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Reform of the Legal Profession: An Alternative 'Way Ahead'

Roger Kerridge and Gwynn Davis*

Introduction

In this article we consider the future organisation of the legal profession in the light of government proposals intended to promote solicitors' take-up of higher court rights of audience. It is our contention that in focusing upon rights of advocacy the current debate is framed too narrowly. We take this view partly on the basis of a recent empirical study, which we briefly review. In the light of that evidence we suggest an alternative approach to distinguishing legal expertise which would, if implemented, convey a more accurate sense of lawyers' skills. Our research has convinced us that if there is to be reform of the legal profession, then proposals for change should encompass all aspects of the delivery of legal services. The debate should be not only about rights of audience, but ought also to encompass legal education, the organisation of court hearings, and the role of the judiciary. Accordingly this essay includes some consideration of the degree to which these other aspects of the legal environment influence the way the profession is organised.

First, a brief history. The legal profession in England and Wales has always been divided into branches or sub-professions. Apart from scriveners and notaries, there have in the past been attorneys, solicitors, proctors, conveyancers, special pleaders, equity draughtsmen, advocates[1] and barristers. But there have been two principal branches, solicitors[2] and barristers. The relationship between these two branches had become settled by the end of the eighteenth century and changed relatively little between about 1790 and 1990. During the course of the nineteenth century the other sub-professions were swallowed up or amalgamated into the two principal branches. Attorneys amalgamated with solicitors; proctors joined them; special pleaders and advocates became barristers. There was a real possibility during the middle years of the nineteenth century, the age of reform, that the final fusion might come about. But it did not, and the two branches of the profession remained separate.

* Department of Law, University of Bristol.
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1 Members of the College of Advocates, known as Doctors' Commons, ie those who practised before the Court of Admiralty and the ecclesiastical courts before 1857.

2 Using the term 'solicitors' in the wider sense – to include attorneys.

Solicitors have always dealt directly with lay clients and, until recently, had a monopoly of conveyancing[3] and of the conduct of litigation other than advocacy. They also had rights of audience in the lower courts.[4] Barristers have not been permitted to deal directly with lay clients,[5] but they have always enjoyed full rights of audience in all courts, including until recently an effective monopoly of rights of audience in the higher courts.[6] Decisions as to rights of audience, who could appear in which courts, were left by and large to the judges (who had themselves all been recruited from the Bar[7]). It was they who, *de facto*, created or maintained the Bar's monopoly[8] in relation to rights of audience in the higher courts.

The distinction between the two branches of the profession has never been confined to these matters of access by lay clients, conveyancing, and rights of audience. It was clear during the latter part of the eighteenth century and throughout the nineteenth century that barristers were in general better educated than, and socially superior to, solicitors. Even in the 1870s only five per cent of those admitted as solicitors were graduates,[9] in contrast to some seventy per cent of those practising at the Bar in 1885.[10] Barristers were all based in London and had good access to libraries. Solicitors were more scattered and generally did not have such access. Barristers were the senior branch of the profession, and solicitors, who were regarded as general legal practitioners, went to them for advice as well as for advocacy. As to their relative positions in society, it can be discerned from the novels of Jane Austen that solicitors, at least at the start of the nineteenth century, were 'not socially acceptable'.[11]

There was a gradual change over the course of the twentieth century, to the point where the solicitors' profession became almost entirely graduate. As solicitors formed larger partnerships, specialisation within partnerships increased, again facilitated by improved access to libraries. It was no longer true that most solicitors were general practitioners. Many of the best graduates chose to become solicitors rather than barristers,[12] and it could no longer be asserted that solicitors were, as a group, socially inferior to barristers.[13]

3 The art of creating and transferring rights in or over land by deeds. Solicitors obtained their conveyancing monopoly during the early nineteenth century as a *quid pro quo* for paying stamp duty on practising certificates and duty on articles, ie they were granted the monopoly in exchange for paying tax: R. Abel, *The Legal Profession in England and Wales* (Oxford: Basil Blackwell, 1988) 141.

4 Principally, the magistrates courts and the county courts. In fact, for solicitors to be granted rights of audience in the newly created county courts in 1846 was thought at the time to be a step on the road to fusion.

5 Since 1989, members of designated professions (other than solicitors) have been allowed to approach barristers directly for *advice*. This is 'DPA' (Direct Professional Access). At the time of writing (June 1999) the General Council of the Bar is preparing to launch BarDirect, a new scheme which will enable some other organisations to consult barristers directly, and not via solicitors. This scheme is now in its pilot stage.

6 The Crown Court, the High Court, the Court of Appeal and the House of Lords.

7 There were no solicitor judges before 1949. The Justice of the Peace Act 1949, s 29, enabled solicitors to become stipendiary magistrates. Under the Courts Act 1971, solicitors became eligible to become circuit judges but were *not* eligible to be promoted to the High Court bench. Under s 71 of the Courts and Legal Services Act 1990, solicitor circuit judges became eligible for promotion to the High Court bench – at the time of writing, one solicitor has become a deputy High Court judge.

8 As Parke B said in 1831: 'No person has a right to act as an advocate without the leave of the Court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage': *Collier* v *Hicks* (1831) 2 B & Ad 663, 672. See also D. Pannick *Advocates* (Oxford: OUP, 1992) 175.

9 Abel, n 3 above, 143.

10 *ibid* 47.

11 G.H. Treitel, 'Jane Austen and the Law' (1984) 100 LQR 549, 550. The vulgarly effervescent Mrs Bennett in *Pride and Prejudice* was an attorney's (ie a solicitor's) daughter.

12 P. Reeves, *Are Two Legal Professions Necessary?* (London: Waterlowe, 1986) 101–103.

13 Abel states, n 3 above, 170, that as late as the Second World War barristers were automatically granted commissions; solicitors were not.

