

## THE VALUES AND FUNCTIONS OF A REFERRAL ADVOCATE

“Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public...” (Lord Reid in *Rondel v Worsley* [1969] 1 AC 191)

“An advocate, whose main duty it will be to represent his clients before the courts, must be a person in whose reliability and integrity the court must be able to place complete trust, it always being remembered that an advocate owes a duty at least as much to the court as to his client. And the court must be satisfied that he will not by his behaviour do anything to bring the courts or the profession into disrepute.” (Fieldsend CJ in *Hayes v The Bar Council* 1981 ZLR (A) 183)

### INTRODUCTION

1. When we were requested to write a paper on the values and functions of a modern referral advocate, we felt that as young and, in our opinion at least, “modern” members of this profession, we should be able to come up with a list of values and functions in short order. After all, each of us had first-hand experience of being a “modern advocate”. It was only later, when discussing the parameters of our research and the issues faced by the Bar in our respective jurisdictions (England and Wales, Ireland and New Zealand) that we realised the complexity of the task. With the knowledge that the paper would be presented to an international audience, we were keen to expand our research to draw upon the traditions in other jurisdictions. To keep our focus within manageable bounds, we had to settle on the jurisdictions which we would cover. The choice was obvious. We would draw upon the experience of the members of the International Council of Advocates and Barristers (ICAB),<sup>1</sup> who were instrumental in organising the very conference at which we are lucky enough to present this paper.
2. Having agreed the parameters of our research, we have sought to distil the values and functions of advocates in Australia, England and Wales, Hong Kong, Ireland, Namibia, New Zealand, Northern Ireland, Scotland, South Africa and Zimbabwe. The results are set out in the Annex to this paper.

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<sup>1</sup> According to the ICAB Constitution, at para. 4(a), those members are the Australian Bar Association, the General Council of the Bar of England and Wales, the Hong Kong Bar Association, the Bar Council of Ireland, the New Zealand Bar Association, the General Council of the Bar of Northern Ireland, the Faculty of Advocates (representing the Scottish Bar), the General Council of the Bar of South Africa, the Zimbabwe Bar Association and the Society of Advocates of Namibia.

3. We were hoping to find some common threads and shared values to ensure that our restatement of the values and functions of a modern specialist advocate could be of use across all of the ICAB jurisdictions, despite the inevitable differences in the structure and issues faced by the profession. We are happy to report that those common values were not hard to find. We should mention, however, that our intention was not to produce a definitive statement of all conceivable values and functions of a modern advocate but only those which we thought were the most important.
4. Our hope is that this paper will serve as a useful starting point for further discussions about the future of our profession in the modern era of international disputes and the increased use of arbitration and alternative dispute resolution. We are grateful to the organisers for giving us the opportunity to present it to such an esteemed audience.

#### **WHO IS A REFERRAL ADVOCATE?**

5. Before proceeding to the main part of this paper, we explain the terminology we use.
6. We have chosen to refer to an advocate as a “he” (merely to avoid distracting our readers from cumbersome language). All such references, however, are intended to be read in a gender-neutral way to reflect the diversity of the modern profession, which is indeed one of its values.
7. In a number of ICAB jurisdictions, such as England and Wales or Scotland, the term “advocate” is no longer synonymous with the members of the independent referral Bar. In fact, both barristers and solicitors are able to obtain rights of audience in front of all courts. In our view, it would make little sense if the values adopted by self-employed advocates were different from those held by employed advocates. We therefore hope that our restatement of values will be equally applicable to all advocates appearing in courts and tribunals across the ICAB members’ jurisdictions.
8. When it comes to function, however, we have specifically focused on the referral Bar. When we refer to a “referral advocate”, we mean an independent self-employed advocate who accepts briefs to appear before court from any person on whose behalf they are instructed. The main difference between the independent referral Bar and employed advocates is that the former are subject to the so-called Cab Rank Rule and

are professionally obliged to accept instructions from any client regardless of any personal dislike for the client or the case. As Lord Pannick colourfully puts it:<sup>2</sup>

[The advocate] earns his living propounding views to which he does not necessarily subscribe, and which are sometimes anathema to him, on behalf of clients whose conduct may not interest him, will often offend him, and can occasionally cause him outrage.

9. An employed advocate, in contrast, generally only accepts those briefs in which his firm accepts instructions. A firm is not subject to the same Cab Rank Rule.

## **THE NEED FOR THE RESTATEMENT OF VALUES AND FUNCTIONS**

10. The specialist advocacy profession is currently perceived to be undergoing a paradigm shift. This perception is fuelled in part by the worldwide financial crisis which has highlighted the need to provide efficient and cost effective legal services where quality has almost become secondary to cost. However, in some jurisdictions, the reforms which gave rise to the changes in the legal professional landscape had commenced well before the financial crisis. These reforms, coupled with pressures on funding, mean that many values and norms which we have taken for granted are coming under sustained pressure, and new values and norms have the potential to take hold.
11. As a profession, we need to be astute to changes which society is undergoing and adapt to those changes, but without compromising the core values of our profession. In the days of consumerism and emphasis on consumer-led services, we must, as advocates, remember that the legal justice system, of which we are an integral part, exists not only for the benefit of consumers of the legal justice system but for the benefit of society as a whole. We have to be mindful that changes to the structure of the legal profession do not lead to a fundamental shift in the way our legal justice system serves our democratic society. The Bar can only do so by reminding itself about the fundamental principles and values which are inextricably linked to its primary function in the society which it serves.
12. As the President of the Supreme Court of the United Kingdom, Lord Neuberger, pointed out:<sup>3</sup>

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<sup>2</sup> David Pannick QC, "Advocates" (Oxford University Press, 1992), at p. 1.

