with the other measures which the Law Society proposes.

4.33 It is also necessary to try to ensure that the heads of departments are themselves sufficiently independent to be able to put the lawyers' point of view

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clearly and robustly in the event of any dispute. The Society has accepted the Committee's recommendation that a minimum level of seniority should be prescribed. The rules now provide that solicitor heads of department must be of the three years' seniority required to practise independently. The Committee accepts this, but regards three years' seniority very much as a minimum requirement, and expects that organisations will generally look to lawyers of considerably greater experience to head their legal departments.

4.34 During the discussions with the Committee, the Law Society was initially content to accept the principle that the heads of legal departments should be working full-time within the department on legal work. (The Committee saw no conflict, in the case of local authorities, between the functions of the head of a legal department and those of a monitoring officer under the provisions of the Local Government and Housing Act 1988.) On further consideration, however, the Society took the view that imposing such a rule would significantly restrict the current functions of heads of legal departments in a number of areas. It therefore argues that the proposal would have a very serious impact, for what it believes would be little benefit.

4.35 The Committee has considered carefully the arguments set out on page 2 of the Law Society's May application to the Lord Chancellor. The Society points out that heads of local government legal departments are sometimes responsible for elections, committee servicing or administration, and that senior solicitors in commerce often act as company secretaries. In the Society's view, "It is difficult to see how combining these functions within the role of head of the department would affect the professional autonomy of those working within the department. In particular the function of a company secretary in ensuring that the company conforms to legal requirements is not dissimilar to the role of monitoring officer in local government."

4.36 In the Committee's view, it is fundamental to the approach first suggested in the September letter that legal departments whose members are to exercise rights of audience in the higher courts should consist of lawyers doing only legal work. This is the mechanism by which it is proposed to avoid potentially conflicting managerial or policy responsibility.

4.37 It is an essential feature of this approach that the department's head is employed exclusively as a lawyer and has no potentially conflicting managerial or policy responsibilities. The position of company secretary inevitably entails an involvement in corporate policy incompatible with heading a legal department whose functions include advocacy in the higher courts.

4.38 **The Committee advises that rules governing the exercise of higher court advocacy rights by employed lawyers must ensure that the head of department is engaged full-time within it.**

Acting for third parties

4.39 There are some circumstances where (usually because of a contractual relationship with plaintiff or defendant) third parties have an interest in the outcome of litigation. The obvious example is where an insurance company is subrogated to the rights of an insured person, which has the effect of enabling the company to take over any litigation arising from a claim. Where, for example, the insured person is liable for an excess payment, he or she will still be interested in the outcome of such a case.

4.40 The Law Society's Employed Solicitors Code permits solicitors to conduct litigation and to appear in the lower courts on behalf of an insurance company in the name of an insured, and the Law Society is consulting on the circumstances in which solicitors may act for third parties generally. Because of the large sums and wider implications of litigation in the higher courts, but on the basis that the

Law Society was likely to wish to return to this issue, the Committee expressed in its letter to the Society of 18 September 1992 (Annex D) the view that in-house solicitors acting as higher court advocates should be permitted to appear only on behalf of their employers.

4.41 The Law Society sought to deal with this in the November application by inserting a new provision in the Employed Solicitors Code. Paragraph l(h)(iii) of the Code permits an employed solicitor to exercise additional rights of audience under one of the Law Society's higher court qualifications if "the solicitor is appearing either on behalf of his or her employer, or under the terms of paragraph 7 below (law centres, charities and other non commercial advice services)." The Society states in its submission on the April application that this would prevent solicitors employed by insurance companies appearing in the name of the insured in the higher courts.

4.42 During the Committee's consideration of the application, it appeared that there was at least some uncertainty about the effect of the rule as drafted, and in particular whether it would apply if the insurance company had been subrogated. In any event, the Committee thought it would be preferable that there should be an explicit prohibition on solicitors appearing as higher court advocates on behalf of their employer when a third party retains an interest, direct or indirect, in the outcome of the proceedings. This would also cover cases where a right to sue is assigned, for example, to a debt collecting or factoring company as well as an insurer. It so advised the Society in its advice of 10 May (Annex E).

4.43 The Society has responded by pointing out that the wording suggested by the Committee would be unduly restrictive, since many people (such as the employees of a company, or community charge payers) might have an indirect interest in the outcome of a case, in circumstances where there would be no difficulty about employed solicitors appearing. The Society has therefore included a rule that employed solicitors may only act as higher court advocates "where the claim being pursued or defended by the employer does not arise from or include reliance on rights assigned to it by another" (paragraph 1(h)(vii) of the Employed Solicitors Code). This fully meets the Committee's concerns about assignment, in particular because it is not limited to solicitors employed by insurance companies.

Judicial review

4.44 In its April 1992 advice to the Lord Chancellor, the Committee pointed out that the area of public and administrative law was likely to create particular problems if extended rights of audience were granted to employed lawyers. Since the GLS does not seek to exercise rights in civil cases, this applies especially to lawyers employed by local authorities, which are likely to become involved from time to time (normally as the respondent) in applications for judicial review. The Committee's earlier advice recorded its concern not only that this was an increasingly complex and specialised area of the law, but also that success in a particular judicial review could become a major political objective for a local authority.

4.45 The Committee has considered arguments from the Bar Council that employed advocates should never be permitted to represent their employers in judicial review proceedings, for two main reasons. The first is the gravity and potential public importance of even the most apparently routine applications. The second is that the distinct procedure followed in judicial review, which sets it apart from other civil litigation, places a particularly heavy burden of full and frank disclosure on the respondent's legal representatives.

4.46 The majority of the Committee is satisfied that the Law Society's rules will ensure that employed lawyers appearing as higher court advocates will be effectively separated from executive and policy-making functions within their

organisations, and will minimise the risk of improper "political" pressure. In considering the need for additional safeguards in relation to judicial review, the Committee has borne in mind the Law Society's practice rule on choice of advocate, and the provisions of the Code for Advocacy on the decision to appear. These forbid solicitor advocates to appear in proceedings where the legality of a course of action for which they have been responsible is in dispute; and require them, in considering whether a different advocate should be instructed, to take account of the gravity and complexity of the case, their ability, experience and seniority, and their relationship with the client.

4.47 Guidance accompanying the rules reminds solicitors, whether in private practice or employed, that "where the fundamental interests, reputation or fortunes of a client are in issue in litigation, and the solicitor is for any reason likely to be regarded as intimately identified with the fortunes of the client in that litigation, the interests of the client are likely to be best served by the employment of another advocate who would clearly appear to the court to be objective."

4.48 The majority of the Committee, accepting that the Law Society's rules are likely to discourage employed solicitors from appearing in cases where it would be inappropriate for them to do so, sees no need for an exclusionary rule relating to judicial review proceedings.

Frequency of appearance

4.49 In its advice of April 1992 to the Law Society and to the Lord Chancellor, the Committee made it clear that its second major concern in dealing with employed lawyers' rights of audience was 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 rights only rarely. This reflected a wider concern that courtroom advocacy skills are fugitive, and are likely to deteriorate if not regularly practised. The Committee has also discussed these concerns with the Society since its advice was published. The Society's application now proposes a package of measures which, taken together, aims to prevent solicitor advocates appearing in cases for which they do not have the aptitude, or sufficient, or sufficiently regular, experience.

4.50 The elements of the package, which apply to all solicitor advocates are:

(i) a requirement that candidates for the test and course must satisfy the Law Society as to the range, frequency, regularity and quality of their advocacy experience;

(ii) a rule (4.1(a) in the Code for Advocacy) that solicitors must not accept a brief "if they lack sufficient experience or competence to handle the matter, or if their experience of advocacy in the relevant court or proceedings has been so infrequent or so remote in time as to prejudice their competence"; and

(iii) a requirement in rule 4.3.1 of the Code for Advocacy that solicitor advocates must consider whether the client's interests would be best served by instructing a different advocate, having regard to factors which include the ability, experience and seniority of the solicitor advocate originally instructed.

4.51 The Law Society points out in its November application that in legal departments where the choice of advocate has effectively been delegated to the solicitor, it will be appropriate for solicitors to set out in writing for the client the criteria determining the choice between in-house and external advocates, and to keep records of how the selection has been made.

4.52 Finally, the application points out that the Law Society's compulsory continuing education programme will by 1998 cover the whole of the practising profession, including employed solicitors. "The Society will then wish to draw to

the attention of all those who have obtained higher court advocacy qualifications that if they have been unable to keep their advocacy skills up to date by regular use, they should consider attending an advocacy refresher course if they expect to exercise their qualifications."

4.53 It will be important for the criteria under which in-house advocates will be selected to be clear. The guidance on choice of advocate which is to be included in *Client Care - a Guide for Solicitors* now provides that "where advocacy in the county court is likely to last more than half a day, it would normally be appropriate for the discussion and decision to be recorded on file and in a letter to the client." The Committee considers that, in accordance with this guidance, employed solicitors should normally be expected to record in writing their reasons for taking a case in-house for cases of similar seriousness.

4.54 The Advisory Committee has considerable reservations as to whether employed solicitors could be prevented by rules of conduct alone from appearing, or being pressed by their employer into appearing, where their experience does not warrant it. Nevertheless, in such matters rules of conduct, strengthened and clarified by guidance where necessary, must be the principal means by which the professional activities of responsible individuals are controlled by their professional bodies. The Committee considers that the rules proposed by the Society are an appropriate way to deal with this problem, and are capable of being enforced.

Civil work in legal departments: the Committee's advice

4.55 **The Committee has set out in paragraphs 4.36-4.37 above its fundamental reservations about the rules relating to the functions of the head of a legal department. If those reservations are met, the majority of the Committee is satisfied that solicitors who are employed outside the Crown service and who can comply with the Law Society's Code for Advocacy and Employed Solicitors Code should be eligible to apply for the Society's Higher Courts (Civil Proceedings) Qualification, and to exercise rights of audience in the higher civil courts.**

Criminal proceedings

4.56 As has been emphasised, the working group's approach in its discussions with the Law Society was to identify groups of employed solicitors who could go forward quickly to acquire and exercise higher court advocacy qualifications, because the circumstances of their employment protected them against conflict of functions and offered them sufficient opportunity to maintain their advocacy skills. The question of extended rights for the CPS and GLS was expressly excluded from the working group's discussions with the Law Society, because of the Committee's views on the need for primary legislation. **A majority of the Committee is not yet satisfied that employed solicitors should be permitted to exercise extended rights of audience in the higher criminal courts, for reasons set out in paragraphs 4.62-4.70 below.**

The CPS and GLS

4.57 The Committee's approach to extended rights of audience for the CPS and GLS is set out fully in its advice to the Lord Chancellor of April 1992. The essential point that would need to be dealt with is the suggestion that even a limited extension of Crown lawyers' advocacy rights might be the thin end of the wedge, leading to a system where virtually all criminal advocacy in the higher courts was undertaken by lawyers employed by the Crown. This, as the Committee has already said, would be unacceptable. In the Committee's view, the best way to deal with such concerns would be to bring the exercise of any extended advocacy

rights that might be granted to solicitors employed by the CPS and GLS within the control of the framework set up under the Courts and Legal Services Act 1990, by an amendment to the Schedule 4 procedure. The Committee accordingly advised the Lord Chancellor in its Annual Report for 1991-1992 that the 1990 Act would need to be amended to require that administrative directions governing the extent to which rights of audience enjoyed by lawyers employed by the Crown might be exercised should also be subject to approval under the framework established by the Act.

4.58 In its November application, the Law Society sought to find a way of meeting the "thin end of the wedge" argument without waiting for primary legislation. The application accordingly put forward an amendment to the Employed Solicitors Code which would enable employed solicitors to appear as advocates in the higher courts if:

> "in the case of a solicitor employed in the Crown Prosecution Service, or the Government Legal Service, the employer has specified written criteria governing the choice and use of advocates in the higher courts and those criteria have been approved by the Lord Chancellor and the designated judges, they having had regard to such advice as they may receive from the Advisory Committee and the Director [General of Fair Trading], and such approval has not been withdrawn in consequence of non-compliance with the criteria."

4.59 The Advisory Committee accepted that the proposed rule was intended to have the same effect as the legislative amendment which the Committee had advised the Lord Chancellor to seek. It doubted whether the Lord Chancellor and designated judges would have power to carry out administrative functions without statutory provision, or indeed whether participating in such a procedure lay within the Advisory Committee's own powers under the Act. It also saw some practical difficulties in how the proposed rule might operate.

4.60 The Committee so advised the Law Society in its advice of 10 May (Annex E), explaining that it had reservations of principle about the establishment of a new mechanism, outside the framework of the Courts and Legal Services Act 1990, which would govern not only the manner in which a large class of advocates should exercise rights of audience, but in effect whether they should have, or continue to have, rights of audience in the higher courts at all. The Committee does not think it is appropriate, following the passage of the 1990 Act, for the grant of rights of audience to be governed in a manner which Parliament has not expressly considered and approved.