The case for fusion

Over a hundred years ago, Bagehot described the division of the profession as 'an artificial hedge which cramps and hurts clients'.[14] There have always been, within the solicitors' branch of the profession, some who have favoured fusion with the Bar, but the Bar, jealous of its status, has resisted. Members of the Bar have argued that a divided profession gives a service which is both better and cheaper than could be offered by a merged profession with, in effect, in-house advocates. The claim that the divided profession provides the lay client with a *better* service is of course difficult to test. The assertion was made, for example, by Lord Shawcross thirty years ago[15] when he said, 'It is this very division [of the legal profession into barristers and solicitors] which has perhaps contributed more than any other single factor to the great prestige which English justice enjoys throughout the world'.

A divided profession almost certainly delivers a better service some of the time, and it no doubt delivers a cheaper service in some contexts. But there are also occasions when the divided profession delivers a 'Rolls Royce' service at very considerable cost. Two questions then follow: first, is this cost greater than would be incurred if the profession were fused; and second, if the cost is greater, is it nonetheless a reasonable cost given the quality of service which is delivered?

Calculating the cost of a divided legal profession is not a straightforward matter. One problem is that circumstances vary from case to case, and across different spheres of litigation. It will generally cost more to employ two lawyers than it costs to employ one, but if two lawyers are needed to carry out a task, it may well be cheaper if one of them is self-employed and, so to speak, on stand-by rather than in some sort of permanent link with the first.

This brings us to the question of overheads. Solicitors in general incur higher overheads than do barristers. But it does not follow from this that solicitors who are regularly involved in advocacy incur higher overheads than are incurred by those barristers with whom they may reasonably be compared. It is fair to assume that a litigation solicitor, particularly one who appears in court, has lower overheads than a solicitor engaged in, say, conveyancing or probate. It may have suited solicitors, as a group, to take no account of this when attempting to justify their charges to the taxing authorities, or to those responsible for fixing legal aid rates. And it may have suited barristers too. They could justify their own charges as being less than solicitors' charges, without needing to delve too deeply into how either set of charges was calculated.

Recent developments

Although the middle part of the nineteenth century was a period when fusion appeared to be a real possibility, by the end of the century the mood had changed. Solicitors were generally prosperous and content with their lot. In the decade after the end of the First World War the case for fusion was again argued,[16] but the expansion of the mass conveyancing market between the 1930s and the 1960s vitiated pressure for reform. However, when the solicitors' conveyancing monopoly came under threat in the 1970s some solicitors began to think seriously about challenging barristers' exclusive rights of audience in the higher courts. The Royal Commission on Legal Services, the Benson Commission, was appointed in

14 'Bad Lawyers or Good', *Literary Studies* (1898 ed) Vol VIII, 278.
15 *The Times*, 21 June 1966.
16 Reeves, n 12 above, ch 1, esp 6–8.

July 1976 and reported in October 1979.[17] It recommended, in effect, no change to the *status quo:* no change to the solicitors' conveyancing monopoly and no breaching the Bar's monopoly on higher court advocacy rights. One might have been forgiven for thinking that the Benson Commission's Report would sound the deathknell of reform for another generation.

Not so, as it turned out. Only four years after the Benson Commission's Final Report, Austin Mitchell MP introduced a private members' Bill[18] providing for licensed conveyancers – in effect, a full scale attack on the solicitors' conveyancing monopoly. The Bill had broad public support and, to the lawyers' surprise and dismay, passed its first reading in Parliament. The government then promised that if the Bill were withdrawn, its provisions would be enacted in government-sponsored legislation. Part II of the Administration of Justice Act 1985 provided for the creation of licensed conveyancers, and the first to obtain their licences did so in 1987. The Law Society, the solicitors' governing body, now began to push for extended rights of audience for its members, partly at least to make up for the prospective loss of conveyancing work.[19]

The Courts and Legal Services Act 1990 changed the legal basis for the exercise of rights of audience.[20] Under Part II of the Act, the General Council of the Bar and the Law Society were *both* authorised to grant to their members rights of audience before the higher courts. Barristers would continue to enjoy higher court rights of audience, but solicitors could now be granted rights of audience before the higher courts under the Higher Courts Qualification Regulations 1992. Under these Regulations, solicitors could qualify as higher court advocates provided:

(i) they had practised for at least three years and *either*;
(ii) they could demonstrate a sufficient level of advocacy experience over a two year period and show also that they had taken an appropriate Higher Courts Advocacy Training Course and passed a Qualification Test in Evidence and Procedure; *or*
(iii) they could show that they had recent advocacy experience before appropriate courts *or* that they had appropriate judicial experience *or* that they had a combination of advocacy and judicial experience.[21]

A solicitor could be granted a higher courts qualification as a civil *or* as a criminal advocate *or* as a combined (civil and criminal) advocate. By September 1998, 689 solicitors had obtained this higher courts qualification, 138 as civil advocates, 428 as criminal advocates and 123 'combined'. Of the 689 who had qualified, 502 had done so by exemption and only 187 by taking the training course and passing the test.

Research

In 1994, two years after the 1992 Regulations came into force, the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC), a body established under the 1990 Act, decided to commission research in order to determine the extent to which the granting of rights of audience under those Regulations had contributed to

17 Cmnd 7648.
18 The Home Buyers' Bill 1983.
19 The Marre Committee was appointed by the Bar Council and The Law Society in 1986 and reported in July 1988. The majority on the Committee, including all of the solicitors and most of the independent members, wanted to extend solicitors' rights of audience; the barrister representatives did not.
20 See n 8 above. The 1990 Act removed from judges the right to decide who could appear before them.
21 This latter is known as the 'exemption route'.

the development of legal services and, if possible, to identify any problems or benefits arising from the changes which were then under way. With colleagues at the University of Bristol[22] we were one of two successful bidders for this research commission.[23] We conducted our study amongst Bristol solicitors and members of the Bristol Bar, reporting to ACLEC in 1996.[24] In all we interviewed 61 solicitors, 11 barristers, five barristers' clerks and two judges. All those interviewed were given assurances of confidentiality and anonymity.