<sup>3</sup> In the 80 Club Lecture to the Association of Liberal Lawyers given on 19 February 2013, "Tomorrow's Lawyers Today – Today's Lawyers Tomorrow".

While the future may be uncertain, we can still consider what we would want it to look like and see how we can utilise the tools in hand to bring about that future. We do not have to be passive recipients of change. Indeed, we owe it to future generations to consider the possibilities presented by regulatory reform, changes to the justice system, financial constraints and technological innovations, and to consider how they can be harnessed to promote our commitment to justice and the rule of law.

With these words of warning in mind, we present our conclusions to you.

## **THE COMMON VALUES OF A MODERN ADVOCATE**

13. We consider that all modern advocates should and do subscribe to the following common values:
- (1) Justice
  - (2) Independence
  - (3) Integrity
  - (4) Courage
  - (5) Competence or excellence
  - (6) Civility
  - (7) Camaraderie
14. While most of these require little elaboration, we thought it would be helpful to explain briefly what meaning we ascribe to each of these values and why.

### ***Justice***

15. The concept of “justice” or, more precisely, acting in the interests of justice, has the potential to encapsulate almost all other values listed above. However, its importance is such that we identify it as a freestanding principle, not least because it is inextricably linked to one of the most important functions of the modern advocate – ensuring effective administration of justice. This point was pithily made in Lord Clarke’s closing address at the last World Bar Conference:<sup>4</sup>

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<sup>4</sup> Lord Clarke of Stone-Cum-Ebony, “Why the Bar matters and will go on mattering”, closing address at the World Bar Conference 2012.

...the existence of an independent Bar is central to the working of the courts and thus the rule of law, and without the rule of law, justice and democracy are nothing. There it is in a nutshell.

16. The advocate's right to represent clients in court is a corollary of the advocate's duty to serve the administration of justice. One aspect of this duty is the Cab Rank Rule outlined elsewhere in this paper.<sup>5</sup> Closely related to the Cab Rank Rule is the responsibility to ensure effective representation of those who cannot afford legal services, including through pro bono work. The Bar has a great tradition of representing those who cannot afford legal assistance pro bono and it is important that this continues, especially in light of cuts to legal aid in many ICAB jurisdictions.
17. Another similarly important aspect of the modern advocate's justice-related responsibilities is the duty to give the court "*a fair representation of facts and adequate instruction in the law*".<sup>6</sup> Advocates practising in all jurisdictions examined by us owe an "overriding" or "paramount" duty to the administration of justice. It is the existence of this duty that led Lord Hoffmann to conclude that:<sup>7</sup>

Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice.

18. The classic enunciation of this overriding duty of an advocate to act in the interests of justice was given by Lord Justice Denning (as he then was) with his characteristic clarity:<sup>8</sup>

As an advocate he is a minister of justice equally with the judge. He has a monopoly of audience in the higher courts. No one save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or in the case of a dock brief, a nominal fee. He must accept the brief and do all he honourably can on behalf of his client. I say "all he honourably can" because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court.

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<sup>5</sup> See paras. 8 and 21-24.

<sup>6</sup> Lord Hoffmann in *Hall v Simons* [2002] 1 AC 615 at 692D.

<sup>7</sup> In *Hall v Simons* [2002] 1 AC 615 at 686E-F.

<sup>8</sup> *Rondel v Worsley* [1967] 1 QB 443 at 502 B-C (emphasis added).

19. This special position of advocates as “ministers of justice” is all the more important in States where disregard for the rule of law is common. Advocates (together with judges) are one of the pillars upholding the rule of law and must therefore be committed to upholding the interests of justice at all times.

### *Independence*

20. The concept of independence of advocates can be elusive since it has so many different meanings. The different aspects of independence valued by the courts and Bar associations in various ICAB jurisdictions are set out in detail in the Annex to this paper. What follows are the aspects of “independence” which appear to have the most prominence among the advocates practising in these jurisdictions.
21. First and foremost, the referral advocates in all<sup>9</sup> jurisdictions examined by us are subject to a professional duty or a professional tradition to take all work offered to them, provided they are available and competent to do it and will receive a proper remuneration for it. This is often referred to as the Cab Rank Rule. Despite some doubt as to the effectiveness of the Cab Rank Rule,<sup>10</sup> the importance of this aspect of independence of advocates cannot be underestimated. The existence of the Cab Rank Rule promotes access to justice by ensuring that legal representation is available to all who need it, including odious clients and unpopular causes. It ensures that everyone is entitled to representation of their choice. In other words, it is not up to the advocate to decide which causes to take on. The choice of the advocate rests with the client.
22. One of the benefits of this rule is to prevent major consumers of advocacy services, such as high street banks, regulators or insurers, from putting certain (or indeed all) specialist advocates in their particular field “out of circulation”.<sup>11</sup> This in turn enables consumers to have access to the same quality of legal advice and representation as that available to the big commercial organisations and the State and helps to ensure equality of arms before the law. In addition, the Cab Rank Rule ensures that no

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<sup>9</sup> Since Zimbabwe has a fused profession, no formal equivalent of the Cab Rank Rule operates in that jurisdiction. That said it appears that advocates honour the Cab Rank Rule in practice, as can be seen in their representation of political and other minority groups in challenges to the State and its actions.