4.61 The Society has deleted from its application of 13 May the provision which would allow the criteria for the exercise of those rights to be approved by the Lord Chancellor and designated judges on a voluntary basis. The application would thus enable solicitors employed by the CPS to apply for a higher courts advocacy qualification on the same terms as other employed solicitors. The Society indicates that it would be willing to reintroduce such a provision, should the Lord Chancellor and designated judges indicate that they would regard that as a desirable development. The Society invites the Committee to accept that undertakings given by the Head of the Government Legal Service and the Director of Public Prosecutions, with the authority of the Attorney General, provide all the assurance that is needed about the way in which extended rights of audience will be exercised.

4.62 The Committee cannot accept this suggestion. No minister can bind his successor, and it is to be remembered that when the CPS was first formed it was upon the assurance of the Law Officers that there was no intention that the CPS should exercise rights of audience in the Crown Court. The Committee regards it as of fundamental importance to the proper administration of justice that a state prosecution service should not have a monopoly of all prosecutions in the Crown Court; and all the evidence they have received has been to like effect. The

Committee remains of the view that this central principle of the administration of criminal justice should be secured by Act of Parliament and not left to ministerial policy.

4.63 **For all these reasons, the Committee's advice is that the Law Society's rules submitted with the applications should not have effect. Before it could consider advising in favour of the implementation of rules which would grant rights of audience to solicitors employed by the CPS, the Committee would wish to see the 1990 Act amended as it has advised, and to have further discussions with the CPS in order to satisfy itself that the overall standard of service had reached an acceptable level, and to await the recommendations of the Royal Commission on Criminal Justice.**

4.64 The Committee appreciates that these factors might lead to some delay in resolving the question of the exercise of rights of audience by CPS solicitors. The Committee notes, however, that the Royal Commission is due to report this summer, and it would seem quite likely that legislation will be needed if its recommendations are to be implemented. That could well provide an opportunity for the Government to seek an amendment to the 1990 Act.

Solicitors employed outside the Crown service

4.65 In its advice to the Law Society of 13 May, the Committee expressed the view that the exercise of rights of audience by employed solicitors in the Crown Court could not be considered in isolation from the problem of rights of audience for the CPS, and that it would be wrong to adopt a piecemeal approach to so serious a question. It would be important to strike a balance between the volume of Crown Court prosecution work done by lawyers in the CPS, by in-house advocates conducting private prosecutions, and by independent advocates. In the case of private prosecutors, there would in addition be the need to ensure that the employer's commercial interests never led to oppressive prosecutions. This would require the most careful consideration of the application both of the Philips principle (that the decision to prosecute should be taken by a lawyer independent of those responsible for the investigation), and of the Code for Crown Prosecutors. Employed solicitors should therefore not be eligible for the Higher Courts Criminal Qualification, at least for the time being.

4.66 The Society's subsequent application to the Lord Chancellor argues against this restriction. The Society suggests that one of the most important areas of demand for higher court advocacy rights in the local authority sector is appeals from the magistrates' courts to the Crown Court. Other non-CPS prosecutions are also mentioned, and the point is made that barristers who have to be briefed in cases brought under special legislative provisions are often unfamiliar with the area of law involved.

4.67 The Committee appreciates these points, but still believes that it would be inappropriate to determine the question of extended rights in criminal proceedings for lawyers employed by local authorities and in the private sector before determining whether any rights are to be exercised by the CPS, which is the national, independent prosecuting authority. The Society's application does not, in the Committee's view, deal adequately with the concern to avoid oppressive prosecutions for commercial interests.

4.68 It is not sufficient, in the Committee's view, simply to dismiss the Philips principle and the Code for Crown Prosecutors as being "relevant primarily to the *institution* of proceedings rather than to the conduct of advocacy". The arrangements for independent legal departments which the Committee has been discussing with the Society do not deal with possible conflicts of functions which may arise where a single organisation investigates alleged offences, decides whether or not they should be prosecuted, and presents them in court. The prosecution

advocate carries a particular and personal responsibility to ensure consistent and just prosecution. The Committee takes the view that further careful thought needs to be given to see whether the arrangements for separate legal departments are capable of being adapted to deal with criminal work in the higher courts.

4.69 In reaching this conclusion, the Committee considered the question of defence work. It believes that because in practice employed solicitors would rarely have occasion to use their skills to defend their employers in the Crown Court, it could not justify an exception to the general rule to cater for this eventuality.

4.70 All these are difficult questions of both principle and practice, and the Committee therefore advised the Law Society that its rules should make it clear that employed solicitors may for the present exercise additional rights of audience only in civil proceedings in the higher courts. The Society has not followed that advice, and the Committee remains of the view that the rules should not have effect in their present form.

Indemnity insurance

4.71 One further matter mentioned in the Committee's advice to the Law Society of 10 May was the need for employed advocates to be covered for liabilities to third parties. The Society indicates, in its application to the Lord Chancellor, that it has considered the position and concluded that no changes to the present indemnity insurance arrangements are required. It points out that section 62 of the 1990 Act provides an immunity for advocates from actions in negligence, and that the Employed Solicitors Code already requires solicitors to ensure that their clients are aware of the insurance position.

4.72 There are several additional factors which the Committee believes should be considered. First, the immunity conferred by section 62 does not extend to *all* an advocate's activities, but only to the actual conduct of a case in court and actions very closely connected with this. An advocate who is called upon to comment on his employer's case outside court might therefore, for example, find himself liable in defamation. Secondly, that immunity will not protect solicitor advocates against whom the court makes an order under section 4 of the Act for wasted costs in favour of the opposing party. Finally, the reference to indemnity insurance in the Employed Solicitors Code applies only to the limited circumstances in which employed solicitors are permitted to act for someone other than their employer. It is therefore not relevant to advocacy in the higher courts.

4.73 The Committee would not wish to suggest that the omission of any new provision on indemnity insurance was in itself sufficient reason to advise rejection of the Law Society's application. The Law Society's Indemnity Rules do not, in any event, require approval by the framework set up under the 1990 Act. The Committee does, however, urge the Society to reconsider the position in the light of the points raised above.

DISSENT

THE CONSUMER'S ACCESS TO LEGAL SERVICES

SUMMARY

1. The correct approach to the issue of rights of audience is to seek to ensure that litigants not only have equal access to the courts but that the quality of their representation is not determined by the available funding. The poor and powerless should not be disadvantaged by unequal and inadequate representation. The administration of justice should not be imperilled by inequalities in the standard of representation. Inequality of representation puts at risk the effectiveness of the adversary system to inform the decisions of the courts. This is particularly important because the impact of the decisions of the higher courts commonly extends well beyond the parties to the litigation.

2. We welcome the Committee's repetition of its unanimous appeal to the Law Society (at paragraph 1.9) that solicitor advocates ought to accept some responsibility for ensuring that "those who need legal services, but cannot afford to pay for them, get help". For the reasons set out in paragraph 1.9, those sentiments are purely exhortatory. We would go further.

3. We consider that as a condition of obtaining rights of audience in the higher courts, solicitor advocates should be required, subject only to certain specific exceptions, to accept instructions from clients seeking their services in the fields in which they practise. This rule should apply to any advocate (barrister or solicitor) holding himself or herself out to provide services to the public. It should in particular provide that no such advocate should be free to refuse instructions on the grounds that the client is legally aided or that the legal aid remuneration is inadequate.

4. No one who claims the considerable privilege of rights of audience in the higher courts should expect to exercise such rights purely for personal advantage. It is in our view essential to the maintenance of the proper and efficient administration of justice that the services of advocates in the higher courts should be available to strong and weak, right and poor alike. It is equally important that litigants whose cause in unattractive or in conflict with the personal ambitions and interests of the advocate should nonetheless be represented by the advocate of their choice.

5. The existing arrangements operate on this basis. They make an important contribution to the level of integrity in the system of British justice. Even though there have been a number of serious miscarriages of justice recently identified, the system is generally held in high regard and seems relatively free of corruption. The relationship between advocate and client and between advocate and court is an important influence in establishing and maintaining that integrity. Advocates should not be inhibited in the presentation of a case for fear that they will be thought to associate themselves with the conduct or cause of their clients. It is known to be his or her duty to take the case. Personal feelings and consideration of personal advantage are not factors which can properly be allowed to intrude. To decline to impose the same duty on other advocates in the higher courts would be to prejudice this important standard. Worse, it would undermine the present practice of the Bar and would be likely lead to the weakening and eventual abandonment of the existing rule.

6. The rules imposed should be appropriate to, and effective within, the new environments in which they will operate. Our concern is with substance rather than form.

7. Far from widening the choice of those seeking advocacy services, the Law Society's approach to this issue will narrow it. The approach prevents the widening of choice by allowing the choice to be that of the advocate or his firm and not that of the client.

The present position

8. At present all advocates who have full right of audience before the higher courts in England and Wales are bound by a rule which requires them, subject to certain exceptions, to accept any brief or instructions to act on behalf of any person in any field in which he professes to practice 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. Among the most important exceptions are that the advocate must not accept work for which, having regard to his or her other professional commitments, s/he has insufficient time, nor take on cases which mights give rise to a conflict of interest or a breach of confidence.

9. Although the advocate is not obliged to take a case which is not being offered at a proper fee, the special need of those who cannot afford the cost of private legal services is safeguarded because in a legal aid case, the legal aid fee is determined to be a proper fee unless and until the profession acting collectively otherwise determines. It is not left to the individual to pick and choose or to reject legally aided work.

10. It is essential to ensure that an advocate accepts any instructions to appear irrespective of the party on whose behalf he is instructed, the nature of the case itself or any opinion the advocate may have of the character, reputation, cause, conduct or beliefs of the client. This duty to accept the case ignores its merits, the prospects for success or the guilt or innocence of the person who seeks advocacy services.

11. There can be little doubt that to permit solicitor advocates to have rights of audience in the higher courts without this positive obligation will undermine the Bar's present rule, and provide strong ammunition for barristers who may not wish to observe it when they must compete with solicitors under the new regime. They will inevitably ask why they should be bound by a rule which those with whom they will have to compete are not. The Bar Council would have difficulty in justifying or enforcing such a rule in these circumstances.

12. It was urged on us that the present rule is not always obeyed. It is plain beyond argument that the rule does have a beneficial and significant impact. In any event we can accept that like speed limits, rules may not always be obeyed, but that does not make them undesirable or prevent them playing an important regulatory role.

The reasons why a rule is necessary

13. We believe that there are two predominant reasons for such rules: one a matter of principle, the other one of policy. The principle arises from the role of the advocate in the adversarial legal system. The advocate may not exploit a right of audience solely for his own maximum financial gain or other personal advantage but, in the performance of this role, owes wider responsibilities to the court and to the public. The acknowledgement of this obligation forms part of the justification of advocacy; because the advocate does not pick and choose his clients, it cannot be said that his acceptance of instructions signifies any approbation of

the points which his instructions lead him to advance. Because of this, he is better able to advance his case fearlessly and independently and without any suggestion that he thereby is personally approving his client or his case. This is a significance factor in the relationship between the court and the advocate. It helps among other things to avoid generating unnecessary and unhelpful heat, and strengthens the sense of the advocate's responsibilities to the court.

14. The rule has other important consequences in practice. First, no advocate can sensibly be blamed, criticised or refused work by those who would otherwise instruct him on the grounds that he has taken work "on the other side". It is recognised that because of the existing rules the advocate is obliged to take any case unless one of the recognised exceptions applies. This seems to us readily to explain why so many barristers are instructed to appear in the course of their practice for both prosecution and defence, for both plaintiffs and defendants, for and against insurance companies, banks, local authorities and Government etc. It is in the interests of efficiency that advocates should have experience on both sides in the fields of which they practise and should not be or be seen as committed to one side of the argument. Second, a range of choice for the client is assured. He is not limited to those who customarily appear on "his side" of the case or for his type of person or institution.

15. The reason of policy is that the rule serves to ensure that any person who requires representation in a court has the right to instruct an advocate of his reasonable choice. An important feature of the administration of justice is the availability of specialist advocates to clients irrespective of geography or the commercial size of their chosen legal advisers. In this way, under the present arrangements, the small provincial firm of solicitors has the same access to leading and specialist advocates as the large city firm.

16. We consider it especially important that under any new arrangements, designed to introduce new or better ways of providing advocacy services, the same access by medium and small firms of litigators to specialist advocates, whether solicitors or barristers, should be available. An unfortunate feature of the legal system is that it is often seen to magnify the inequalities in society and an important safeguard is the opportunity that the citizen has to obtain representation from advocates of the highest quality, without first having to convince such an advocate to accept the case.

The deficiencies of the proposed non-discrimination rule

17. The Law Society proposes a limited nondiscrimination rule. We believe it is inadequate and fails to meet the needs of justice for four reasons.

(1) THE SOLICITOR CAN PICK AND CHOOSE

18. The rule proposed would still permit a solicitor advocate to pick and choose between potential clients, provided only that he cannot be shown to have contravened one of the four express negative requirements contained in the rule. There is nothing, for example which would prevent a solicitor advocate from declining to act on the ground that it does not suit the advocate or his firm for financial or other such reasons. Similarly, a client might be refused because he is tiresome or demanding or because the fee offered, although proper, is less than might be charged to a more affluent client. One case may be more likely to fail than another and as every advocate would recognise, it is more comfortable, agreeable, easy and professionally advantageous to act in cases which are interesting, highly paid, not unduly onerous and likely to be successful.