Economic barriers to solicitor advocacy

Many solicitors told us that the economics of their business militated against in-house trial advocacy. One partner specialising in defendant personal injury work remarked of trial advocacy:

> It takes time. I can get a couple of lever arch files together or get the clerk to do it and send it off to counsel. I can get a clerk to sit behind counsel. In the meanwhile I can be getting through all this stuff here on my desk. Now if I have to do advocacy I need to prepare for it and because I do not do it very often I probably have to prepare for it more fully … So all that preparation and all that attendance is stuff which can be done by someone else and is preventing me from doing work which my clients want me to do to progress the cases.

For the most part solicitors argued that there would be no cost advantage to the client in their doing trial advocacy – their fees could well exceed those of a barrister – and there would likewise be no cost benefit to the firm. This was a recurring theme:

> Most solicitors are under different pressures during the day. Barristers can say: 'I have a trial tomorrow and I need to prepare.' On an average day in the office the phone is going, clients are coming in, people are pestering me, whereas barristers do not have that, or their clerk manages it. You have to take into account the time spent in preparation – if a solicitor specifically wanted to do [advocacy] they would have to reduce their caseload … I am conscious of my fee target and the need to put in the chargeable hours.

Another factor which deterred solicitors from doing their own advocacy was that they might waste several hours waiting for their case to come on. The choice of advocate was seldom dictated by any consideration of 'rights', but essentially rested on a judgment of profitability (as far as the solicitor personally was concerned) and cost (viewed from the perspective of the client). This in turn led some barristers to regard the question of solicitors' rights of audience as of academic interest only. As it was put to us by one senior figure in the Bristol Bar:

> Extended rights of audience [for solicitors] are an irrelevance. This is why, in a sense … this survey … is an irrelevance. I shall tell you why. [Take] the Family Bar. For the last 25 years solicitors have been able to do precisely the same work [as barristers]. [But] there has been a flourishing Family Bar. [Again take] Personal Injury work. For years … solicitors have had rights of audience in the County Court. [But] none of the insurance companies, none of the big Union firms, use solicitors in the County Court [as advocates]. They use the Personal Injury Bar.

Our informants generally based their assessments (and their predictions for the future) on an appraisal of the economic self-interest of solicitors, but they tended to

22 Ruth Annand, Julia Hasler and Tim Press.

23 The other was a team from the University of Westminster led by Professor John Flood.

24 R. Annand *et al*, *The Impact of Solicitors' Higher Court Rights upon the Advocacy Market in Bristol* (Bristol: University of Bristol Press, 1998); G. Davis *et al*, 'Solicitor Advocacy and Higher Court Rights' (1997) *New Law Journal* 212–216; G. Davis and R. Kerridge, 'Opportunities for multi-disciplinary work in the market for advocacy' *Proceedings from the Law Society's Annual Research Conference 1997*, The Law Society.

do this without identifying the various key assumptions which contribute to the costs of litigation (and specifically advocacy) under present conditions. For example, many of those interviewed, solicitors and barristers alike, claimed that it costs less to employ barristers than to employ solicitors because barristers' overheads are lower. They treated this as axiomatic – with need neither for discussion nor proof. One former barrister, who was now working for a firm of solicitors, said that he was charging clients more now for the work which he did on their behalf and yet he was, himself, receiving less:

> I have noticed that when I have done cases of a substantial nature – a two week big industrial tribunal case a few months ago – I tend to bill (or 'record', as I am now in the 'recording' business) a lot. Far more than it would cost if I were doing it as barrister. Far, far more.

Another barrister informant observed:

> Solicitors have to employ more staff than we do … Most assistant solicitors still have their own secretary … So [in solicitors' firms] you get this high ratio of employed staff [to fee earners].

Yet, why should this be? If the work is the same, why should different lawyers incur different overheads in respect of it?

Our Bristol interviews revealed that it can be extremely difficult to calculate the cost of a decision to brief a barrister given the many complicating factors. But in general employing freelance counsel adds to the cost if he or she is asked to undertake a relatively straightforward task, such as drafting pleadings. Experienced clients, such as insurance companies, develop an appreciation of the additional costs which are likely to be involved and so discourage resort to counsel unless absolutely necessary. One solicitor specialising in insurance work put it as follows:

> Insurers tend not to like us to run off to counsel for every jot and tittle, and again that is driven by cost considerations, because obviously our insurers are very mindful of what it is going to cost them and they expect to get a service out of us in a cost-effective way.

This same solicitor acknowledged that when representing the plaintiff rather different considerations came to the fore:

> Plaintiff [work] is entirely different, because in plaintiff [work] the motivation, unfortunately … is maximising costs, ultimately, at the end of the day. And the way you maximise costs, it is entirely cynical to say it, but the way you maximise costs, because of the way the taxation system is set up, is by doing as much work as possible on the case … So in those cases you are encouraged to go to counsel more because you know that you will be paid for counsel's work and you cannot be criticised if you rush off to counsel and get counsel to settle all pleadings and to advise you at all appropriate stages.

It seems from this that there may be occasions where the demands of effective workload management, and of profitability, cut across the client's economic interest. This is not of course to deny the value in some instances of having a second opinion, or of counsel's role in 'managing' a difficult client in that client's own interest.

Looking to the future

Reviewing our study, we were struck by the extent to which practitioners were preoccupied with their day-to-day tasks and responsibilities. There was a general reluctance to become involved in long term planning, let alone to calculate, or even to consider, the long-term effects, and cost, of any root and branch reform of the

profession. Most of our informants thought that change was inevitable: the problem was that they could not be sure of the form which any change might take, and it was difficult to plan for changes which might or might not occur.