<sup>10</sup> See, for instance, the Flood/Hviid Report referred to in Section II (England and Wales), para. 48 of the Annex, and the view expressed by Lord Sumption during his speech on Thomas Erskine at the World Bar Conference in 2012.

<sup>11</sup> This is something that both high street banks and regulators have been able to do in England in respect of the firms of solicitors, for instance, by insisting that no firm on their chosen panel of counsel is able to act in a case against a bank or a particular regulator.

advocate can be criticised for representing a client whom the public consider to be particularly reprehensible. The rule that “*lawyers shall not be identified with their clients or their client’s causes as a result of discharging their functions*” is sufficiently important to have received recognition by the UN.<sup>12</sup>

23. The Cab Rank Rule, and its importance in upholding the independence of advocates and the administration of justice, has also been endorsed by the judiciary. Two examples from the UK and New Zealand suffice.

(1) In the House of Lords decision in *Hall v Simons*,<sup>13</sup> Lord Hobhouse stated that “*the duty to act for any client*” is “*a fundamental and essential part of a liberal legal system*” since even the most unpopular are entitled to legal representation. He described the Cab Rank Rule as “*vital to the independence of the advocate since it negates the identification of advocate with the cause of his client and therefore assists to provide him with protection against governmental or popular victimisation*”.

(2) A few years later, the then President of the New Zealand Court of Appeal, Anderson P, described the “cab rank principle” as:<sup>14</sup>

...a professional obligation to facilitate the administration of justice. It is not overstating the obligation to call it one of the foundation stones of a free and democratic society.

24. It is the existence of this rule that allows advocates to act for and against the government (or any other major consumer of advocacy services) in different cases without fear of harassment or loss of future instructions. This ability of referral advocates to appear for opposite sides in different cases is often seen as the strength of the independent referral Bar. Such advocates possess the skill and ability to argue two opposite sides of the case with equal strength and conviction and through that they are often able to pre-empt or diffuse their opponent’s strongest point.

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<sup>12</sup> See the Basic Principles on the Role of Lawyers, para. 18, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990.

<sup>13</sup> [2002] 1 AC 615 at 739G-H.

<sup>14</sup> *Lai v Chamberlains* [2005] 3 NZLR 291 (CA) at [106] (upheld by the Supreme Court at [2007] 2 NZLR 7).

25. Another important aspect of the modern advocate's independence is that he must not compromise his standards in order to please his client, the court or any other third party.
26. Thus an advocate must always remember that whilst he has a duty to represent his client fearlessly, without regard to his own interests, he cannot win by whatever means. He must present all the facts fairly, without withholding those which do not present his client's case in the best light. An advocate must also give the court full instruction in the applicable law, including all authorities, whether or not they support his case. Similarly, the advocate must advise his client to disclose all relevant documents to the other side (and thus the court). It is then the advocate's job to persuade the court that those unfavourable facts and authorities do not in fact detract from the strength of his client's case (or advise his client to settle the case).
27. When it comes to giving advice to clients, it is the advocate's duty to give his honest and objective opinion, irrespective of what his client might wish to hear. To the client, an opinion confirming the client's incorrect view of the law is worthless. Similarly, it is not up to the lawyer to judge the client's case, if the client wishes to have it heard in court. As Dr Samuel Johnson put it:<sup>15</sup>

A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. ... If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.

28. In order to ensure proper administration of justice, advocates must also strive to maintain their independence despite structural changes and economic pressures. For instance, the liberalisation of the English professional rules allowing barristers to become managers of, and hold shares in, legal disciplinary practices and/or work in partnerships with other legal professionals threatens the traditional independence of the referral Bar. Similarly, in Ireland, the Legal Services Regulation Bill proposes alternative business structures such as barrister – barrister legal partnerships, barrister – solicitor legal partnerships and multi-disciplinary partnerships which also pose a threat to independence. Barristers must be aware of these pressures and ensure that their quest for business profits does not interfere with their objective judgment and the professional ethics of performing their job independently without regard for their own

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<sup>15</sup> Quoted in James Boswell, "The Journal of a Tour to the Hebrides" (1785) (entry for 15 Aug. 1773).



(or their business partners’) interests. As observed by The Hon. Justice Michael Kirby AC CMG:<sup>16</sup>

The independence of the judiciary and legal profession is a fundamental principle recognised by the international community as indispensable in the attainment of a civilised society. It is fundamental to ensuring that the rule of law is upheld and in guarding against violations of human rights and freedoms. It needs more than words of self congratulations. In the present age it needs reinforcement.

### *Integrity*

29. Integrity is another fundamental value of the modern advocate. Both judges<sup>17</sup> and professional regulators<sup>18</sup> rightly demand the highest standards of integrity from advocates. The need for honesty among advocates was famously emphasised by Abraham Lincoln in 1850:<sup>19</sup>

There is a vague popular belief that lawyers are necessarily dishonest. ... Let no young man choosing the law for a calling for a moment yield to the popular belief. Resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

30. In the adversarial system, where judges depend on advocates for the effective and expeditious administration of justice, integrity is the hallmark of the Bar. Many legal systems would not be able to operate without the relationship of trust between the Bench and the Bar, and indeed within the Bar itself. Thus integrity of advocates is bound up with their duty to the administration of justice as a whole, “*for the advocate must remember that he is not only the servant of the client, but the friend of the court, and honesty is as essential to true friendship as it is to sound advocacy*”.<sup>20</sup> And as noted by Sir Cecil Walsh back in 1916, “*nothing is more calculated to promote the smooth and satisfactory administration of justice than complete confidence and sympathy between Bench and Bar*”.<sup>21</sup>

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<sup>16</sup> In the speech given at the Presidents of Law Associations in Asia Conference on 20 March 2005.