19. The rule as drafted would enable a solicitor advocate to avoid even the negative requirements contained in the rule because of the difficulties in proving that a case was declined for one of the prohibited reasons rather than simply

because he did not wish to take the case. He would not have to give a reason nor in practice would he be called upon to justify his decision.

(2) THE COMMERCIALLY EMBARRASSING CLIENT

20. A particular risk is that a solicitor advocate may decline instructions from a client for fear of upsetting another client of the firm. For example, a solicitor's firm which has acted for (or was hoping to attract as a client) a major bank or insurance company, might decline to allow its advocates to represent a customer of the bank or insurer in proceedings against the bank or company for fear that the other client might not in future instruct the solicitor's firm.

21. All accept that the defendant accused of murder or child abuse must be assured equal access to legal representation. The need for a specialist lawyer of the bank customer, the dismissed employee of a major company, the pensioner who trips over a paving stone, the pupil at a local authority school, the council house tenant, the housing list applicant or the victim of hospital malpractice may be less dramatic, but is no less important a demonstration of the principle that all should have access to the advocate of their reasonable choice.

22. Under the proposed form of the rule, a solicitor advocate is largely free to turn away such "undesirable" clients with impunity whilst acting for the opposing party in exactly the same category of work.

(3) PARTNERSHIP PRESSURES

23. It is suggested that it may be inconvenient for some solicitors to operate even an appropriately adapted version of the existing rule within a partnership. We revert to this below. Although the proposed nondiscrimination rule would prohibit a solicitor advocate from declining to accept instructions on the ground that the nature of the case is "objectionable to the advocate or to any section of the public", the use of the expression "section of the public" would not seem to include the advocate's partners or employers: see for example Charter v. Race Relations Board {1973} AC 868, which decided that members of a club were not a "section of public". Nor would it cover the objectionable clients. Adoption of such a reading of the rule would indeed enable a solicitor advocate to refuse to accept instructions on the basis that his partners or employers found the case objectionable or that they did not like the conduct, beliefs or opinions of the client.

(4) TYING-IN THE ADVOCATE'S CLIENT TO A PARTICULAR LITIGATOR

24. A further deficiency is that the proposed rule would enable the advocate to insist on a "tying in" arrangement, a solicitor advocate for example refusing to act for a client unless the advocate or his firm is engaged as litigator. The Committee has already advised the Law Society to include an express prohibition in the code against requiring the acceptance of the firm's advocacy services as a condition of the provision of litigation services. The same reasoning leads us to oppose a rule which would allow tying in of litigation to solicitor. This approach is important and reflects the concern for freedom of choice for the consumer. The same principles led Parliament to oppose "tying in" for providers of conveyancing.

25. A significant side effect of requiring a client to use "tied-in" litigation services will be to reduce the ability of members of the public to obtain the services of advocates specialising in particular fields of law, for example, judicial review, planning, children, landlord and tenant. The number of specialists in particular fields of law is necessarily limited by the volume of available work. The creation

of advocacy departments within the larger urban firms of solicitors (whether by absorbing specialist barristers or solicitors with experience in these fields) will diminish significantly the number of advocates outside those major partnerships who will be able competently to undertake such specialist advocacy. The effect is likely to be to deprive the clients of small, sole practitioner or rural practices and of Law Centres of access to advocacy services of appropriate expertise.

26. We consider that for these reasons solicitor advocates should not be permitted to refuse to accept instructions on the ground that the litigation has been or is being conducted by another firm of solicitors. Subject to the recognised exceptions, such as a conflict of interest, solicitor advocates must be willing to act as "referral advocates". Such a requirement will assist in meeting the concerns we set out at paragraphs 13 and 14 above and will ensure the continued access for the public to specialist advocacy services, wherever and whoever the litigator may be.

27. The objection to "tying-in" in all its forms is that it is an uncompetitive and restrictive practice. The Committee has insisted that it would be wrong for a litigator to be permitted to tie-in advocacy services to the provision of litigation services is not merely inconsistent but is to regularise a practice of tying-in. It is a necessary corollary to the grant of advocacy rights that such advocate solicitors must be available to act as referral advocates.

A contrary approach

28. We have carefully considered reasons advanced elsewhere. We regret that we do not share such views. We should explain why.

29. We do not accept that the very fact of granting extended rights of audience may be said to render such rules unnecessary. Others see the force of the contrary argument as depending "on there being [at present] a narrow monopoly of rights of audience in the higher courts". It is said that the rule will no longer be required if there is a large and diverse body of potential specialist advocates. (Advice paragraph 3.30).

30. The significant factor seems to us to be the number of specialist advocates actually, rather than potentially, practising before the higher courts. The need for regular and frequent practice and the finite amount of work and court time which is available strongly suggest that there is and will continue to be a limit to the number of practising advocates both generally and in particular fields at any one time. Indeed, there is a real risk that the acquisition of rights of audience in the higher courts may lead to the increased concentration of specialist skills in a relatively small number of solicitors firms in particular areas. The result may be less access to advocacy services and less choice but certainly no more. But the validity of the rule depends we believe upon the issue of principle that all who practise as advocates should be prepared to accept a positive duty to act.

31. Second, the purpose of the rule was more than merely securing "that litigants were not left unrepresented". Such an objective could be served by the court, the Bar Council or the Law Society nominating an advocate to act e.g. as in the days of the dock brief. This would be an obviously inadequate substitute and would do little to assist the great majority of litigants. A litigant is entitled to have available to him or her, a pool of advocates of appropriate experience and ability from whom they, or their litigator, may choose. It is not a negation of the usefulness of the rule that the client may not always secure the advocate of first choice. We do not think this is claimed to be a result of the Bar's present rule and if it were, it would indeed be unrealistic. No rule of conduct could guarantee to secure the advocate of first choice because of listing arrangements and the many commitments which successful advocates, whether barrister or solicitor, will be likely to have. The imperative which such a rule creates, however, is to inculcate in the advocate the duty to accept instructions that, given a freedom of choice,

the advocate might prefer to decline. It also provides the client with a framework within which confidently to seek the services of the specialist advocate, however unattractive the brief, and a clear rule of conduct against which to measure the response.

Suggested difficulties of compliance

32. Third, we do not share any concerns that the imposition of such a rule as a responsibility upon all those who seek the advantage of a right of audience, would create practical and insuperable difficulties. There was a remarkable lack of convincing evidence to suggest that it would.

33. We are not persuaded, for example, that such rules are incompatible with practice in partnership. They may increase the number of cases in which a conflict of interest would prevent an advocate from accepting instructions, by reason of the extra duty which a partner owes, not only to his own individual clients but also to those of his partners. A conflict of interest is, however, an existing and recognised exception to the rules governing advocates in the higher courts.

34. Nor are we persuaded that there are circumstances particular to solicitors' practices, which make it inherently more necessary to be able to decline instructions on the ground of other professional commitments.

35. A further suggestion was that the imposition of a more demanding rule would be incompatible with the statutory objective of widening choice because it might deter some or many solicitors from qualifying for higher court rights. We doubt whether such a rule as we favour would prevent a committed lawyer becoming an advocate. Further, the interests of solicitors should not be the determining factor. Moreover, the broad benefit to the public at large of such a rule is not outweighed by narrow accommodation of the interest of any lawyers who might be unwilling to accept such a responsibility. When accepting instructions on "the other side", the existence of the rule we favour would itself mitigate any such problem, if indeed it is such, for as with barristers at present, reasonable clients will understand that the advocate has no choice, and the unreasonable ones should not be allowed to have their way on such a point as this.

36. The requirements we envisage could only conceivably present any real difficulty for a relatively small number of the larger firms. Firms currently undertaking, for example, criminal defence work plainly could not operate outside the legal aid scheme. Objections on behalf of the larger firms to the approach we commend would be more credible if accompanied by alternative provisions which would have the same substantive effect or otherwise demonstrate an appropriate commitment to equal access.

Legal Aid: Two classes of advocate

37. Equality of access to legal services for those who are within the diminishing limits of eligibility for legal aid is a fundamental need which all advocates have to address. The Law Society's Code, even were it to be amended as the Committee has advised, is to leave to the individual solicitor advocate the decision as to whether or not there are reasonable grounds for rejecting a case because the legal aid fee is not an adequate fee. There are no detailed criteria provided for guidance on the decision. In the absence of such criteria, there is little or no prospect of challenging a decision to reject a case on the ground that a legal aid fee was not a proper fee, unless the decision was so extreme that it could be said that no solicitor could reasonably hold such a view. The effect of this would be to make the acceptance of legal aid instructions by solicitor advocates a matter not of professional duty but of personal or commercial choice. The current debate over the Government's proposals for legal aid eligibility and the flight of many solicitors

from continued practice in legal aid work can only heighten our concern in this regard. If only the more junior and less experienced advocates are to be available to legally aided clients, the standard of representation will become second class and the administration of justice will be severely damaged.

38. That some will choose to evade their responsibilities under the rule does not seem to us to negate its necessity. The existence of the rule creates a climate in which the acceptance of the rule is the norm and the breaches of the rule become identifiable and are amenable to disciplinary processes. At present, legally aided clients have access to specialist advocates at the highest and most qualified levels. It seems to us unacceptable that any new body of advocates should exercise the same rights of audience without acknowledging the same obligation to act for those who cannot afford to pay for their own representation.

39. The Committee's advice is that the Law Society should recognise that it

> "must have some responsibilities in this area" and that
>
> "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."

Those sentiments are purely exhortatory because the Committee took the view that the adoption of the statutory wording of Section 17(5) of the Act would render the Committee powerless to require any more stringent rule to be adopted.

40. We would regard it as an undesirable result if, as we believe it does, the proper and efficient administration of justice required otherwise, that the Act in some way served as an obstacle to the requirement of a more stringent rule. We do not believe that it does so prohibit the imposition of a rule which would act as a proper safeguard.

41. We are reinforced in this view by the provisions of Section 17(3)(c)(iii) of the Act itself, which specifically prohibits discrimination in the provision of an advocate's services " . . . 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)".

42. Since the only concern could relate to the size of the fee, what force may remain in this section, if Section 17(5) may be said to operate so widely? The Act must be construed in such a way as to give real force to this provision at the same time as giving effect to Section 17(5).

43. We see the proper construction of the Act as permitting a more stringent rule to be imposed if, as we see the fact to be, the proper and efficient administration of justice so requires. Parliament clearly did not intend, or provide, that the question whether a person should be granted a right of audience should be determined by reference to criteria set out as to qualification. The Act provides that such is the general, not the only, principle. The statutory objective certainly is not to be relegated to having no force at all. Any principle to be applied in general must admit of exceptions to the generality. Such exceptions arise when the general principle would be incompatible with the proper and efficient administration of justice. The role of the Advisory Committee when considering a proposed code of conduct is not to be restricted to exhortation. The present draft of the code with regard to legal aid obligations is unsatisfactory.

44. The Law Society (but not the City Solicitors' Company) has urged that it would not be appropriate to oblige, for example, the large 'city' firms of solicitors to undertake legal aid work. It might, it is suggested, be organisationally impossible for them to accept such an obligation. We think that the suggestion understates both the ability and means of such firms to contribute effectively to meeting the need. Even if one accepts all that has been urged against an obligation on higher court solicitor advocates to do legal aid work, there is no impediment to a wider

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requirement that such advocates accept and give practical effect to an obligation to play a full and proper part in ensuring that the poor and powerless have equal access to the higher courts.

Conclusion

45. The rules we favour are an acknowledgement of the public role which those seeking rights of audience should adopt. We seek to preserve and foster so far as practicable equality of access to representation for strong and weak, rich and poor alike and to enable clients to choose the advocate and not the other way round. We urge the Lord Chancellor and the designated judges to adopt the same approach.

Mrs Liliana Archibald
Mr Patrick Lefevre
Dr Claire Palley
Ms Usha Prashar
Mr Nicholas Purnell QC
Mr Peter Scott QC

DISSENT

RIGHTS OF EMPLOYED SOLICITORS (INCLUDING JUDICIAL REVIEW)

SUMMARY

Rights of audience in the higher courts for employed solicitors (and employed barristers) call for special consideration, and should not be granted at least at this stage. Rights of audience in judicial review proceedings for solicitors employed in local government and other public bodies should in any event not be granted. The Law Society's application should be amended accordingly.

BACKGROUND AND INTRODUCTION

1. The Committee's views on employed lawyers were spelt out in its two advices of April 1992. The Committee identified formidable objections to the grant of rights of audience in the higher courts for both employed barristers and employed solicitors. It saw particular difficulties in the area of administrative and public law. It envisaged that it might be possible in future years to overcome some of those problems so as to permit such rights to be granted to certain groups of employed lawyers. It did not envisage wholesale grant to all employed lawyers, nor that any grant would be made before future developments had been assessed. By then experience of the wide changes in the private sector which it recommended could also be assessed.