A key dimension of this uncertainty, for all those practitioners who undertook work which was paid for out of public funds, concerned the possibility of change to this funding base. For example, an equalisation of the rates payable to solicitors and barristers (particularly, as would almost certainly be the case, a *downward* equalisation) would influence the allocation of legal work in an immediate and decisive way. One can imagine that changes in the type of contract offered by the Legal Aid Board to firms of solicitors will also have a major impact. At the time we interviewed them, practitioners were all too aware of possible changes in public funding arrangements. They knew that these might prove crucial, but felt that they had no option other than to wait until the changes were upon them before attempting to respond to the new funding environment.

We conclude from this that piecemeal reform of rights of audience, or in any way tampering with the existing, two hundred year old system, will not work. If we are to have reform, then the entire structure needs to be examined. The debate should not be focused exclusively upon advocacy rights, but instead needs to be about the whole shape of the legal profession, about employed and self-employed lawyers, about advocates and non-advocates, about generalists and specialists, about legal education, and about judges.

'The Way Ahead'

Thirty years ago another Labour Lord Chancellor, Lord Gardiner, when setting out to attack the idea of a fused legal profession, poured scorn on the idea that the profession could remain divided while at the same time solicitors obtained full rights of audience. Having tried to make fun of Michael Zander for being young, and Robert Stevens for being American,[25] he dismissed higher court rights for solicitors in these terms:

> I have met one or two solicitors who have said: 'I am all against fusion. All I want is that solicitors should have a right of audience in the higher courts and be eligible for High Court and county court judgeships.' This, of course, is nonsense. It would mean that solicitors could do everything a barrister can do, while the barrister would remain unable to do most of the things solicitors do. On those terms, what possible object would anyone have in being a barrister? Every lawyer would be a solicitor – then he could do everything.[26]

Now we find that an earlier Lord Chancellor's 'nonsense' has become the present government's core proposal.[27] In June 1998, a little more than a year after the general election and change of government, the Lord Chancellor's Department published *Rights of Audience and Rights to Conduct Litigation in England and Wales: The Way Ahead* (hereinafter referred to as *The Way Ahead*). This document sets out the government's proposals in respect of rights of audience. It claims that the 1990 Act 'achieved virtually nothing',[28] and at another point refers to its having

25 Lord Gardiner's treatment of Zander and Stevens is an example of the way in which some members of the Bar, and their supporters, have seen fit to conduct this debate. In fact Stevens was not an American, but an Englishman who at the time taught in America. It is not clear why his views should have carried less weight because he resided outside the jurisdiction.

26 (1970) 23 *Current Legal Problems* 1, 3–4.

27 This is, presumably, an example of 'modernisation'.

28 *The Way Ahead*, i.

had 'a disappointingly limited effect'.[29] It suggests 'the time has come for more radical change'.[30]

In fact, *The Way Ahead* is not a radical or far-sighted document. The core proposal is contained in paragraph 3.2: 'All barristers and solicitors, including those in employment, should obtain full statutory rights of audience on call to the Bar or on admission to the Roll of solicitors'. It is envisaged (paragraph 3.3) that the professional bodies will impose appropriate additional training requirements, such as pupillage or a higher court qualification, on those admitted to the profession before they be allowed to exercise their full rights of audience.

It is not clear whether the government expects the removal of formal barriers to higher court advocacy to open the floodgates to solicitor advocates in those courts. That is the tenor of some of the document, although at other points, for example paragraph 2.16, it would seem that the government does not expect granting solicitors full rights of audience to have a dramatic impact. Nowhere is an explanation offered as to *why* the 1990 Act has resulted in such a modest take-up of higher court rights, or why things should be different in the aftermath of these proposed reforms.

The response of the professional bodies

In September 1998 the Law Society and the General Council of the Bar each responded to *The Way Ahead*. The Law Society clearly felt that it was swimming with the tide of government intentions, while the Bar felt itself to be swimming against. So it is that the Law Society's response runs to just five pages. The authors of the Law Society's response take it as read that it is the 'cumbersome statutory machinery' which has effectively prevented solicitors from taking up their higher court rights. They endorse the government view that all barristers and solicitors should acquire full rights of audience on qualification, with any additional training requirement being a matter for the relevant professional bodies.

The Bar in its response adheres to the well-established courtroom principle that a weak case needs to be argued with the same vehemence as a strong one, but at greater length.[31] There is also a tendency to rely upon unsubstantiated assertion. For example, it is stated that:

> In Belgium, the Public Prosecutor's Office conducts prosecutions on behalf of the State … The Public Prosecutor's Office is regarded by the private profession as attracting second rate lawyers and each profession distrusts the other … The Danish and Italian criminal justice systems provide similar examples.

Whoever wrote the Bar's response did not confine himself to traducing foreigners. The document contains the following passage:

> Indeed, some firms of solicitors have made no secret of their determination to exclude barristers from advocacy on behalf of their lay clients wherever and whenever possible, and without any regard for the need of the lay clients for advocacy of a specialist quality and at a lower cost from the Bar, including some of the largest law firms.

Then there are the allegations about over-charging. Thus:

> Solicitor Advocates tend to be much more expensive than barristers. By way of example, there was a recent arbitration, in which a team from a large firm of solicitors incurred costs

29 *ibid* 4.
30 *ibid* ii.
31 Nine times the length, in this instance.

> said to be more than seven times the costs incurred by the opposing traditional team of leading and junior counsel and solicitors.

'Said' to be? Said by whom? If a team of solicitors incurred costs seven times higher than the opposing lawyers, then, in the absence of special circumstances (and the Bar document is worded in such a way as to imply that there were none), the solicitors in question were either staggeringly incompetent or a bunch of fraudsters. This, with due respect to the Bar, is not an 'example'.