<sup>17</sup> See, for instance, Sir Thomas Bingham MR (as he then was) in *Bolton v Law Society* [1994] 1 WLR 512 at 518A: “*It is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness. That requirement applies as much to barristers as it does to solicitors.*”

<sup>18</sup> See Part D of each section of the Annex.

<sup>19</sup> From Abraham Lincoln’s Notes for a Law Lecture dated 1 July 1850 collected by his White House secretaries, John Nicolay and John Hay, as reported in the “*Collected Works of Abraham Lincoln*”, edited by Roy P. Basler et al. The editors’ note in the “*Collected Works of Abraham Lincoln*” indicates that Lincoln could have written these observations several years later than 1850. It is also not known whether Lincoln ever delivered this lecture.

<sup>20</sup> Judge Edward Abbott Parry, “*The Seven Lamps of Advocacy*” (London, 1923) at p. 20.

<sup>21</sup> Cecil Walsh, “*The advocate, his aims and aspirations*” (Pioneer Press, 1916), Chapter 1.

31. Indeed it appears that the integrity of advocates was demanded from the very early days of our profession. Judge Edward Abbott Perry was able to trace it back to 13<sup>th</sup> century England:<sup>22</sup>

...from the earliest days the advocate may in no way maintain or defend wrong or falsehood. It is the right of his client he is there to uphold, and the right only. Nevertheless, although an advocate is bound by obligations of honour and probity not to overstate the truth of his client's case, and is forbidden to have recourse to any artifice or subterfuge which may beguile the judge, he is not the judge of the case, and within these limits must use all the knowledge and gifts he possesses to advance his client's claims to justice.

32. Maintenance of the highest standards of integrity remains vital to the administration of justice and the reputation of our profession. Yet, as Michael Beloff QC has pointed out, advocates do not possess some inherent morality - "*they are cut from the same crooked timber of humanity as all of us*".<sup>23</sup> It is therefore important that we do not take our commitment to integrity for granted. It is a precious value which has to be preserved, protected and celebrated.

### *Courage*

33. The advocate's courage to fearlessly represent his client, whether in light of general public hostility or in light of hostility from the Bench, is just as important to the administration of justice as integrity. Lord Judge explained that:<sup>24</sup>

Neither the judge nor the administration of justice is advantaged if the advocates are pusillanimous. Professional integrity, if nothing else, sometimes requires submissions to be made to the judge that he is mistaken, or even, as sometimes occurs, that he is departing from contemporary standards of fairness. When difficult submissions of this kind have to be made, the advocate is simultaneously performing his responsibilities to his client and to the administration of justice.

34. Indeed, the advocate's courage in presenting an unpopular cause or client can be seen as an aspect of the advocate's integrity or the duty to act in the interests of justice. Yet, it deserves to be singled out as a professional value which should be protected in and of itself.

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<sup>22</sup> Judge Edward Abbott Parry, "The Seven Lamps of Advocacy" (London, 1923) at pp. 14-15. He refers to the *Mirror of Justices*, apparently written in the 13<sup>th</sup> century by one Andrew Horn, a fishmonger, which stated that "*Every pleader who acts in the business of another should have regard to four things. ... Secondly, that every pleader is bound by oath that he will not knowingly maintain or defend wrong or falsehood, but will abandon his client immediately that he perceives his wrong-doing. Thirdly, that he will never have recourse to false delays or false witnesses, and never allege, proffer, or consent to any corruption, deceit, lie, or falsified law*".

<sup>23</sup> "A view from the Bar": The 2010 Sir David Williams Lecture.

<sup>24</sup> See *R v Farooqi* [2014] 1 Cr App R 8, [2013] EWCA Crim 649 at [109].

35. The value of courage was colourfully described by Judge Parry:<sup>25</sup>

Advocacy is a form of combat where courage in danger is half the battle. Courage is as good a weapon in the forum as in the camp. The advocate, like Caesar, must stand upon his mound facing the enemy, worthy to be feared, and fearing no man. ... Unless a man has the spirit to encounter difficulties with firmness and pluck, he had best leave advocacy alone.

36. Courage is also praised by the judiciary as one of the values on which the success of the Bar is based:<sup>26</sup>

Forensic techniques may vary from time to time but it is still possible to point to success at the Bar based upon a reputation for courage in standing up to the judge when occasion demands.

37. Courage outside the courtroom is just as important. It takes courage to give honest advice to the client, rather than the advice the client wants to hear. This is even more so where honest advice means that the client would not instruct you again, or that you forego a lucrative brief, or a case which raises a point of law in which you are interested. It is undeniable that both the interests of the client and the administration of justice would be best served by advocates who have courage to dispense honest and independent advice.

### *Competence or excellence*

38. It goes without saying that an advocate cannot represent his client or serve the interests of justice unless he is competent to do so.<sup>27</sup> Availability of competent legal representation is fundamental to a just and fair system of justice:<sup>28</sup>

...the judge personally, and the administration of justice as a whole, are advantaged by the presence, assistance and professionalism of high quality advocates on both sides.