2. At that stage, the Committee correctly considered the issues of principle relating to employed lawyers as common to both solicitors and barristers. They should be addressed in the round. In particular, the Committee considered not only the position of barristers employed by the Crown, but that of all employed barristers when dealing with the application of the GLS and the CPS. It regarded its reasoning relating to barristers as directly applicable to the position of employed solicitors. (See the summary of the advice to the Law Society).

3. The Law Society did not respond to the Committee's advice to omit employed solicitors from its application, nor did it embark on the discussions suggested in the Committee's letter of the 18th September 1992. Instead, in its November 1992 application, it persisted in pressing for rights of audience for all employed solicitors including those in the GLS (civil and criminal) and CPS.

4. Since then the Committee has been subjected to unremitting and repeated pressure both in the Committee and outside to reconsider its previous views on the point. Its own timetable has been related to the dates of meetings of the Law Society's Council and speed has been urged.

5. In the result, a majority of the Committee has been persuaded to advise the Lord Chancellor to grant wide rights of audience in the higher courts to employed solicitors. To arrive at the result, the majority has concluded that the position of employed solicitors should be considered in isolation from that of employed barristers, the position of local government and other public bodies should be

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considered in isolation from that of central government in all civil work including judicial review, and above all if the Law Society makes some changes to its codes of advocacy or conduct, all of the Committee's previously expressed concerns of principle would be met. The majority does not suggest that apart from these alterations anything else has changed, and we are sure that it has not.

6. We give below examples of what the Committee has previously and correctly said on the matters of principle. We refer to the proposed changes in the Law Society's codes. We suggest that these changes are of an exhortatory character, difficult to interpret and in practice almost impossible to enforce. Even more importantly they do not alter the fundamental relationship between the employer and the employed lawyer or answer the concern about the independence of the employed lawyer. The concern about frequency of appearance needed to maintain and keep up to date the fugitive skills of advocacy remains untouched by changes in the codes. No attempt has been made to address, still less answer, the particular problems about the education and training of employed lawyers, although they work in a different environment with different working practices and pressures from those affecting solicitors in private practice or barristers in chambers. There is and could be no suggestion that the latest advice of the majority on employed solicitors reflects managed change in any meaningful way. It is in fact a precipitate decision unmindful of the full implications.

7. The reasoning of the majority is not wholly clear, and parts of its advice if read superficially will give the wrong impression, but we will endeavour to respond in a little more detail below.

8. We first set out the principal concerns by reference to what the Committee itself has advised both the Lord Chancellor and the Law Society.

9. We deal first with the position of employed lawyers generally, and then with judicial review.

EMPLOYED LAWYERS GENERALLY

10. There are at least four major objections to granting rights of audience in the higher courts to employed solicitors at the present time. The concerns are:

1. Independence.
2. Frequency of appearance.
3. Education and training.
4. Managed change.

INDEPENDENCE

11. We quote from the Committee's own advice in April 1992 to the Law Society:

> "4.14 The court and the public . . . 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. . . . 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. . . .
>
> 4.19 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."

See also paragraphs 33–36 of the advice to the Lord Chancellor.

FREQUENCY OF APPEARANCE

12. The need for constant practice to maintain and keep up to date fugitive advocacy skills is particularly important in the context of lawyers whose primary role is not that of advocate but involves performing the varied tasks of an in-house lawyer. Again we quote from the Committee's April 1992 advice to the Law Society:

> "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 . . . "
>
> "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. . . . "

See also the summary of that advice headed "Employed Lawyers" and especially paragraphs 45, 46, 52 and 59 of the advice to the Lord Chancellor.

EDUCATION AND TRAINING

13. This point is linked to but additional to the point just mentioned. Again we quote from the Committee's earlier advice to the Law Society:

> "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. There 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."

See also the advice to the Lord Chancellor

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

THE NEED FOR MANAGED CHANGE

14. This point raises a number of matters. First the question of rights of audience in the higher courts should not be dealt with piecemeal by for example considering the position of employed solicitors to the exclusion of the position of employed barristers. It is neither legitimate nor sensible to do so. In the first place, the arguments of principle are the same. As the Committee said (para 4.22 of the April 1992 advice to the Law Society):

> "The arguments for not extending rights of audience [to employed lawyers] apply equally to solicitors and barristers".

15. The significance of this is that a decision relating to solicitors has implications for far greater numbers than the figures quoted in the majority's advice (see, for example, para 4.23). Those figures are not comprehensive even for solicitors, and we believe that there are as many employed barristers (about 6,000) as are in independent practice at the Bar.

16. The Committee pointed out in its April 1992 advice to the Law Society (para 4.3) in relation to the application of the GLS and CPS that it had been necessary to consider the application in relation to all employed barristers and not

merely those employed by the Crown. Indeed the Committee devoted an entire section (Section IV) of its advice to the Lord Chancellor on barristers employed in local government and the particular problems of administrative law. This was not merely, as the advice shows, because all employed barristers are affected by rule 402.1(c) of the Bar's Code of Conduct, but because piecemeal consideration whether of criminal or civil work would have obscured what mattered. It is to be noted that the Law Society's present application expressly extends to all employed solicitors including those in the GLS as well as those in local authorities and other public bodies. The GLS alone employs approximately 1,000 lawyers, many of whom are engaged in civil work.

17. Thirdly, and more generally, the Committee has rightly recognised its responsibilities to ensure so far as possible:

> "that any changes resulting from an extension of solicitors' rights of audience are managed and monitored to that the proper and efficient administration of justice can be maintained" (para 1.8 of the latest advice).

18. As mentioned above the Committee in April 1992 identified a number of developments which were likely to occur in "the next years" which would 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" (para 58 of the Advice to the Law Society). Not a single one of the developments referred to has in fact occurred. Even more obviously, none of the wide ranging implications of granting rights of audience in the higher courts to very large numbers of solicitors in private practice can presently be assessed in the light of experience.

19. To grant rights of audience in the higher courts to employed solicitors whose basic loyalty is to their employers with all the implications that has for conflict between duties both to the Court and to other parties, would be a far reaching change in the context of private law, and incidentally not one which is acceptable in a number of European countries, including the majority of EEC countries. This point has even greater implications in the context of public law discussed below.

Summary of defects in the majority's latest advice

20. Amongst the points which emerge from the majority's advice are the following:

21. In arriving at its conclusions, the majority had considered only the position of employed solicitors to the exclusion of employed barristers (see above). Thus for example when seeking to show "the likely demand for extended rights of audience in the employed sectors" the Committee ignore (in para 4.23) the far larger constituency of employed barristers (some 6,000) and quote figures applicable only to solicitors. It is true of course that the Law Society's application refers only to solicitors, but it obviously should not be a case of first come, first served. The Committee is obliged to consider the full implications of what is proposed.

22. The majority likewise put aside the position of the GLS even when dealing with rights of audience for local authorities and other public bodies (see above). The justification for this is apparently that the GLS has stated that it does not have "any present intention" of exercising higher court rights in civil cases. It should be obvious that this does not justify excluding from consideration a group who have always been included in the application. Indeed the same could be said to apply to the great majority of employed lawyers in the public and private sectors (see paras 12, 46, 52 and 59 of the April 1992 advice to the Lord Chancellor). Furthermore the GLS' stated intention could and in all probability will change in the light of developments. It must be wrong in principle to consider the granting of rights to local authorities in public law matters without considering the position

of central government. The reasoning of the majority also indicates significant confusion of thought in relation to the GLS.[1]

23. The only changes which the majority rely upon to justify their present advice are proposed changes in the Law Society's own Codes. If all that was required in April 1992 to meet the objections of principle were statements in a code to the effect that employed solicitors (or barristers) should treat their employers as independent lawyers in private practice would treat their clients, and that they would exercise their rights of audience only if they were competent to do so, most of what has previously been said would have been quite pointless.

24. The key to the proposed rules of the Law Society are those that say that the relationship between the lawyer and his employer must be that of an independent professional, and which require employed solicitor advocates to refuse a brief if they have a connection with the client which makes it difficult to maintain professional independence.

25. These rules are both meaningless and impossible to put into practice in the context of employed lawyers. The relationship is in fact that of employer and employee however it is dressed up. Obedience and loyalty to the employer and a close working relationship with colleagues are features of the employed lawyer's function. Such factors add real and legitimate value to his services in many contexts; but to speak simultaneously of professional independence whilst acting as an advocate is to engage in double talk. This is no reflection on the lawyer: it is a recognition of a problem which cannot be addressed by exhortation or so-called structural requirements which do not alter the underlying reality.

26. Enforcement of such rules raises its own obvious problems. Who will complain of breach? To suppose that the employee will have recourse "to the Law Society or a court of competent jurisdiction" (sic) to challenge the employer on a question of independence is surely illusory. To suppose that he will do so in the midst of litigation in which he is acting as advocate for his employer is fanciful. Such window dressing does not give confidence in what is proposed.

27. The proposed rules make no serious attempt whatever to grapple with the problems of frequency of appearance to which such emphasis has previously been attached by the Committee. We have already remarked upon the oddity of excluding the GLS from consideration on the grounds that the rights will not be exercised by GLS employees whilst granting them to others, the great majority of whom say they will not do so either. It will be seen that in dealing with frequency of appearance (paras 4.49–4.52) the majority has been driven to rely on exhortation (eg "they should consider attending a refresher course") and upon rules which do not purport to deal with the particular problems employed lawyers would have in maintaining fugitive advocacy skills after obtaining higher court rights. This approach disregards the obvious contrast between the in-house lawyer with a range of responsibilities and skills, and the full time independent advocate in private practice as a barrister or solicitor.

28. The opportunities for advocacy for the employed lawyer, and thus his ability to practise and keep up to date his skill and knowledge, are fundamentally different from the opportunities for a barrister or solicitor in private practice. He also suffers from the further disadvantages that he acts only for one client, has limited access to assistance from colleagues in contrast to the lawyer in private practice, and is largely immune from the peer pressures which operate in the private sector. Furthermore his duties are likely to be far more varied than those of lawyer in private practice. This creates particular problems in coping with the listing problems and logistical arrangements for advocacy in the higher courts by

[1]Thus e.g. a superficial reading of the majority's advice gives a misleading impression. Paragraph 12 of the summary and paragraph 4.55 of the text suggests that before giving rights of audience to the GLS such rights must be limited and controlled on a statutory basis. Closer reading of the three advices reveals that this view has always been confined to criminal proceedings, and does not relate to civil proceedings (including judicial review) at all.

employed lawyers. The Law Society makes no proposals to deal with this by education or training. None of this is addressed in the majority reasoning.

29. The problems of educating and training employed lawyers to ensure that they remain suitably equipped and trained at whatever time they choose to exercise higher court rights of audience plainly require particular consideration. High on the agenda for any education and training would be the need to cope with the problems of independence and frequency of appearance.

Who suffers?

30. It must be stressed that independence, frequency of appearance, and education and training affect the court and the opposing parties as well as the employer and employee. The length of trials, the cost and above all the risk that inadequacies in the lawyer's performance will lead to the wrong result must be at the heart of any consideration of rights of audience. The problems of maintaining efficiency (and we would hope improving it) must not be made more acute by changes made to satisfy political urgings of professional bodies.

Conclusion on employed lawyers

31. Our concerns about the independence of employed lawyers are not confined to central and local government and other public bodies. We have profound reservations about the good sense of altering the relationship between the advocate and his client and between the advocate and the court by granting rights of audience in the higher courts to advocates who owe their livelihood and future prospects directly to the client whom they represent. We doubt if such a change is appropriate, at least until the consequences of a very wide extension of rights of audience to solicitors in private practice (potentially over 50,000 in all) have been absorbed and assessed, and much closer attention given to minimising possible adverse consequences. To add to this number thousands of employed lawyers seems to us to be unwise, as well as being unnecessary.

32. Where a court fails or seems to fail to do justice the court is blamed. Confidence in the whole system is undermined by such cases. Yet the court can only succeed in its fundamental task when it is presented with all relevant material needed to conclude where the truth lies. The factors which assist or hinder this process are therefore crucial to the extent of success or failure. Often they are intangible. Rules of Court requiring, e.g. full disclosure and objectivity, and rules of conduct seeking to avoid a misleading presentation due to lack of independence are certainly needed. But they compete—not always effectively—with misplaced loyalty and other human frailties. Peer pressure to be found in the working environment of private practitioners still has an important role to play.

33. The pressures in the context of employed lawyers whose skills and expertise are part of a management team with mutual loyalty and common dependence on their employer are both very different and more difficult to recognise and resist. This is not a criticism of employed lawyers: far from it. But the question is whether the independence of the advocate from his client is an important aspect of the integrity of our judicial system. We have no doubt that it is. We equally have no doubt that it is not possible to achieve this independence by rules of conduct asserting for example that the employed lawyer should treat his employer as his client or must work with 2 other lawyers; still less is it possible to police the operations of such rules in practice.