The main thrust of the Bar paper rests on the claim that the present limitations upon rights of audience, far from being anti-competitive, are necessary to ensure fair competition between advocates. Secondly, it is claimed that to remove the Bar's monopoly (or near monopoly, as it now is) of advocacy in the higher courts would be to increase the power of the executive. Sidney Kentridge QC has described the proposal that the Lord Chancellor effectively determine rights of audience as a 'quiet constitutional revolution'.[32] For 700 years, he says, authority over advocates has resided in the judges: the government's proposals would erode that authority and would likewise erode the independence of the Bar. Kentridge, a South African, draws a comparison with the apartheid regime in South Africa which, he says, repeatedly sought to place the Bar under its control; this was resisted in the knowledge that the independence of the bench was inextricably linked with the independence of the Bar.

The constitutional point is worthy of debate, although if the government is intent on delivering a State-controlled judiciary, surely it will not be sufficient for the purpose simply to permit lawyers employed by the Crown Prosecution Service to act as advocates in the Crown Court. It seems to us therefore that the constitutional argument is slightly contrived. Obviously the Bar is worried about the economic threat which will accompany any decision to grant employed lawyers full rights of audience, and concerned also that this may in due course affect the whole structure of the legal profession. It is for this reason, we suspect, that the Bar is inclined to confuse arguments relating to employed lawyers with consideration of the rights of audience of solicitors in private practice. As far as the former are concerned a revealing footnote to the Bar's paper reads: 'It is only fair to observe at this point that the employed Bar does not agree with much of what is argued in this and the succeeding chapter'. In other words, the Bar was unable to present a united front on this issue.

An alternative approach

The problem with *The Way Ahead* is that its focus is too narrow. It appears itself to be an attempt at tinkering, rather than a well thought out plan of reform. What is needed at this point is for the various dimensions of change to be looked at together. This should not be a debate solely about advocacy rights, but rather it should encompass the future organisation of the legal profession, including self-employed lawyers, employed lawyers, advocates, non-advocates, general practitioners, specialists, and of course judges. It is about whether there should be restricted access by the public to certain classes of lawyer. And it cannot help including a discussion of legal education.

The current debate has started in the wrong place. There appears to be an assumption that advocacy is, and should be, at the centre of things. There is no

32 (1998) *New Law Journal* 1346.

reason to assume this. Advocacy is not the only specialism within the legal profession – it may not even be the most important specialism. Of course advocacy is a special skill, but it may or may not be combined with other specialisms; and the legal profession as a whole needs to consider not only how it treats specialist advocates, but how it treats all the other specialists, as well as the practitioners who are to some degree generalists. What is missing from the present discussion is any consideration of the place of the specialist who is not an advocate, or of the advocate who is not a specialist (other than in advocacy).[33]

If we take advocacy, in the broad sense of the term, to be one specialism within the profession, but a specialism which cuts across many others, it is possible to divide lawyers into four groups:

(i) general practitioners, with no claim to specialise in any particular field of law, or in advocacy – although they may do some advocacy;
(ii) specialists who are not advocates – specialist insolvency lawyers, company lawyers, tax lawyers, and so on;
(iii) specialist advocates – not confining themselves to any one branch of the law, but skilled in pleading and forensic advocacy; and finally
(iv) specialist advocates who also specialise in a particular branch of the law – for example, specialist insolvency or company lawyers who are *also* forensic advocates.

Two questions follow from this four-fold division. The first is:

> what requirement, if any, should there be upon a lawyer claiming to be a specialist (whether a specialist who is not an advocate, or one who is *only* an advocate, or one who is both an advocate and a specialist in a particular branch of the law) that he be able to demonstrate or prove that he is a specialist?

And the second is:

> should access by the lay client to any of the specialists be by way of referral only, or should the lay client be able to obtain direct access to any or all of the specialist lawyers?

The rules which now govern the relationship between barristers and solicitors appear to assume, tacitly, that all barristers are not only specialist advocates but are also capable of giving advice on any branch of the law. Yet this cannot possibly be true. Obviously most barristers, after they have qualified, specialise to some degree, but there is no requirement upon solicitors to brief a barrister who is expert in the area of law in question; nor is there any objective way of testing whether a given barrister is expert in a particular field.

The debate which is taking place at the present time is a debate about the relationship between specialist *advocates* and other lawyers. It appears to assume that lawyers in categories (i) and (ii) above should be treated as one group and those in categories (iii) and (iv) should be treated as another. Yet some of the lawyers in group (ii) may have much more in common with group (iv) than they have with group (i); and some members of group (iii) may be more akin to group (i) than they are to group (iv).

33 We recognise that most lawyers, both barristers and solicitors, claim to specialise in particular fields of law. But it is very difficult at the present time to decide how much weight to attach to these claims. The cynic might say that the true test of specialisation is a refusal to take on cases other than in a narrow area. Meanwhile it seems probable that the vagaries of court listing, and economic considerations generally, will encourage many barristers to be 'flexible'.

Those who argue that the legal profession should remain divided into two branches often cite the medical profession by way of analogy. For example, in the Bar's Response to *The Way Ahead*, a footnote states: 'There is nothing unique about the legal profession in this division of specialisation. The analogy of the medical profession comes readily to mind'. It is not clear what this is supposed to mean. The medical profession is *not* divided into two. There are it is true general practitioners and specialists, but these specialists are specialist in something in particular: 'specialist' is not a meaningful label in itself. There are a whole series of specialisms. Furthermore, a doctor may be at the same time a general practitioner and a specialist. This is perfectly acceptable provided he has qualified as both, provided he keeps up with the necessary continuing education requirements in both, and provided he abides by the referral rules.[34]

The closer the medical analogy is examined, the less support it gives to the notion that medical and legal practitioners organise themselves along similar lines (the implication being, one assumes, that if the two professions behave in similar ways this organisational arrangement is bound to be in the best interests of the patient/client). Would-be lawyers, whether intending barristers or solicitors, can begin their training by taking degrees in disciplines other than law, followed by the Common Professional Examination, the course for which takes one year. Then they must decide which branch of the profession they wish to enter. They have a further year before they take their (separate) professional exams. After that the barrister must undertake a year's pupillage[35] and the solicitor a two years' training contract. Once a barrister has qualified, he is deemed to be learned in all branches of the law and when in court he wears a wig, the uniform of the eighteenth-century gentleman.