39. Similarly, for the public to have confidence in the administration of justice, they must have confidence in the ability of the legal profession to provide effective and competent legal advice and representation.
40. However, there is no reason why we, as a profession of specialist self-employed advocates, should not strive for excellence rather than mere competence. Excellence in advocacy, knowledge of the law, and courage to use that knowledge effectively,

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<sup>25</sup> Judge Edward Abbott Parry, "The Seven Lamps of Advocacy" (London, 1923) at p. 23.

<sup>26</sup> *R v McFadden (Cornelius Michael)* [1976] 62 Cr App R 187 at 191.

<sup>27</sup> See *Medcalf v Mardell* [2003] 1 AC 120, per Lord Hobhouse at [51].

<sup>28</sup> See *R v Farooqi* [2014] 1 Cr App R 8, [2013] EWCA Crim 649 at [109].

sets apart the independent referral Bar from other professions. Excellence will ensure the survival of the independent Bar despite any structural changes to the profession and the increasing demand for cheaper services. Finally, excellence of advocates and the judiciary is at least partly responsible for clients all over the world choosing to resolve their disputes in certain international jurisdictions.

41. The maintenance of competence and excellence of the Bar is the duty of the profession itself, both collectively and individually. For instance, while regulators in England and Wales are presently concerned with establishing a compulsory system of measuring and regulating competency of advocates,<sup>29</sup> there is no reason why the Bar itself should not do more to maintain the standard of excellence across its profession. For instance, many experienced advocates across all ICAB jurisdictions see it as their duty to the profession to educate young barristers in the art of advocacy.<sup>30</sup> Similarly, as Judge Parry reminisced in 1923:<sup>31</sup>

We have seen of old how the senior members of the Bar trained up the juniors in the mystery of their craft, and throughout the practice of the profession it has always been a point of honour for the elders to assist the beginners in those difficult days of apprenticeship.

42. Nowadays, Inns of Court, the Faculty of Advocates, the New Zealand Bar Association, the Honorable Society of King's Inns in Ireland (and, no doubt, societies representing barristers and advocates in other jurisdictions) are recognised as leading centres of advocacy training and expertise. They provide the necessary training and experience to young barristers and advocates who may not have otherwise been able to obtain sufficient experience of a particular type of advocacy on their feet. These institutions are well placed to extend their expertise in advocacy training to all branches of the legal profession who wish to pursue this specialist skill and learn the craft of advocacy. Indeed, they and all other members of ICAB should be encouraged to devise (or continue to improve) advocacy training courses to allow young advocates to hone their skills. Without this, the continuity of excellence at the independent Bar, which is its hallmark, cannot be assured.

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<sup>29</sup> The introduction of the compulsory Quality Assurance Scheme for Criminal Advocates (QASA) by advocacy regulators in England and Wales is currently being challenged as unlawful by the English Bar. While the challenge was dismissed by the Divisional Court in *Lumsdon v Legal Services Board* [2014] EWHC 28 (Admin), the case is currently on appeal to the Court of Appeal and the decision is expected in October/November 2014.

<sup>30</sup> See, for instance, Edwin Glasgow QC's speech at the World Bar Conference 2012 on "Advocacy Training: What the Young Bar really needs."

<sup>31</sup> Judge Edward Abbott Parry, "The Seven Lamps of Advocacy" (London, 1923) at p. 102.

43. Finally, it is important that the culture of excellence is encouraged among young advocates since they are the future senior Bar and judiciary. Administration of justice depends on knowledgeable and competent judges as much as on knowledgeable and competent advocates.
44. How do we maintain excellence? In Shakespeare's words, "*excellence is through industry achieved*".<sup>32</sup> This is echoed by Aristotle's famous saying that:

Excellence is an art won by training and habituation. We do not act rightly because we have virtue or excellence, but we rather have those because we have acted rightly. We are what we repeatedly do. Excellence, then, is not an act but a habit.

45. Our task is therefore to hone and sharpen our advocacy and legal skills through regular practice both in training and in court, the ultimate training arena for advocates striving for excellence. As a specialist advocacy profession we ought to take advantage of the opportunities we get to practise our skills in court, "*an unforgiving crucible in which the competent survive, the inadequate dissolve, but the good are burnished.*"<sup>33</sup>

#### ***Civility and camaraderie***

46. The final values which we wanted to bring to your attention are civility and camaraderie.
47. One might wonder what civility and camaraderie have to do with the administration of justice? Yet, it cannot be denied that lack of civility by an advocate towards his opponents (whether in the courtroom or outside it) is unlikely to assist the administration of justice. Indeed, the use of dubious tactics by an advocate and discourtesy more generally is likely to injure his reputation as an advocate and the reputation of the Bar as a whole.
48. Advocates representing opposing sides to any dispute would do well to remember that they are both trying to serve the interests of justice by defending their clients' rights by all proper and lawful means. This, however, should not prevent them from being civil to each other. Indeed, the manner of practise of self-employed advocates

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<sup>32</sup> William Shakespeare, "Two Gentleman of Verona".

<sup>33</sup> Martin Shaw, the Kalisher lecture given in October 2012, "Excellence is through industry achieved."

encourages the atmosphere of fellowship, support and camaraderie among the advocates that we must never take for granted.

49. The importance of civility and courtesy in advocacy is acknowledged by the Virginia Bar Association's Creed as follows:<sup>34</sup>

Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well-being.