34. The structural relationship between employer and employee is not changed by asserting that relations between them should be something different from what they actually are. Changes affecting the administration of justice should not depend upon an artificial edifice which serves only to disguise the reality behind it. Nor does it suffice to seek to segregate one of the in-house lawyer's functions from his

others in a way that is difficult to define, impossible to police, and diminishes his own role within the organisation,

35. Accordingly, we advise the Lord Chancellor that it would not be appropriate to accede to the view of the majority on employed lawyers.

We now turn to judicial review. We do so without repeating what we have said above, but pointing out that a number of points apply with added force in this context.

JUDICIAL REVIEW

SUMMARY

36. We advise that in any event the rights which it is proposed to grant to employed solicitors should not extend to cases ofjudicial review. Such a conclusion is entirely within the statute (which expressly contemplates limiting rights of audience to particular courts or proceedings), and helps to secure some consistency with the approach and conclusions of the majority on criminal matters, where the link has been expressly drawn between the CPS, the GLS and others with the power to prosecute criminal offences.

THE COMMITTEE'S VIEWS

37. Although the Committee has from an early stage put aside the GLS in this connection and indeed all other public bodies susceptible to judicial review, it has dealt with the position of local authorities. In its April 1992 advice to the Lord Chancellor it said:

> "55. One area is likely to create particular problems. Applications for 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."

THE NATURE OF JUDICIAL REVIEW

38. It is hardly necessary to remind the Lord Chancellor or the designated judges of these points but we mention them to indicate some of the points which have influenced us.

39. Judicial review is the core safeguard for the ordinary citizen against abuse of power both in the area of high constitutional principle and in everyday life. This is reflected by the fact that such cases can *only* be heard in the High Court and judicial review is a *unique* case.

40. Public law applied by the Divisional Court, generally by judges who themselves have particular experience in this field, is itself a specialist area. The unique procedure adopted under O.53 of the Rules of the Supreme Court is significantly different in operation to that which applies to private law disputes. In particular, under the O.53 procedure the public body is allowed to respond to allegations of misconduct by affidavit. Such affidavits can be and are often sworn by officials (not necessarily the Minister or other decision-making individual) and are typically designed to limit the scope for debate and further enquiry.

41. A very great deal has to be taken on trust by the court when attempting to do justice between state and citizen. There is no basic requirement on the respondent to make disclosure of all relevant documentary material (contrast O.24 r.2) or to answer interrogatories from the complainant unless excused by the court (contrast O.24 r.2). Both discovery and interrogatories are the exception and not the rule. Affidavits are commonly not tested by cross-examination. A special order for cross-examination is needed and is not granted in most cases. Assessment by

the court of material which has not been disclosed to the complainant thus forms no part of the procedure[1]. The court adjudicates upon the evidence and arguments presented in an adversarial context; it does not act in an inquisitorial capacity. There is therefore often very little with which to test the fullness and frankness of the respondent's affidavit except what can be perceived (perhaps by a litigant in person) on the surface of the affidavit, together with any documentary material which the respondent himself has selectively produced.[2]

42. At present government, whether local or central, is represented in judicial review proceedings by independent advocates. No system is perfect and it is not always easy to identify those factors which give a system of justice (and we believe have given the British system) the vital element of integrity. We firmly believe that representation by independent advocates is and is *seen* to be an important factor in ensuring that the affidavit of the respondent is not economical with the truth or otherwise misleading. The temptation to mislead is always there, as evidence in recent years including that from at least one former minister and from the highest level of civil servant, has notoriously confirmed. Every litigant should so far as possible have confidence in the system which deals with his complaint. To undermine the safeguard of independent advocates in cases where the result can admittedly have very considerable political implications and wide ranging consequences appears to us to call for clear justification.

43. The court (as well as the parties and the public) is entitled to assume,as the Committee has stressed, that a lawyer advocate is appearing in an independent capacity and presenting the case with the detachment necessary to balance his duties to the Court with those of his clients. We found the views of Lord Woolf, with his wide experience as both Treasury Counsel and judge dealing with cases of judicial review, expressed in the 41st Hamlyn Lecture entitled *Protection of the Public — A New Challenge,* particularly significant. He said:

> "A great strength of the system is that the Crown is being represented by an independent member of the Bar who is briefed and paid for each case he does and is able to take an objective view free from departmental pressures. Yet during his period in office the department will make available to him information which is not available to any other outside legal adviser and which indeed can relate to the activities of previous administrations, so it is not even available to ministers.
>
> ... The fact that the Treasury Devil is an independent member of the Bar contributes to the trust which exists between the Treasury Devil and the courts and the lawyers involved in legal proceedings against the Crown. It is accepted that he will not knowingly allow the Crown to abuse its position in the courts. If there is information available to the Crown which should be disclosed, it will be, irrespective of any argument of a technical nature to the contrary. If a Department wishes to use its powers oppressively it will be prevented from doing so."

44. The trust to which Lord Woolf refers has a considerable impact on the extent to which costs and time are taken up by interlocutory applications and debate during the hearings. It also contributes significantly to the perceived validity of the outcome.

45. At issue here is not so much any deliberate breach of rules but of ethos and culture. An experienced practitioner in judicial review, principally acting for litigants seeking review said:

1Note: the rare exception relating to inspection of documents to resolve issues of public interest immunity does not affect the generality of cases.

2Note: None of this is a criticism of the O.53 procedure, which is plainly designed to limit the delays and cost which would otherwise be involved. The procedure is now being considered by the Law Commission, and its conclusions could well bear on the points we make.

> "There is undoubtedly a view that judicial review proceedings are or can be a hindrance to good administration ...I have no doubt that it does affect requests for discovery, interrogatories, or cross examination. I think you would find that most lawyers who operate in this field would agree. This has created a kind of culture within many public authorities by which they believe that they need not disclose their reasons in full in any answering affidavit nor give full discovery"

46. As already stated judicial review cases frequently give rise to intense political pressures. They may also put personal loyalties under considerable strain. It may be difficult for an officer whose decision is impugned in the Courts not to take that personally. For an advocate to defend his colleagues' conduct puts his own ability to be and remain wholly objective under great strain even when he has not been directly or indirectly involved in the decision making process or the actual decision under challenge. Lord Woolf put it succinctly:

> "It is all too easy to underestimate the advantages of an independent mind in the inner closets of government."

47. The Committee was told that local authorities would not normally expect to exercise rights of audience in judicial review except in the simpler cases. We see no effective way of monitoring this. Cases which seem simple are not always so. Whether there will be more extensive use of in-house rights for supposed financial reasons, or for "convenience" (perhaps because the in-house lawyer "understands" the problems from his more intimate relationship with his client) is again something over which no-one will have effective control if the views of the majority prevail. It is not possible to segregate the simple type of case. To found the proposed unlimited rights on the basis of simple cases seems inappropriate.

48. As mentioned above, the Committee has stressed the need for frequency of appearance to maintain and develop the skills of an advocate. In April 1992 it rightly saw it as highly undesirable that rights of audience should be extended to a large constituency the members of which were unlikely to exercise them frequently. If central government does not propose to use such rights if granted, and local government proposes to do so only slightly, there is no demand to justify granting their employed lawyers such rights. If on the other hand, the take up were more considerable, the other problems we have mentioned would be even more serious. In either case the answer should be the same, whether in relation to central or local government.

CONCLUSION ON JUDICIAL REVIEW

49. Our concerns are particularly acute in the field of judicial review which is an area of such crucial constitutional importance. We think that concerns about the failure to do justice apply as powerfully here as in the criminal field. Accordingly, we urge the Lord Chancellor and the designated judges not in any event to grant rights of audience in judicial review cases to solicitors employed by local authorities and other public bodies.

MRS LILIANA ARCHIBALD
DR CLAIRE PALLEY
NICHOLAS PURNELL Q.C.
PETER SCOTT Q.C.
I agree with what is said above about judicial review.
MS USHA PRASHAR

DISSENT

ONE STEP AT A TIME

1. There are a number of areas in which an extension of rights of audience to solicitor advocates can be achieved simply and speedily. The main, most obvious, most highly prepared group of potential candidates are the solicitors doing legal aid criminal work. Other groups, almost equally obviously ready, include solicitors, private and employed, and employed barristers working in the area of child care. But for the Law Society's "big bang" approach, many such solicitors would already be admitted higher court advocates in appropriate fields.

2. Delay apart, the weakness of the "big bang" approach is that it requires a single set of rules and regulations applicable to every person qualified as a solicitor no mater where employed or how remotely their actual work is related to either litigation or advocacy.

3. Curiously perhaps, the inappropriateness of this approach is nowhere more evident than it is with the application of the proposed conduct rules and training regulations to the work of solicitors who are partners of or are employed by the large "City" firms of solicitors. For example, while the requirement for "flying time", advocacy experience in the lower courts, as a base upon which to found an entitlement to seek qualification as a Crown Court advocate is obviously sensible, it must be evident that the model is hopelessly inappropriate to the circumstances of, say, a senior "City" tax specialist sufficiently experienced as a litigator to consider a limited advocacy role in a multi-million pound action in the High Court.

4. The failure to consider the context in which any given rule operates would not be so troubling but for the potential side-effects. Under the arrangements adopted by the Law Society and approved by the Committee, the only practical way the larger firms could benefit from the extension of rights of audience is to form specialist advocacy departments and, at least initially, to "buy-in" mid-career specialist barristers to staff them. If just one of the major firms set up such a department, all would inevitably follow with potentially devastating consequences. It does not seem sensible to grant unwanted rights which cannot be used directly, particularly where indirect use is potentially harmful. In this, as in the two other areas of concern discussed below, we need to go back to the drawing-board.

5. The Committee did have some very limited success in getting the Law Society to consider the effect of the operational context in two areas, employed solicitors and the judicial review jurisdiction of the High Court. **In the event I am afraid we did not achieve acceptable outcomes and, in relation to both, whilst I do not always support the reasoning of the dissent on employed lawyers and judicial review, I support the conclusion that the rights sought should not, at this stage, be granted.**

6. Turning first to the issue of "employed lawyers". The problem here does not arise out of the employment relationship. Individual lawyers don't change overnight, for better or worse, because they are employed by a non-lawyer. Rather the issue is whether any given employment and working environment will give the lawyer sufficient control and the relative autonomy required to enable him or her to operate effectively and within an appropriate ethical framework.

7. Historically, and for the great bulk of lawyers, these matters have been resolved by requiring lawyers providing legal services, particularly those in which lawyers are monopoly providers, either to be self-employed and/or employed within lawyer owned and controlled firms. The managing lawyer must have at least three

years post-qualification experience. These lawyers' businesses are generally required to be wholly or largely dedicated to the providing of legal services. Such lawyers are precluded from sharing profits with non-lawyers. Where partnerships are allowed, multi-disciplinary partnerships are banned. Generally such businesses have a relatively large client base and few are excessively dependent on a single client. Sensitive to the possibility of undue influence from non-lawyer third-parties, professional rules typically seek to regulate referral arrangements.

8. Until this application, the Law Society has never had any difficulty identifying the very real problems which can arise outside such a framework. Recently, for example, the Society has mounted a formidable resistance to non-lawyer supervised multi-disciplinary partnerships. Employed lawyers are a recently acquired blind spot and the one exception to this general proposition. Here, uniquely, it was claimed, there is no difficulty about lawyers working in multi-disciplinary environments not under the overall supervision of lawyers and not, even in the final analysis, subject to the dictates of the lawyers' ethical codes.

9. In relation to employed lawyers, the Committee has not sought anything more than equivalent arrangements to those applicable to private commercial firms. The Society's original defence of its permissive approach to employed lawyers (providing, of course, they act only for their employers), that existing regulation is primarily designed to protect the public and that no equivalent protection is required for the employer client, was plainly untenable. This is not least because, in the context of the higher courts, it is the community as a whole who will suffer if the efficient administration of justice is impaired by poor advocacy not just the luckless employer.

10. Perhaps because the Society realised it was creating a series of unfortunate hostages to fortune against the time when the accountants seek litigation rights, during the recent consideration of the employed lawyer issue by a joint working group/party, the Law Society brought forward proposals which addressed the key issues very satisfactorily and would undoubtedly have provided a way forward for, in particular, the child care etc. specialists then identified as the main potential user of extended rights of audience in local government service. Indeed, the proposals made would probably have brought some general aid and comfort to the somewhat beleagued employed solicitor. In the event the Law Society resiled from its proposals and we were left with the current unworkable rump. We again have proposals which ignore the real world in which they are supposed to have effect. It is, for example, not enough to declare that a solicitor "shall have access to the highest decision making authority in a large organisation." In order to ensure that such a rule is meaningful and real access is achieved, one must ensure that the most senior lawyer is a chief officer of the organisation who normally reports to and is normally accountable directly to the highest decision making body of the organisation. The Committee is at one in believing the Law Society's approach is mistaken. I take the view that the core requirement must be a single legal services department headed by a lawyer who is a chief officer who reports to and is accountable to the highest decision making bodies of the organisation. On the other hand, I would be willing to explore further extending the categories of "legal services friendly" work such a head of department could properly undertake.