If these rules were transposed from law to medicine, would-be doctors would be able to begin by taking degrees in disciplines unconnected with medicine, and would then take a one-year Common Medical Examination. At the end of that year they would decide whether they wanted to be specialists or general practitioners. They would then pursue separate courses, each of which would last a year. They would then undertake apprenticeships, one year for specialists and two years for general practitioners. When they had qualified, the specialists would, at least in theory, be specialist in everything and, in order to demonstrate their status, would, when in hospital, wear some item of eighteenth-century clothing or carry something which would have been carried by an eighteenth century doctor – perhaps a jar of leeches.

It is not our intention in this article to discuss whether the minimum period of training for lawyers in England at the end of twentieth century is sufficient. There is good reason to suppose that it is not, but that debate can be conducted elsewhere. What does fall to be discussed here is (a) whether there should be any formal division in the legal profession; (b) if so, what sort of division it should be; and (c) at what point practitioners need be assigned to one or other group.

We want to pursue our suggestion that the natural division within the legal profession, if there is to be a division, is into four: (i) general practitioners; (ii) specialist lawyers who are not advocates; (iii) specialist advocates not choosing to specialise in any particular branch of the law; and (iv) specialist lawyers who are also advocates. Specialist lawyers must, of course, sub-divide because each is a

34 A doctor who is both a GP and a specialist is not able, as a GP, to refer patients to himself as a specialist.

35 The barrister qualifies *before* his pupillage and can even appear in court half-way through the pupillage.

specialist in his own particular sphere. And it is no good lawyers simply *asserting* that they are specialists – they must somehow be able to demonstrate it.

What is surprising about the Bar's input into the present debate is its emphasis on advocacy and its apparent unwillingness to recognise the above divisions. The Bar's response to *The Way Ahead* contains the following statement: 'It [the Bar] is a referral profession, essentially of specialist advocates'. It is as though doctors were to suggest that there is only one specialism in medicine, and that specialism is surgery (and that there is no need to distinguish between different kinds of surgeons). What about all those at the Bar who are not, essentially, advocates? Specialist advocates may outnumber those barristers whose primary role is drafting or giving advice, and Rumpole may make better television than a day in the life of a tax silk, but the advisory role must at least be considered.

If it is accepted that the legal profession sub-divides naturally into four, rather than into two, how ought it to be organised? It would seem reasonable for *all* lawyers to be educated together, and to remain unified until there is good reason for them to sub-divide. The current division is an historical left-over from a world in which barristers and solicitors came from different social backgrounds and did not mix. It has become a means of keeping the two branches of the profession separate, but the two-fold division has become more and more difficult to justify. Indeed, it may well not survive the reforms which have already been proposed. If the legal profession is in reality already sub-divided along the lines we suggest, then it makes sense for *all* lawyers to undertake a common training, in effect to enable them to become members of group (i). Thereafter, those who wish to become members of groups (ii), (iii) or (iv) would undertake further training. This might include specialist practical experience, or the taking of exams, or some combination of the two. So someone who claimed to be a specialist advocate would have to show that he had a certain amount of experience of forensic advocacy, and someone who claimed to be a family lawyer would have to demonstrate special knowledge of family law.

The question then arises as to which group(s) should grant direct public access to their members and which should give access by referral only. Clearly, access to members of group (i), the general practitioners, must be direct. Access to members of groups (ii), (iii) and (iv) could, in theory, be direct or by referral. At present, access to members of these three groups depends on whether they are solicitors or barristers. Most, but not all, members of group (ii), the non-advocate specialists, are solicitors. Most, but not all, members of group (iii), the non-specialist advocates, are barristers. Almost all members of group (iv), the specialist advocates, are barristers. Access, whether direct or by referral, can only be considered in the light of any proposed change to the formal divisions within the profession. There could be a four-fold classification, with different titles for the four sorts of lawyer, but this seems over-complicated. Our suggestion would be that lawyers in categories (ii), (iii) and (iv) be permitted to choose whether or not to grant direct access to the lay client. We would expect that almost all of those in category (iv) would choose to restrict themselves to referral only, but that those in categories (ii) and (iii) might choose either direct access or referral. It does not necessarily follow from this that those who chose to be members of the referral profession would be called 'barristers', or that they would have to be organised as barristers are now organised, but it might be simplest if they were.

To sum up, the profession would be divided into four groups and members of three of these groups would be able to choose whether to be (direct access) solicitors or (referral only) barristers. Apart from the question of labelling, we

envisage at least four key differences from the present arrangements. First, all lawyers would undertake an initial common training – this would promote freedom of movement within the profession. Second, a lawyer could *only* enter category (ii) if he had demonstrated (by examination or otherwise) special expertise in some branch of substantive law; he could only enter category (iii) if he had demonstrated (by examination or otherwise) special expertise in forensic advocacy; and he could only enter category (iv) if he had demonstrated (by examination or otherwise) special expertise in some branch of substantive law *and* in forensic advocacy. Because of this, there would be a clear distinction between categories (ii), (iii) and (iv). A lay client, or another lawyer, could easily discover whether lawyer X was in (say) category (iii) or category (iv). A lawyer could not pretend to be an expert in an area of the law of which he knew little. Third, those who had entered categories (ii), (iii) or (iv) would have a choice. They could become members of the referral Bar or they could remain as direct access solicitors. The distinctions within the profession would be easier to understand, both for the public and for other lawyers. The pretence, in so far as it still exists, that a newly qualified barrister outranks a long-qualified specialist solicitor would be gone. The distinction between members of the profession would be one of substance. Fourth, it would be easy for someone in categories (ii), (ii) or (iv) to move from the direct access part of the profession to the referral part, and *vice versa*. This should promote economic efficiency.