Civility is not inconsistent with zealous advocacy. You can be civil while you're aggressive, upset, angry and intimidating; you're just not allowed to be rude.

50. The maintenance of advocates' professional relationships with their opponents is important, not least due to the fact that they may well have to meet those opponents in chambers, in the Bar Library, in the dining hall of one of the Inns, and at Bar and wider professional events and functions for the rest of their professional career. For this reason, Judge Parry noted back in 1926 that:<sup>35</sup>

... at the English Bar we may claim that we set a good example to other bodies of learned men by our real attachment to the precepts and practice of fellowship, and may, without hypocrisy, commend the rest of mankind to follow in our footsteps,

And do as adversaries do in law,

Strive mightily, but eat and drink as friends.

51. We hope that this atmosphere of civility, courteousness, camaraderie and fellowship continues to be preserved across all of the modern Bars irrespective of their size. As John R. Silber recognised in 1972:<sup>36</sup>

The lawyers' contribution to the civilizing of humanity is evidenced in the capacity of lawyers to argue furiously in the courtroom, then sit down as friends over a drink or dinner. This habit is often interpreted by the layman as a mark of their ultimate corruption. In my opinion, it is their greatest moral achievement: It is a characteristic of human tolerance that is most desperately needed at the present time.

## **THE FUNCTIONS OF A MODERN ADVOCATE**

52. The functions of a modern advocate reflect in some measure the values we have identified above. Upholding the rule of law and ensuring the interests of justice by

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<sup>34</sup> Lord Clarke; lecture to Malaysian Judges on Ethics and Civil Procedure of 14 September 2011, at para. 40:  
[http://www.kehakiman.gov.my/sites/default/files/ETHICS%20for%20Malaysian%20Judges%20O%202011\\_.pdf](http://www.kehakiman.gov.my/sites/default/files/ETHICS%20for%20Malaysian%20Judges%20O%202011_.pdf)

<sup>35</sup> Judge Edward Abbott Parry, "The Seven Lamps of Advocacy" (London, 1923) at p. 107.

<sup>36</sup> John R. Silber, quoted in the Wall Street Journal, 16 March 1972, at p. 14.

acting as an intermediary between the lay client and the judge is the primary function of the referral advocate. In practical terms, however, the modern advocate performs the following functions:

- (1) provision of specialist advocacy services;
- (2) provision of litigation advice, including advice on prospects of success, advice on evidence, advice on compliance with procedural rules and advice on any procedural applications;
- (3) provision of specialist and/or expert legal advice; and
- (4) problem-solving, including provision of advice pre-empting litigation or finding means to resolve a dispute without resort to courts.

***Provision of specialist advocacy services***

53. Advocacy has always been recognised as a specialist skill. All advocates (irrespective of which part of the legal profession they come from) require specialist training before they are able to appear in court. Importantly, however, advocates must have the opportunity to build on their compulsory professional training with practical experience. That experience may come in many forms: attending court and tribunal hearings, conducting arbitrations and mediations or attending advocacy workshops. Employed advocates may acquire such experience and achieve a very high level of skill. Specialist referral advocates, however, by virtue of their training and the natural focus of their practice, often have considerably more experience in the art of advocacy than their employed colleagues. Indeed, even in jurisdictions where the profession is fused, such as the U.S., law firms will often have specialist litigators whose job consists of attending court hearings on behalf of the firm's clients.
54. The strength of advocates belonging to the referral Bar, as opposed to employed advocates, consists in their ability to act for opposing sides in different cases. Thus the same advocate can represent a defendant on one day and then act for prosecution on another. This variety of experience allows them to gain experience of advocacy for two opposing sides of the argument, which would not be available to their employed colleagues (at least not without moving to a different employer).

55. This feature of the Irish bar was described by Denham J (as she then was) in the Irish Supreme Court case of *Bula Ltd. v. Tara Mines Ltd. (No. 6)* in the following terms:<sup>37</sup>

Thus, for example, having acted for the Director of Public Prosecutions in prosecuting a case, counsel may the next day defend a defendant in a case prosecuted by the Director, or, having completed a personal injuries claim on behalf of a plaintiff in which case the defendant was covered by an insurance company, the counsel may then represent a defendant covered by the insurance company. Indeed, a person who has been on the receiving end of a barrister's skill (whether it be by way of advices or cross-examination or whatever) often decides that the next time he or she will need counsel he or she will ask his or her solicitor to seek out that particular barrister. Choice of counsel is an important matter.

56. In his recent book<sup>38</sup> Richard Susskind spells out the suggested end of the legal profession as we know it due to economic demand for cheaper legal services, developments in IT and the use of online dispute resolution methods. However, even he acknowledges that:<sup>39</sup>

... much of the work of the oral advocate is highly bespoke in nature and it is not at all obvious how the efforts and expertise of the courtroom lawyer might be standardised or computerised. Indeed, oral advocacy at its finest is probably the quintessential bespoke legal service.

57. For this reason, he concludes that there is little doubt that the very high value and complex legal issues will continue to be argued before courts and that “*the clients will continue to secure the talents of the finest legal gladiators who will combat on their behalf.*” He does express some doubt as to whether clients would continue instructing advocates for less complex disputes on the basis that it might be commercially unjustifiable.