11. Finally, I turn briefly to the judicial review question. It is agreed on all sides that employed solicitors ought not to undertake the advocacy in significant judicial review cases. That much is enshrined in the proposed guidance. It cannot be sensible to found a right of audience on the basis that the advocate will in fact only be marginally involved. This is particularly so where this limit is to be secured only by guidance. Still less can such an approach be justified when most of the available marginal involvements are likely to disappear as a consequence of the review currently being undertaken by the Law Commission.

12. The approach to the specialist jurisdictions like judicial review requires much more thought. I am strongly inclined to the European approach and take the view

that such jurisdictions probably need a small and select cadre of specialist advocates. Indeed, I suspect that this is already the day to day reality. If that reality was to be formalised, perhaps via Schedule 2 (6) of the Courts and Legal Services Act 1990, then the competence and other tests applied to potential new advocates could reflect that reality and would no longer be based on the notional rights of audience of the least experienced barrister.

Patrick Lefevre

Communications Division

Walter Merricks
Assistant Secretary General, Communications

ANNEX A

THE LAW SOCIETY

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Alistair Shaw
Secretary
The Lord Chancellor's Advisory Committee
on Legal Education and Conduct
8th Floor, Millbank Tower
Millbank
London SW1P 6QU

DA/dw

8th April 1993

Dear Alistair

The Law Society's Application for Rights of Audience

Since our meetings with the Working Group we have redrafted the relevant amendments to the Employed Solicitors' Code, and drafted amended guidance on the choice of advocate. The proposed amendments are attached and we would now like the Committee's advice on the extent to which these rules would further the statutory objective and comply with the general principle.

The amendments are largely self-explanatory and follow the lines discussed with the Working Group, but the following comments may be helpful:

"Services which may properly be provided as part of a solicitor's practice"

We prefer this formulation to "legal services". We are familiar with the proposed formulation since it is already used in connection with our hiving off rule (rule 5).

"Normal establishment of three lawyers"

We are continuing consultations with those who may be affected by this proposal. The Working Group's feeling was that there was a clear danger that a solicitor might not be able to preserve professional autonomy to the extent which would be necessary for the exercise of rights of audience in the higher courts. For our part we accepted that it was most unlikely that solicitors in small departments would want to exercise rights of audience in the higher courts. In the coming days there may be more reaction to our proposal and we will pass on any further comments or observations on the impact of this proposal of which the Committee ought to be aware. On its forthcoming visits the Committee may also gather impressions which will assist in assessing the value of the proposal and whether it is set at the right level.

In a previous draft we included a provision to require that all the relevant legal services on behalf of the employer should be provided or procured by the department. On closer examination of the practicalities of this proposal, it seemed to create more difficulties. First, it must always be the right of an employer to choose how and from whom it seeks legal advice, and the provision we had drafted could have been seen as inhibiting that right. Second, a company, for very legitimate business reasons (for example an oil company) may divide its business activities broadly into exploration and drilling on the one hand and refining and retailing on the other. It may well find it convenient to have two separate legal departments dealing with the relevant areas.

Companies which had recently been the subjects of mergers or takeovers would find their rights of audience suspended if they did not immediately merger the legal departments. The thinking behind the original proposal was an attempt to respond to the Working Group's concerns about departments being reduced in scope and size to a level where their professional autonomy would be threatened, and we have now addressed this directly with the proposal for a minimum size of department. Accordingly we have omitted the previous provision.

"Professions ancilliary to law"

I understand that following the visit to the BT legal department it was thought that express provision should be made for the position of patent agents and trademark agents who are commonly found in company legal departments.

Amended guidance

The amended guidance on choice of advocate follows closely the thinking developed in discussion with the Working Group.

Monitoring Developments

In our discussions with the Committee following the submission of our April 1991 application, we undertook to participate in an annual review of the availability of advocacy services to see whether any undesirable developments had taken place in the market, and if so to consider what measures might be necessary to correct them. We now envisage that the annual review would embrace all trends in the development of higher courts advocacy by solicitors and in particular would include the extent to which solicitors in the employed sector had applied for or were exercising higher courts advocacy rights, and whether in the light of developments the Society should modify any aspect of its qualification regulations or rules of conduct.

Yours sincerely
Walter

Walter Merricks

252449 G

Amendments to the Employed Solicitors Code

Paragraph (h)

delete sub-paragraph (iii)

and substitute:

"The solicitor is wholly employed in a separate legal department which, however it may be described (but for present purposes referred to as a department), is concerned exclusively with providing services which may properly be provided as part of a solicitor's practice and meets the following conditions:

(a) that the most senior individual in the department with direct line management or professional responsibility for its day to day operation (the head of the department) is a lawyer (that is a solicitor who holds a current practising certificate, or an employed barrister);

(b) that the head of the department has practised as a lawyer for at least three years;

(c) that the head of the department has access to the highest level of decision-making authority;

(d) that the department has a normal establishment of at least three lawyers and is composed exclusively of lawyers, those qualified in professions ancilliary to law (e.g. patent agents, trade mark agents, legal executives), and appropriate support staff who are answerable in terms of line management or professional responsibility to the head of the department;

(e) that the relationship between the department and those to whom advocacy and litigation services are provided is that of solicitor and client.

6395

Reference - Page 19 of November application

Amendments to GUIDANCE [Additional material to be included in Client Care - A Guide for Solicitors ("Advocates and Counsel" Chapter 3, p.14]

1. After line 4 insert:-
   "Solicitors who propose to undertake advocacy should also have regard to the provisions of paragraph 4.1 of the Code for Advocacy. This requires solicitors not to accept a brief if:-

   they lack the necessary experience;

   they will have inadequate time to prepare;

   the brief seeks to limit their authority;

   they would be unable to maintain professional independence;

   they have been responsible for actions that are in dispute; or

   there is a risk of a conflict or a breach of confidence.

   In particular solicitors, whether in private practice or employed, should note that where the fundamental interests, reputation or fortunes of a client are in issue in litigation, and the solicitor is for any reason likely to be regarded as intimately identified with the fortunes of the client in that litigation, the interests of the client are likely to be best served by the employment of another advocate who would clearly appear to the court to be objective."

2. In line 13

   delete "or", insert "and".

ANNEX B

LORD CHANCELLOR'S DEPARTMENT
TREVELYAN HOUSE
GREAT PETER STREET
LONDON SW1P 2BY

Telephone 071-210 8789

Your reference

Our reference

10th March 1993

A E Shaw Esq
Secretary
Lord Chancellor's Advisory Committee
on Legal Education and Conduct
Millbank Tower
Millbank
London SW1P 4QU

Dear Alastair,

COURTS AND LEGAL SERVICES ACT 1990, S.29(3)
APPLICATION BY THE LAW SOCIETY FOR EXTENDED RIGHTS OF AUDIENCE

I wrote to you on 22 February, enclosing amendments which the Law Society had made to the Higher Courts Qualification Regulations which are part of the above application.

The Council of the Law Society has made a minor change to the Rules of Conduct proposed in the same application. In its advice to the Society the Advisory Committee had pointed out that that part of the non-discrimination rule which the Society had adopted, which entitles a solicitor-advocate not to accept instructions if he is not being offered a proper fee, did not follow exactly the words of the Act. The Society's rule allows this, "if the advocate has reasonable grounds to consider that ...", whereas the wording of the Act is "if there are reasonable grounds for him to consider that ..."

The Law Society has informed us that the difference in wording arose from the fact that the Society's Code was drafted to avoid the use of masculine pronouns. The Society's wording was not intended to, nor is it believed that it did, provide for a subjective rather than an objective test. The Bar Council had, however, claimed that the Society's wording would allow for a subjective test. The Advisory Committee had recently reminded the Society that it attached some importance to this matter, and the Council therefore decided to amend the provision.

The amendment made was to paragraph 2.5 of the Law Society's Code for Advocacy as follows:

> For the words "if the advocate has reasonable grounds" substitute "if there are reasonable grounds for the advocate".

I would be grateful if you could treat this as a formal request for further advice in accordance with Part II of Schedule 4. I am writing in similar terms to the Director-General of Fair Trading.

Yours sincerely
Nicky Oppenheimer

(Mrs) N A OPPENHEIMER

ANNEX C

Communications Division

Walter Merricks
Assistant Secretary General, Communications

THE LAW SOCIETY

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Committee on Legal Education
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DA/dw

12th March 1993

Dear Alistair

THE LAW SOCIETY'S APPLICATION: RULES OF CONDUCT

You wrote to me on 23rd February on two points the Committee wished to raise.

Choice of Advocate

As explained in paragraph 11 of our application our approach is normally to seek to ensure that any restrictive rules go no further than is necessary to meet the mischief at which the rule is aimed. Broadly we think it is important that advice is communicated to the client either in writing or directly in person or on the telephone, and secondly that there be some written record. Clients vary enormously in their sophistication, and it may well be wise for a solicitor to follow up advice given to a client in person with a letter, particularly if the client is unsophisticated in the sense that he or she has not been involved in legal proceedings before. Where however the client is for instance regularly engaged in litigation, for example an insurance company, a file note might well be sufficient. We have not attempted to distinguish between sophisticated or experienced clients and those not so, but this might be necessary if the guidance were to be more prescriptive.

The Solicitors Investment Business Rules are perhaps the most prescriptive of our rules in requiring solicitors to advise clients on most key aspects of investment business. Nevertheless the main requirement for record-keeping is simply that the transactions effected as a result of the advice should be recorded.

The Committee will no doubt be familiar with the Transaction Criteria recently published by HMSO on behalf of the Legal Aid Board. The approach here is very detailed, and divides work into two broad headings - I Gathering the Information and II Advising on this Information. The latter is introduced by the following statement:

> "The advice given to the client should be recorded on the file (either in attendance notes or in confirmatory letters to the client)."

The Legal Aid Board has a strong interest in ensuring that solicitors do not write unnecessary letters for which they will then have to make a charge on public funds. Private paying clients may also resent receiving confirmatory letters they believe to be superfluous and for which they will have to pay. For these reasons the Society believes that it struck the right balance in providing that the guidance should point solicitors to confirming the advice in a letter or as an alternative recording it in a file note.

Legal Aid

In paragraph 3.48 of its April advice the Committee advised that solicitors should be given guidance on the proper interpretation of the words "fee offered" in relation to legal aid cases.

The Society's rule follows exactly the provisions of Section 17 of the 1990 Act. During the debates on the Bill this was the most contentious provision, and different amendments were introduced at different stages of the Bill during its passage. The Act requires that a non-discrimination rule be included in the conduct rules of any professional body providing advocacy services, and it is therefore likely that the relevant provisions will find their way into the conduct rules of professional bodies other than the Law Society. Given the contentious background to the provisions, it is also quite possible that they will at some point be subject to judicial scrutiny, and therefore it is right that any guidance by the Society to solicitors as to their interpretation should only be tentative. The guidance will leave solicitors to make up their own minds as to the proper interpretation, but will assist by providing some of the relevant background, including statements made by the Lord Chancellor in Parliament. Our view is therefore that the guidance will not constitute a rule of conduct.

Where there is a standard fee or an hourly rate prescribed for advocacy work by legal aid regulations, or where the level of remuneration commonly allowed for advocacy work by the legal aid authorities can reasonably easily be ascertained, there is no difficulty in suggesting to solicitors that the phrase "being offered a fee" would encompass legal aid fees. The matter is a little complicated by the fact that the Lord Chancellor has determined to introduce a scheme of combined fees for advocacy and litigation services for criminal legal aid work in the magistrates court. The Committee may know that legal proceedings are now under way to determine whether such a scheme can properly be introduced under the Legal Aid Act 1988. Whilst this issue is not of relevance to higher court work, the non-discrimination rule applies to all advocacy and we must do our best to see how it can properly be applied in these circumstances. It is possible that current fee discussions on other areas of work, including fees payable to franchised firms, could have an effect on the way the rule will have to be applied, and in view of the volatile nature of this field, we have always taken the view that it would be sensible to issue the guidance as near as possible to the time at which the rules are actually going to have effect.

Overall our aim will be to try to help solicitors to apply the provisions in a common sense way as far as legal aid cases go in the context of whatever remuneration system is in place. The intention of the legislation is clearly that if the remuneration for advocacy work can be expected to be less than the solicitor's normal charging rate, then the solicitor would for that reason be entitled to decline to undertake the advocacy. Where on the other hand the remuneration to be expected is at or around the solicitor's normal charging rate, then the fact that the case is legally aided would not be a proper ground for refusing to undertake the advocacy.

Yours sincerely
Walter

Walter Merricks

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

ANNEX D

From the Secretary

8th Floor
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Millbank
LONDON SW1P 4QU

Telephone 071-217 4296
Fax 071-217 4283

Your reference :

Our reference : → AC 5/2 s.1

18 September 1992

Dear Walter,

EMPLOYED SOLICITORS

1. The Committee has now had an opportunity to consider the Law Society's document on rights of audience for employed solicitors, dated August 1992.