It is almost certain that if the profession were (formally) divided into four, rather than two, a major effect of the rearrangement would be to reduce the size of what might be termed the 'generalist Bar'. Those who wanted to refer matters to freelance advocates, and who were able to distinguish, relatively simply, between generalist advocates in category (iii) and specialist advocates in category (iv), would tend to choose the latter. So those lawyers in category (iii) would have an incentive to move into category (iv). That is a further major change to which the other changes would lead.

Other key aspects of the legal environment

There are some aspects of legal work which have a bearing upon the organisation of the profession, but whose importance is not necessarily recognised by outsiders – or, indeed, by the government. There are three issues which we regard as central, each of them raised (unprompted) in the course of our interviews with practitioners in Bristol, but none of which figures prominently in *The Way Ahead*. These three topics are: legal education, court listing, and judicial specialisation.

Legal education

A generation ago the Ormrod Committee on Legal Education[36] pronounced itself in favour of a common basic training for would-be barristers and solicitors. By and large the solicitors and barristers whom we interviewed in Bristol were in favour of joint training. One head of chambers commented as follows:

> I think it [joint training] is absolutely essential. That is ultimately how I see the Bar being maintained … The way to deal with it is to fuse the educational system, make people do both sides up to a point and then let those people who obviously have the capability emerge. They will have demonstrated their capabilities and be sure what they want to do.

36 Set up in 1967; reported in 1971 (Cmnd 4595).

Whilst the barristers whom we interviewed all favoured the retention of a separate Bar, many were in favour of joint training. Some took this further than others: all who raised the point favoured at least joint law school training on what might be termed the Northern Ireland model;[37] some went further and argued for joint training contracts/pupillage; and some barristers envisaged a future in which all lawyers underwent common training and practised on a non-referral basis for a period – say, five years – following which some would decide to practise as barristers. This is, of course, consistent with our proposal for a four-strand legal profession. Joint initial training would be the logical starting point for that, with all newly qualified lawyers beginning their careers in category (i) before they gained experience and, in most instances, obtained further qualifications and became identified as specialists – with some, of course, becoming specialist advocates. One Bristol barrister recalled for our benefit his embarrassment when he appeared for the first time before the Court of Appeal and his lay client commented adversely on his youthful appearance. Appearance is not everything, but he had thought at the time, and still thought twenty years later, that the client's implied criticism of a system which had projected an almost newly-qualified barrister into the Court of Appeal carried considerable force. It is difficult to defend a system which erects formal barriers to protect the lay client from representation by incompetents, but which then positions these hurdles arbitrarily.

Court listing

It was suggested to us by Bristol solicitors that one reason why the 1990 Act had achieved so little was the lack of any attempt to deliver more fixed hearing dates, or even to regard this matter as a priority. The failure to timetable cases defeats the office-based advocate no matter what court is involved. Giving office-based lawyers rights of audience, but without changing the way in which cases are timetabled, meant that the 1990 Act was doomed from the outset.

It was common ground amongst our informants that barristers can be more flexible than solicitors in responding to revised court dates. Solicitors find the present listing arrangements hugely inconvenient. Many conclude that cases without a fixed date must be assigned to counsel. Solicitors need to be able to predict when they will be required at court. It is not so much a question of court listing defeating solicitors' higher court advocacy rights, as of the present listing arrangements in *all* courts tending to favour the full-time advocate over practitioners who are primarily office-based. One assistant solicitor referred to her local County Court in these terms:

> The Court has even started stamping summonses with this outrageous little phrase 'Notice of an Appointment does not guarantee you a Hearing'. Imagine you have an assessment of damages hearing, for example, and you have got two counsel down from London. You have got the clients, you have done all the bundles so it is all up together, and then you go along and sit around for four hours only to be told you are out of the list! I mean, who is going to pay for that wasted cost?

This point was taken up by the chief clerk of one of the Bristol chambers:

> What tends to happen is that the civil servants who run the listings are obliged to keep the judges busy. They have statistics and they have to fill in their little boxes over a year, term, week, whatever it is. They are performance measured on how busy the judges are and how

37 In Northern Ireland would-be barristers and solicitors undertake the same one-year professional postgraduate training course, following which they diverge.

> full the lists are … Of course, the result of all that is that they all over-list and you will get three or four cases listed in a court for a day. Well, everyone knows the judge cannot hear the lot … The result … will be that all the witnesses will be called forward. You may get medical experts from all over the country turning up and then they have to go away. So when people talk about the cost of litigation, it is not necessarily the lawyers' fees, it is also all the costs thrown away on all these aborted hearings.

A more rigid system would operate in favour both of the office-based advocate, and of the freelance advocate who is also a specialist lawyer. This is because the present arrangements often lead to last minute substitution, favouring the quick thinker who is not *too* specialised. Broadly speaking they encourage the retention of the generalist Bar.

Solicitors identified two other deficiencies in the present listing arrangements. First, they claimed that the *quality* of advocacy suffers through last minute changes; and secondly, they argued that one reason barristers fail to deal promptly with papers, or fail to attend Plea and Directions Hearings, is that they cannot be certain that they will still have the case at trial.