58. It is difficult to see, however, what other alternatives would be open to them, unless they wish to represent themselves. Unless the dispute settles out of court, specialist and bespoke advocacy services of the referral Bar are likely to be always in demand, irrespective of the difficulty of the issue. Indeed, in the case of less complex trials, the services of self-employed advocates are likely to be much less costly than those of the law firms with higher overheads. This last point has been made in these terms:<sup>40</sup>

No busy litigation practice could succeed without the assistance of barristers. Quite apart from the specialist expertise that barristers offer, they also offer the very pragmatic role of being somewhere when the solicitor cannot be there, or where it is uneconomical for the solicitor to

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<sup>37</sup> [2000] 4 IR 412 at 443.

<sup>38</sup> “Tomorrow’s lawyers: An introduction to Your Future” (Oxford University Press, 2013).

<sup>39</sup> At Chapter 6, “Trial lawyers and barristers”.

<sup>40</sup> By Dr Tom Altobelli, “Working with Barristers: A solicitor’s guide to relations with the Bar”, at <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026515.pdf>.



be there personally. ... Often it makes more sense economically for a solicitor to stay in the office and see new clients, than it is for the solicitor to be preparing a case, or instructing a barrister in mentions or routine matters that can quite properly be delegated. ...

59. Accordingly, irrespective of the structure of the profession, specialist advocacy services will always be required. In our opinion, the independent referral Bar, not constrained by the demands of corporate profits and corporate conflicts of interest, remains best placed to provide those specialist advocacy services. Importantly, if clients wish to be able to access the entire talent at the Bar, it is in their interest to support the continued existence of an independent referral Bar, whose members will be able and indeed required to act for any client.

*Provision of litigation advice*

60. The work of a modern advocate, at least in commercial and civil matters, is no longer confined to appearing in court. Typically, an advocate will be called upon to advise on the merits of a potential claim before the court proceedings are commenced. They also identify possible legal grounds of any claim or defence as well as advise on the lines of enquiry and evidential investigation which should be pursued by the lay client in order to advance or resist the claim.
61. Even before the proceedings commence, a modern advocate's advice is sought on how best to respond to any pre-action correspondence. In public law cases, where the decision threatened to be challenged is yet to be taken by a public authority, an advocate's opinion may well be sought on the legality of a particular course of action or decision and its compliance with the principles of reasonableness, proportionality and procedural fairness. Such advocates are thus be intimately involved in the process of making the final decision even before such decision is challenged.
62. Once litigation commences, an advocate's advice is typically sought on procedural matters, such as the need to make applications for further particulars or further disclosure, on disclosure of evidence (and in particular whether any privilege applies) and finally, on the presentation of evidence. Modern advocates are no longer considered to be experts only in oral advocacy but also in the procedural intricacies of the ever changing and complicated civil and criminal procedure rules. Young advocates would be well advised to become enthusiastic scholars of court procedure

since clients are more likely to seek their advice on tricky procedural points than tricky legal points (which are usually deferred to more senior advocates).

63. Nowadays, the trial represents the final phase of a long litigation process which is subject to case management by the courts. With the current emphasis on “hands on” case management by judges in many ICAB jurisdictions, and on alternative dispute resolution, effective advocacy depends just as much, if not more, on the steps taken by an advocate prior to bringing the case to court as on the “day in court” itself.
64. Further, with the increased emphasis on keeping the costs of litigation down, modern advocates are required to advise not only on the application of the civil procedure rules but also on the most proportionate ways of complying with court orders and rules.

#### *Provision of specialist legal advice*

65. More and more often, advocates are asked to give advice on matters which do not involve litigation at all. For instance, how to structure a transaction in accordance with applicable regulatory or tax rules to avoid litigation with or investigation by the regulatory or tax authorities; how to draft a successful submission for a planning permission; how to respond to a particular government proposal; or how to handle redundancies in order to avoid disputes with former employees. In these cases advocates are relied upon for their specialist and detailed knowledge of the relevant law and for their awareness of matters which can lead to litigation. Their role is a prophylactic one: to avoid or mitigate legal (including litigation) risk.

#### *Problem-solving*

66. Finally, the modern referral advocate is expected not only to be expert in the law and its use by the courts and tribunals of his jurisdiction, but he is also expected to possess more general skills in problem-solving:<sup>41</sup>

At the most pragmatic level, lawyers are society's professional problem solvers. Lawyers are called upon to make distinctions, to explain how and why cases or experiences are alike or different. Lawyers are expected to restore equilibrium, to be balancers. Every discipline, every profession, every job, and every calling has a cutting edge. At that cutting edge, lines are drawn. Lawyers and judges are society's ultimate

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<sup>41</sup> Rennards Strickland and Frank T. Read, “The Lawyer Myth: A Defense of the American Legal Profession” (Swallow Press/Ohio University Press, 2008).

line drawers. On one side of the line, the conduct, action, or inaction is proper; on the other side of the line, it is not.

67. These are not new sentiments. Abraham Lincoln said of legal practice:<sup>42</sup>

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

68. Practically, the modern advocate's wider role as problem-solver requires knowledge of the alternatives to litigation that might be able to provide solutions for the legal problem at hand. Increasingly those alternatives can include not only specialist tribunals but also ombudsmen and consumer advocacy services, on top of the more traditional forms of alternative dispute resolution such as mediation, negotiation and arbitration. The growing use of alternative dispute resolution is common to many ICAB jurisdictions, reflecting in part at least the growing costs of access to the courts as a dispute resolution forum. Modern advocates need to adapt to the changing nature of dispute resolution and be able to advise their clients on all potential choices open to them.