Conflict of functions: the Committee's view

2. The rights of audience which employed lawyers might exercise in the higher courts are, of course, a question which the Committee has already considered in great detail, setting out its views at length in advice to both the Lord Chancellor and the Society. It may be helpful to summarise the most relevant points. One of the Committee's fundamental concerns is that some functions carried out by employed lawyers are not compatible with advocacy in the higher courts. The point of principle was expressed (in relation to the employed Bar) in the Committee's advice to the Lord Chancellor on the question raised by the CPS and GLS:

> 'The Committee would not wish to extend rights of audience for barristers ... 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.'

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3. The Committee also pointed out that the duties carried out by employed lawyers varied very widely:

> '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.'

4. In the absence of any detailed information on the functions carried out by employed solicitors, and of any specific proposals in the Law Society's application to safeguard against a possible conflict of roles or responsibilities for those who might appear in the higher courts on behalf of their employers, the Committee advised that the proposed higher courts advocacy qualifications should be open only to solicitors in private practice.

5. The Committee's concerns have focused on the need to ensure that solicitors acting as advocates on behalf of their employers are not so closely identified with the interests and policies of the employer that they might be, or be seen to be, acting as both clients and lawyers. In the Committee's view, this is important because the court (and, to some extent, the public) needs to be clear whether a case is being presented by an independent advocate or, in effect, by a litigant in person. This is a concern the Society already recognises in a very narrow context in the rule which permits the partners of a firm to act when suing for fees, but requires them to appear unrobed to make it clear that they appear as litigants in person. The court is entitled to assume that a lawyer advocate is appearing in an independent capacity and presenting the case with the detachment necessary to balance his duties to the court with those to his client. A detailed study of the functions carried out by various categories of employed solicitors might determine which functions were, and which were not, compatible with the role of an advocate in the higher court.

6. The Society has reservations about the practicality of such an approach, and its desirability in principle. The Committee has some sympathy with the former argument, if not with the latter.

7. If it is thought impracticable to separate out the many functions which employed solicitors carry out because of the variety of their roles, it might be feasible to identify solicitors for whom there was little or no risk of a problem because their work was only legal in nature. The obvious group would be solicitors whose work was done wholly within a genuinely identifiable and separate legal department. It would, however, be necessary to establish whether the department in question was free-standing within its organisation. A number of criteria would have to be considered, for example, whether the department:

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- had responsibility only for advising on the legality of actions and policies (as opposed to their desirability on other criteria), and for providing consequential support such as the conduct of litigation;

- had a position and status within the organisation which supported the legal department's independence and protected its members against pressure;

- had clearly defined lines of access to senior management for use if there was serious doubt about the legality of a proposed course of action.

8. Work done in a legal department which met acceptable criteria might in most circumstances be comparable with work which the employing organisation might conveniently choose to send out to a firm of solicitors in private practice. It may be that some of those who employ lawyers already do so in departments which meet such criteria (or are moving towards that situation under such influences as the prospect of compulsory competitive tendering for local authorities).

9. The Law Society has already suggested that employed solicitors applying for higher court advocacy qualifications should be required to submit a job description with their application for scrutiny by the appropriate committee. Plainly, were a function-based approach to be adopted, a more stringent provision in the qualification regulations would be needed, requiring applicants to satisfy the Society that their working conditions met criteria of the kind referred to above. In view of the relatively small number of employed solicitors who are likely to seek rights of audience in the higher courts, it seems unlikely that such a requirement would impose a significant administrative burden on the Society.

Rules of conduct

10. It is clear that a 'structural', or 'function-based' approach could not be achieved by conduct rules alone. If, however, the Society wished to explore such an approach further, rules of conduct along the lines of those proposed in Annex A to your document would be of value to reinforce it. The exact form of such rules, and of accompanying guidance, would need further consideration.

11. The broad definition of 'legality' given in the commentary, together with draft rule 4.1(d), might provide a helpful starting point. Since the concept of legality would be crucial to how any such rule worked in practice, it would need to be defined to set out the breadth of its intended application, and be accompanied by substantial guidance.

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12. It seems to the Committee that the concept of 'responsibility for a decision' includes circumstances where the potential advocate, although not directly involved in the decision or action being litigated, had managerial responsibility for it or had determined the policy under which it was taken. Consideration should also be given to whether this principle applies to cases where the merits of policies or actions for which the lawyer was responsible, and not simply their legality, were being challenged.

13. It is the Committee's firm view that further consideration should be given to the position of company directors. Under the Companies Acts, they share complete and equal responsibility for their companies' actions and policies. They are bound to be so closely identified with the company's interests that they should not appear as advocates for their company in the higher courts.

Contracts of employment

14. The Law Society has suggested that an employed solicitor's independence might be recognized by a specific term in his contract of employment, or in a declaration by the employer. The Committee has made it clear that it does not consider that a contractual term or employer's declaration would of itself provide a sufficient guarantee of avoiding a conflict; but it sees merit in measures such as these working in combination with the others under consideration.

Frequency of appearance

15. The Committee's second main concern about advocacy rights for employed solicitors, in addition to conflict of functions, is that they might not have the opportunity to appear in the higher courts sufficiently frequently to maintain their skills at the appropriate level. The Society has pointed out, in its response, that some employed solicitors (albeit a minority) would be able to make extensive use of higher court rights, and that those who could not do so would be unlikely to go to the trouble and expense of obtaining the additional qualification.

16. The Committee has considered this argument, and accepts that draft rule 4.1(a) (as amended) may be a sensible way of reminding solicitor advocates - whether employed or in private practice - of their obligation to maintain their skills. Because this rule has necessarily to be cast in general terms, the Society would need to evolve guidance for individual solicitors on how it should apply to their particular circumstances.

17. The Committee would also wish to encourage the use of continuing education courses, as proposed by the Society, to ensure that solicitors keep their advocacy skills up to date.

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Employed solicitors acting for third parties

18. On the assumption that the Law Society is likely to wish to return to this topic in due course, the Committee accepts that, should employed solicitors gain rights of audience in the higher courts, they should be permitted to appear only on behalf of their employers. Any such rule should prevent a solicitor employed by an insurance company from appearing in the High Court on behalf of the insurer in the name of the insured.

The CPS and GLS

19. In the case of the CPS, the Committee saw special difficulties - unconnected with conflict of functions or frequency of appearance - which were explained in its advice to the Lord Chancellor. These were:

(i) The 'thin end of the wedge' argument - even if the CPS agreed to undertake only a small percentage of Crown Court cases in-house, this might lead eventually to an effective CPS monopoly of Crown Court advocacy, which the Committee would regard as undesirable.

(ii) The overall standard of service of the CPS - despite the progress which the CPS has made towards uniformly national high standards of service, it would not yet be appropriate for it at present to take on the additional responsibility of Crown Court advocacy.

(iii) The Runciman Royal Commission is currently considering afresh the whole balance of the criminal justice system, and it would not be appropriate to make changes to the CPS's role in the Crown Court before the Royal Commission's views were known.

20. The Society has addressed only the first of these arguments - the thin end of the wedge. They have done so by putting forward a further amendment to the Employed Solicitors Code. The Committee believes that this proposed rule (set out at Annex B to the Society's document) would place an unrealistic and inappropriate burden on individual solicitors employed by the CPS to limit the exercise of advocacy rights by the Service as a whole. The Committee doubts, in any event, that it would be right for a professional body to have an effective administrative control over a Government department's discharge of its functions.

21. The Committee remains of the view that administrative directions governing the exercise of advocacy rights by lawyers employed by the Crown should be subject to approval under the framework set up by the Courts and Legal Services Act. The

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Committee continues, also, to attach importance to the arguments about standards of service and the Royal Commission, which cannot be dealt with by the Society's proposed solution.

22. For all these reasons, the Committee still believes that it would be inappropriate at present for advocates employed by the CPS to exercise rights of audience in the higher criminal courts.

23. In relation to the GLS, the Committee remains of the opinion expressed in paragraph 26 of its advice to the Lord Chancellor of 14 April 1992.

<u>Conclusion</u>

24. Should the Society submit proposals on any of the matters referred to above to the Committee, it would of course need to consult interested bodies.

Yours Alistair.

<u>A E Shaw</u>

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

From the Secretary

8th Floor
Millbank Tower
Millbank
LONDON SW1P 4QU

Telephone 071-217 4296
Fax 071-217 4283

Your reference :

Our reference :

10 May 1993

Dear Walter,

EXTENDED RIGHTS OF AUDIENCE FOR EMPLOYED SOLICITORS:
ADVICE TO THE LAW SOCIETY ON ITS SUPPLEMENTARY
APPLICATION DATED 8 APRIL 1993

1. The Advisory Committee has considered the Law Society's letter of 8 April 1993, with which the Society submitted a supplementary application comprising amendments to the Employed Solicitors Code and to the guidance accompanying the practice rule on choice of advocate. The Committee's advice is that the application needs to be amended in the following ways in order better to comply with the general principle and further the statutory objective of the Courts and Legal Services Act 1990.

Size and structure of department

2. It was proposed in discussions between the Law Society and the Committee's working group that any legal department whose members were to exercise extended rights of audience in the higher courts should have a 'normal establishment' of at least three lawyers. The Society has adopted this in its amendments to the rules. On reflection, however, the Committee believes that the intended meaning would be best conveyed if the words 'a normal establishment' were changed to 'an establishment'. This makes it clear that, although temporary vacancies are permissible, it would not be acceptable for the actual establishment to be temporarily reduced below the specified level (for example, because of a recession), even though it was intended to restore the previous level in due course. The rules should also be amended to make it clear that the establishment is in terms of the equivalent of three full-time posts.

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3. In the course of the discussions with the working group, the Society proposed a rule requiring 'that the structure of the employing organization is such that the delivery or procurement of advocacy and litigation services is the responsibility of the department'. This has been dropped from the latest submission, both because the Society now considers it to be too restrictive and because the Society believes the Committee's concerns about the strength and autonomy of legal departments are met by the minimum size requirement.

4. The Committee accepts that it is unnecessary for the rules to interfere with an employer's freedom to seek outside legal advice without using an internal legal department as intermediary.

5. The Committee also accepts that employers might perceive positive advantages in solicitors working in sub-units or outposts of an internal legal department, in order to develop closer links with 'client' departments. There can be no objection to solicitors in these circumstances appearing as higher court advocates, provided they are members of a unitary legal department with appropriate liaison arrangements and clear lines of accountability to the head of that department, and provided a proper professional relationship is maintained between lawyer and client.

6. In some organizations, however, the structure of legal services is even further fragmented. Some local authorities may, for example, have separate 'legal departments' within their Housing and Education departments, each of which comprises only a small number of relatively junior lawyers, and is not managed centrally. Such a development creates a number of problems in relation to the exercise of higher court rights of audience. It weakens the cohesiveness of the legal department, and may therefore significantly reduce its ability to foster an atmosphere which sustains professional independence and ethos. Clearly, the heads of such 'departments' are also likely to be considerably less senior in organizational terms than the head of a single department. This must reduce their ability to resist improper pressure, and to represent the department's concerns effectively within the organization.

7. The Committee therefore thinks it is important for organizations who wish their employees to exercise rights of audience in the higher courts to maintain separate legal departments. These should have clear lines of responsibility to a single, professional head within the organization as a whole. They should be so organized that contact between the members of the department is sufficient

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to maintain a proper professional ethos. It is the Committee's belief that it should be possible to make such arrangements without unduly interfering with an organization's ability to manage and deploy its lawyers effectively.

8. The Society will wish to consider how this aim should be achieved. There are arguments for making it a clear provision by rule. This might, for example, provide that the legal department, whether or not it operates through sub-units, must be a single department. The Committee recognizes, however, that in very large organizations (perhaps with subsidiary companies) such a provision may cause difficulties. The Society might therefore think a more wide-ranging form of wording is appropriate, and prefer to prepare guidance to accompany the relevant provisions of the Employed Solicitors Code.

<u>Head of department</u>

9. One suggestion put to the Law Society by the Committee's working group, which the Society has not adopted in its supplementary application, was that the rule (h)(iii)(a) should make it clearer that the head of a legal department within which extended advocacy rights were exercised should be required to work full-time within the department, and not, for example, as a company secretary with a range of other responsibilities.

10. In the course of one of their briefing visits, Committee members heard that such a requirement might constrain the company's organization or the head of department's career prospects. Having considered this point, the Committee remains of the view that, in order to enhance the autonomous professional status of a legal department doing in-house higher court advocacy work, the head of the department should not exercise other functions that might detract from that status.

11. The Committee believes, however, that there should be an exception in the case of a local authority's senior legal adviser who is also the authority's monitoring officer. In the Committee's view, a monitoring officer's functions under the Local Government and Housing Act 1988 are compatible both with heading a department whose members are to exercise extended advocacy rights, and with appearing as an advocate (subject to the rules on not appearing in cases with which the lawyer has been too closely identified with the client's policies).

12. The Committee therefore advises the Society to adopt a rule requiring that the head of a legal department whose lawyers appear as in-house advocates must be employed full-time

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within the department. This might be achieved by adding the words 'exclusively employed within the department' at the end of sub-paragraph (a). The rule should be further amended to provide that, in the case of a local authority, the head of the legal department may also act as monitoring officer.