Given that it will never be possible to timetable all cases in advance with any degree of exactitude, *someone's* time has to be wasted; someone has to be inconvenienced. So who should this be? Why should it not be the judge? Or to put this another way: why is it preferable to inconvenience, say, six lawyers plus four expert witnesses rather than one judge? Again, the answer seems to be based, at least in part, on an historical accident. From the mid-nineteenth century, when the levels of court fees were placed on a statutory footing, much of the actual cost of providing court services was excluded from the calculation of court fees. It was only in 1994 that the then Lord Chancellor suggested that judicial salaries no longer be excluded from the definition of recoverable costs.[38] A Discussion Paper, *Access to Justice – Civil Court Fees*, published by the Lord Chancellor's Department in February 1998, went as far as to suggest the possibility of charging litigants on a 'pay-as-you-go' basis with daily hearing fees. This suggestion has not been implemented, but there are now going to be separate fees set for each of the main stages in civil litigation.[39] The movement is clearly towards charging litigants the true cost of the service provided. But a logical corollary of treating litigants as paying customers is that their interests be given greater weight. Indeed, they might be given the opportunity to pay *extra* to ensure that they have fixed dates and times. Some litigants might find that this provided them with a considerable overall saving.[40]

This is relevant to the future shape of the profession because the so-called 'returned brief' discourages early preparation and squeezes out the subject specialist in favour of the generalist advocate. In our terms it favours category (iii) lawyers over categories (ii) and (iv). A system with fixed hearing dates, or more fixed hearing dates, would alter the balance of the profession. It would be part of a trend, encouraged by the other reforms which we propose, favouring the subject specialist at the expense of the generalist advocate.

A specialist judiciary

Judicial specialisation is relevant to practising advocates in at least two ways. First, senior members of the Bar, many of whom already sit as Recorders, contemplate

38 Cmnd 2509.

39 See *Civil Court Fees*, Consultation Paper, published by the Lord Chancellor's Department in November 1998.

40 eg where the time of expert witnesses, as well as lawyers, could be saved.

the possibility of full-time judicial office. The extent of judicial specialisation may well affect their view of the attractiveness, or otherwise, of a career on the bench. Secondly, all advocates have a direct interest in the quality of the judge before whom they are to argue a case, and quality is related, at least in part, to experience. Most of the barristers whom we interviewed favoured a greater degree of judicial specialisation, arguing that when specialist judges were appointed the impact was wholly positive. This was one observation:

> The development [of the Bristol Bar] in the last ten years has been extraordinarily positive and fast. It is largely down to specialist judges sitting, because in a sense the Bar is irrelevant. You can always bring the Bar to places. You can take me to Cardiff or to Newcastle, or more importantly, you can bring the whole of London down to Bristol, and they will come. But you must have a judge in whom lawyers have confidence … Once you have got the perception that there is a specialist judge, or judges, sitting, all else follows. That's what's happening in [a named legal area]. It started off with a judge who was a qualified success, then another, then a particular judge who is a tremendous success. The jurisdiction has blossomed to such an extent that the quality of applicants to chambers for this sort of work has also shot up.

The strongest support for a specialist bench came from middle-ranking barristers and solicitors who had experienced the benefits of having a specialist in their field sitting in Bristol.[41] Practitioners know which judges are competent in particular fields. If they, the solicitors and barristers, are specialists they expect judges to be specialists too. The reputation of any legal centre depends more on the judges than it does on the local Bar.

It has generally been perceived that the Lord Chancellor's Department does not favour judicial specialisation. For example, Recorders have not generally been allowed to stipulate that they will only try certain types of case. But now, we are advised, the Department supports solicitor advocates provided they are specialists. The corollary, surely, is to encourage judicial specialisation also. A generalist Bar feeds a generalist judiciary, and a generalist judiciary gives comfort to a generalist Bar. This, then, is the third nettle that needs to be grasped if the Lord Chancellor's Department is serious in its intention to reform the legal profession.

Future developments

As we draft this article (June 1999), the Access to Justice Bill, which began life in the Lords, has just been passed through the Commons. The Lords made an important amendment to the original draft Bill, deleting clause 31, the clause which gave rights of audience to employed advocates.[42] The Commons then reinstated this clause.[43] It appeared from the discussions in the House of Commons Select Committee that some members of the Bar, particularly those who had links with commerce and industry, were in favour of its reinstatement. The Bar as a whole seems not to be united on this issue, and although it is possible that the Lords will once again delete the clause when the Bill goes back to them, this now

41 Judges have been known to express a different view. See, for example, Sir Neville Faulks (a retired judge) in *A Law Unto Myself*, who wrote that it was 'fun [being a vacation judge] trying Chancery matters of which I had no experience at all' (London: Kimber, 1977) 126–127, 137.

42 Employed advocates include, of course, members of the Crown Prosecution Service.

43 It is now clause 36.

seems unlikely. If the clause stands, it is bound to affect the workload of some members of the self-employed Bar.[44]

Whatever the fate of this clause,[45] it will not be the end of the matter. The profession as a whole will come under increasing pressure to demonstrate that it is delivering a cost-effective service. This pressure will come both from the government paymaster and from the private client. There is also bound to be increased competition from other professional groups. There is a clear need, therefore, to create a structure which is demonstrably in the public interest. Two key elements in this are *flexibility* and *transparency*, and these lie at the heart of our proposal.

Lawyers, both solicitors and barristers, made a series of errors a generation ago when they thought that they could preserve their restrictive practices and maintain their monopolies. They were wrong. The profession is probably less self-confident now, and the future is uncertain. Many praiseworthy features could be lost if there is a drift towards unification. A unified profession would probably be dominated by large firms employing in-house advocates. The referral arm of the profession would be squeezed and could eventually disappear. Costs would probably rise and the client base would shrink. The public, in other words, would be the poorer. This does not have to happen, and we have outlined a possible way forward.

44 The Bar Council's proposal to launch BarDirect – a scheme whereby some organisations may be able to instruct the Bar without going through solicitors (see n 5 above) – appears to be, at least in part, a response by the Bar to what it considers to be encroachments on its territory. This *could* be the slow route to fusion.

45 The Access to Justice Bill received Royal Assent on 27 July 1999, after this article went to press. Clause 36 of the Bill is now section 37 of the Access to Justice Act 1999.