13. The Committee notes that sub-paragraph (b) would require the head of the department to have at least three years' seniority, which is the minimum requirement for a solicitor in private practice to practise independently. Of course, it is to be expected that the head will be of much greater seniority and the Committee expects the Society will pay attention to the seniority of the head of the department when considering solicitors' applications.

Access to decision-making

14. It will be essential, in the event of a dispute about the legality or propriety of a proposed course of action, that the head of department should have the ability to put the lawyers' arguments directly to decision-makers. The Committee understands that is the Law Society's intention, but advises that it should be made clearer by amending sub-paragraph (c) so that it reads "the head of the department has direct access to the highest level of decision-making authority."

Solicitors employed by insurance companies

15. A further point has come to the Committee's attention, although not arising directly from the supplementary application of 8 April. It arose from consideration of the advocacy rights of solicitors employed by insurance companies, but raises more general issues about any cases involving the interests of third parties.

16. In its letter to the Society of 18 September 1992, the Committee expressed the view that in-house solicitors acting as higher court advocates should be permitted to appear only on behalf of their employers. The letter suggested that any rule on this matter should prevent a solicitor employed by an insurance company from appearing in the High Court on behalf of the insurer in the name of the insured. (This was on the basis that the Society would want to return in due course to the whole question of employed solicitors acting for third parties.)

17. The Committee understands that the Society intended to deal with this point by an amendment to the Employed Solicitors Code which was submitted as part of the November 1992 application: paragraph 1(h)(iii) of the Code permits an employed solicitor to exercise additional rights of

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audience under one of the Law Society's higher court qualifications, if 'the solicitor is appearing either on behalf of his or her employer, or under the terms of paragraph 7 below (law centres, charities and other non-commercial advice services)'.

18. There is, however, some uncertainty as to whether the rule as drafted would have the intended effect, since a solicitor acting in a case where an insurance company is subrogated to the rights of an insured person is, in fact, acting on behalf of the company (in the name of the insured). It may also be possible for an insured person to assign his right of action to his insurers, whilst retaining an interest in the outcome of the litigation, e.g. in respect of uninsured losses. It is possible that somewhat similar problems might arise in cases where creditors assign debts to a collecting firm. The Committee therefore advises the Society that its rules should include an explicit prohibition on solicitors appearing as higher court advocates on behalf of their employer when a third party retains an interest, direct or indirect, in the outcome of the proceedings.

Advocacy in the higher criminal courts

I: The CPS and GLS

19. The April application does not deal with rights of audience for the CPS and GLS, because that topic was expressly excluded from the discussions between the Law Society and the Committee's working group. The Society's application contains rules which would permit CPS and GLS lawyers to exercise rights of audience in the higher courts. It is the Committee's view that this rule should not have effect, and it intends so to advise the Lord Chancellor. The Society will wish to have an account of the Committee's reasons.

20. In its advice to the Lord Chancellor on the question of rights of audience for employed barristers, the Committee explained that its concerns about conflict of functions and frequency of appearance did not apply to advocates employed by the CPS, which is an independent prosecuting authority dedicated to the prosecution of offences. The Committee also advised that the proper and efficient administration of justice would not be maintained if in-house CPS advocates prosecuted in all or most criminal cases in the higher courts.

21. The Committee therefore considered whether it would be possible, as the CPS itself had proposed, to establish a 'mixed' system where only a small (and carefully controlled) percentage of Crown Court cases could be

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presented by in-house CPS advocates. The main difficulty here was the need to find an effective control mechanism: both the Bar and senior members of the judiciary have expressed great anxiety to the Committee that even a limited extension of the CPS's advocacy functions into the higher courts would be the 'thin end of the wedge', leading inexorably to a virtual monopoly by the CPS of all Crown Court prosecution advocacy.

22. The Committee concluded that it would be most 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 higher court rights of audience granted to CPS advocates could only be exercised within limits which the Lord Chancellor and the designated judges had approved, after obtaining the advice of the Advisory Committee.

23. There is, however, no certain way in which this could be achieved under the present legislation. The Committee has therefore advised the Lord Chancellor in its first Annual Report that the Courts and Legal Services Act 1990 should be amended to require 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.

24. The Committee's advice to the Lord Chancellor gave two further reasons why the Committee could not recommend an immediate extension of the CPS's advocacy rights. First, the Committee was seriously concerned by some of the evidence it had received on the present performance of the CPS, which suggested that the Service as a whole was not yet at a stage where it could demonstrate that it was ready to take on new responsibilities in the higher courts. Secondly, shortly after the Committee started work the Royal Commission on Criminal Justice was appointed. Its terms of reference clearly raised fundamental issues for the future system of prosecution in this country. The Committee saw difficulties in making a major change to the CPS's functions before the Royal Commission's recommendations had been received.

25. The GLS has indicated that it seeks at present for its lawyers only to be able to appear in the higher criminal courts, and has said in discussion with the Committee that it would be willing to comply with any 'quota' of higher court cases imposed on the CPS. The Committee's only other concern about an extension of advocacy rights for the

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Service is that Government lawyers presenting their own cases in the higher courts might be perceived by the public as being too closely identified with their Departments to act as independent advocates. (This, indeed, is a concern which extends to in-house prosecutors acting on behalf of local authorities or other bodies.)

26. The Law Society has, understandably, sought to find a way of meeting the 'thin end of the wedge' argument without waiting for primary legislation. The application accordingly puts forward an amendment to the Employed Solicitors Code which would enable employed solicitors to appear as advocates in the higher courts if:

> "in the case of a solicitor employed in the Crown Prosecution Service, or the Government Legal Service, the employer has specified written criteria governing the choice and use of advocates in the higher courts and those criteria have been approved by the Lord Chancellor and the designated judges, they having had regard to such advice as they may receive from the Advisory Committee and the Director [General of Fair Trading], and such approval has not been withdrawn in consequence of non-compliance with the criteria."

27. The Advisory Committee accepts that the Law Society's new rule is intended to have the same effect as the legislative amendment which the Committee has advised the Lord Chancellor to seek. There must, however, be considerable doubt in law as to whether the Lord Chancellor and designated judges would have powers to carry out administrative functions without statutory provision (particularly since Parliament has set up a carefully determined and elaborate procedure for determining precisely similar questions relating to the grant of rights of audience to groups of advocates, and might therefore be taken to have excluded the possibility of other activity, outside the framework of the 1990 Act, to the same effect). Indeed, it might be open to question whether participating in such a procedure lay within the Advisory Committee's own powers under the Act.

28. The Committee is clearly not qualified to advise on the legal question. The Committee does, however, have considerable reservations of principle about the establishment of a new mechanism, outside the framework of the Courts and Legal Services Act 1990, which would govern not only the manner in which a large class of advocates should exercise rights of audience, but in effect whether they should have, or continue to have, rights of audience in the higher courts at all. The Committee does not think it is appropriate, following the passage of the 1990 Act, for the grant of rights of audience to be governed in a manner which Parliament has not expressly considered and approved.

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29. There are, in any event, some more practical doubts about how the rule could operate. It could only work if those given responsibility under it (the Lord Chancellor, the designated judges, the Advisory Committee, and the Director General) all agreed that they could and would participate in the procedure. Without statutory provision, none of them could bind their successors, so that at some uncertain date in the future the operation of the rule could be interrupted if any of their successors took the view that it was inappropriate for the procedure to continue.

30. The Committee does not think it likely that the CPS would conduct its work in a way that brought into real doubt whether or not it was complying with the criteria, and therefore brought the rights of audience of the solicitors it employs into question. If the situation were to arise, however, it would be necessary for consideration of whether or not to withdraw approval from the criteria to follow clearly defined procedures, laid down at the outset. In the absence of a statutory framework designed specifically to meet that situation, the Lord Chancellor and the designated judges would themselves need to devise an appropriate procedure.

31. They would need to consider whether provision should be made for them to be advised by the Advisory Committee (or, if appropriate, the Director General) on any question as to whether the criteria had been complied with. It might also be thought that the procedure should provide for the CPS or the GLS to be informed that withdrawal of their higher court rights of audience was being considered, or to make representations. A further point that would need clarification is whether withdrawal of approval would be secured by a decision of one of the five participants, or whether a majority (or unanimity) would be needed.

32. These procedural details are all the more important because the withdrawal of a substantial group of prosecution advocates from the higher courts would have a drastic effect on the way in which the courts could function. The Committee believes that they would be more appropriately dealt with under new statutory arrangements.

33. For all these reasons, the Committee's advice is that the Law Society's amendments to the Employed Solicitors Code should not have effect insofar as they relate to solicitors employed in the CPS and GLS.

II: <u>Solicitors employed outside the Crown service</u>

34. Taken together, the November and April applications would permit solicitors working for any other employer (including

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local authorities and large companies) to prosecute criminal cases in the higher courts on behalf of their employers. They would also enable any suitably qualified employed solicitor to act as a defence advocate in higher court criminal cases on behalf of his or her employer.

35. In the Committee's view, the question of the exercise of rights of audience by employed solicitors in the Crown Court cannot be considered in isolation from the problem of rights of audience for the CPS, and it would be wrong to adopt a piecemeal approach to so serious a question. It would be important to strike a balance between the volume of Crown Court prosecution work done by lawyers in the CPS, by in-house advocates conducting private prosecutions, and by independent advocates. In the case of private prosecutors, there would in addition be the need to ensure that the employer's commercial interests never led to oppressive prosecutions. This would require the most careful consideration of the application both of the Philips principle (that the decision to prosecute should be taken by a lawyer independent of those responsible for the investigation), and of the Code for Crown Prosecutors.

36. As regards the question of employed solicitors appearing to defend their employers in the Crown Court, it is to be hoped that this would indeed be a rare call upon their skills, and it would be difficult for the lawyer to comply with the 'frequency' requirement if he did not also have the opportunity to act as a prosecutor.

37. All these are difficult questions of both principle and practice, and the Committee therefore advises that the Law Society's rules should make it clear that employed solicitors may for the present exercise additional rights of audience only in civil proceedings in the higher courts.

Judicial review

38. The Committee wishes to give some further consideration to the exercise of rights of audience by employed solicitors in judicial review proceedings. It is possible that the Committee may need to give further advice on this matter.

Indemnity insurance

39. The Committee is also concerned that, whilst solicitors in private practice are all covered for liabilities by the Solicitors Indemnity Fund, employed advocates are not so covered and their employers may not have taken out insurance cover for liabilities to third parties resulting from the negligence of their employed professionals. Cases in the High Court often involve large sums of money, and it is possible to envisage circumstances in which the advocate

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may incur a liability to third parties in spite of the statutory exemption under Section 62 of the Courts and Legal Services Act 1990. The Committee invites the Law Society to consider whether changes need to be made to the Indemnity Rules to deal with this point.

Yours sincerely,

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Printed in the United Kingdom by HMSO
Dd 5062990 C9 10/94 3252449 19542 Ord 300566

higher courts, including the cost implications, should wherever possible be given to the client in writing. A file note, to which the client would be unlikely to have access, would not be enough to meet the Committee's concern.

3.14 The Committee put this point to the Law Society, which, in its supplementary application of 8 April 1993 (attached to this advice at Annex A), amended the final sentence of the guidance to read:

> "Where advocacy in the county court or in the higher courts is likely to last more than half a day, it would normally be appropriate for the discussion and decision to be recorded on file **and** in a letter to the client."

3.15 The Committee is content with this formulation, on the understanding that this will lead to clients being advised in writing wherever possible.

Tying-in of advocacy to litigation services

3.16 The Committee advised that the Law Society's 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.

3.17 The Society's response is an addition to the practice rule on choice of advocate:

> "A solicitor shall not make it a condition of providing litigation services that advocacy services shall also be provided by that solicitor or by the solicitor's firm or the solicitor's agent."

Prohibited grounds for discrimination

3.18 The Committee advised the Society that "sexual orientation" should be added to the list of grounds on which discrimination is prohibited, in rule 2.4.2(a) of the code for advocacy. The Society has followed this advice.

Legal aid

3.19 In its April 1992 advice, the Committee advised two amendments to the part of the non-discrimination rule dealing with legal aid (rule 2.5 in the code for advocacy). First, the wording of the rule should follow the statute exactly, so that it would read "... if there are reasonable grounds for the advocate to consider ..." instead of "... if the advocate has reasonable grounds to consider ...". This, in the Committee's view, emphasises the objective nature of the criteria being applied.

3.20 The Society did not take up this point in its November 1992 application, but submitted an amendment in a subsequent application to the Lord Chancellor which complied with the Committee's advice. The later application was referred to the Advisory Committee in March 1993 (Annex B), and the Committee now advises that the rule should be approved.

3.21 The Committee's second suggestion was that the words "fee offered" should be clarified by an explicit statement along the lines that their meaning, in relation to legal aid cases, is "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 Society has indicated, in a letter to the Committee dated 12 March 1993 (Annex C), that it agrees with the Committee's interpretation of the statutory wording, and intends to issue appropriate guidance. The Society prefers, however, to wait until the outcome of its negotiations with the Lord Chancellor on the legal aid remuneration system is known.

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