69. It can be noted that in some of the ICAB jurisdictions, New Zealand and Hong Kong being examples, there is a professional obligation on advocates to keep clients advised of alternatives to litigation that are reasonably available to them.<sup>43</sup> This professionally incentivises the advocate to act as a problem-solver.

70. In addition, modern advocates are required to understand the client's commercial objectives, including whether involvement in lengthy and unpredictable litigation is in the client's best interest. Whilst this does not affect the advocate's legal analysis, it will often be relevant to identifying and helping to weigh the options practically open to the client in light of the advocate's legal analysis.

71. Finally and closely related to the need to understand the client's commercial and other extra-legal objectives, a modern advocate must also be aware of the role of the modern media and be able to advise his clients on media strategy compliant with the law, including the court's procedural rules.

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<sup>42</sup> See footnote 19 above.

<sup>43</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (New Zealand), rule 13.4; para 116A of the Code of Conduct of the Bar of the Hong Kong Special Administrative Region.

## CONCLUSION

72. Ours is a profession undergoing change. But in this we are no different to other professions, as well as most if not all of the industries and trades. Of course we must recognise modern drivers of change, including globalisation and digitisation, and we must respond to them. But in doing that it is important that we do not forget the values we stand for and the functions we best perform. Nor should we lose sight of why we have those values or of why we perform those functions. This paper has testified to the fact that many of the values and functions of the modern specialist advocate are not new but rather they reflect practices developed and lessons learned over many years by the specialist advocates who came before us. Their legacy serves as a nice reminder not only of the living nature of our legal justice system, but also of our need to ensure that we are vigilant to look backwards as well as forwards as we mould the values, the functions and indeed the expectations we place upon the shoulders of modern specialist advocates, to ensure that those advocates reflect and can meet the needs of our ever-changing society.

73. With that in mind, we leave to Sir Frank Kitto the closing words:<sup>44</sup>

[A] barrister is more than his client's confidant, adviser and advocate, and therefore must possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judge, as well as with his fellow members of the Bar in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations.

**Claire Hogan**  
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**Tetyana Nesterchuk**  
Fountain Court Chambers  
Temple, London

**Matthew Smith**  
Thorndon Chambers  
Wellington

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<sup>44</sup> *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, at 297-8.

## ANNEX

### I. AUSTRALIA

#### A. Structural Organisation of the Bar

1. In some Australian States, barristers have exclusive rights of audience in the courts. In others, both barristers and solicitors can appear.
2. More particularly, the distinction between barristers and solicitors continues in New South Wales (“NSW”) and Queensland, where most barristers are sole practitioners, tend to specialise and generally have no direct contact with clients other than through instructing solicitors.<sup>45</sup> Barristers in these States engage in advocacy before the courts and prepare legal opinions.<sup>46</sup> The government also employs barristers, typically as prosecutors.<sup>47</sup> Solicitors in these States are the general practitioners who may and do work in partnerships.<sup>48</sup> They give general advice to clients, deal with non-litigious matters, and typically make court appearances only in relation to minor matters.<sup>49</sup>
3. South Australia, Victoria, Western Australia, Tasmania and the two territories (ACT and Northern Territory) have fused the profession – although an independent Bar still exists in those places.<sup>50</sup> However, most lawyers practise as both barrister and solicitor, although interest in specialisation has kept some practising only in one profession.<sup>51</sup>

#### B. Primary Role/Function of Advocates

4. The Australian Bar Association’s Model Rules (“ABA Model Rules”) give the following general summary of the work of a barrister:<sup>52</sup>

15. Barristers’ work consists of:

(a) appearing as an advocate;

(b) preparing to appear as an advocate;

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<sup>45</sup> David S. Clark, “Legal professions and law firms”, in David S. Clark (ed.) *Comparative Law and Society* (Edward Elgar Publishing, 2012) at 371.

<sup>46</sup> Ibid, at 371-372.

<sup>47</sup> Ibid, at 372.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> ABA Model Rules (as at 11 May 2013), available at <http://www.austbar.asn.au/> (through the ‘About the ABA’ tab).

- (c) negotiating for a client with an opponent to compromise a case;
- (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
- (e) giving legal advice;
- (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
- (g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
- (h) such other work as is from time to time commonly carried out by barristers.

5. Solicitors who perform court work are likely to specialise in the same way.
6. Barristers in Australia must also observe the Cab Rank Rule and accept any work in a field in which the barrister professes herself competent to practise, at a court at which she normally appears, and at her usual rates. This rule is summarised as follows in the ABA Model Rules:

21. A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:

- (a) the brief is within the barrister's capacity, skill and experience;
- (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence;
- (c) the fee offered on the brief is acceptable to the barrister; and
- (d) the barrister is not obliged or permitted to refuse the brief under Rules 95, 97, 98 or 99.

### **C. Working Relationship with Solicitors**

7. The NSW Law Society publishes a helpful practical resource titled "Working with Barristers: A solicitor's guide to relations with the Bar".<sup>53</sup>
8. Judge Peter Johnstone explains the relationship between barristers and solicitors in this way in his Foreword to that publication:

The existence of an independent Bar is a hallmark of a free society in which the rule of law flourishes. There is, however, an interdependent, symbiotic relationship between the Bar and the solicitors' branch, which it behoves all members of the profession, barristers, solicitors and the judiciary, to respect and nurture.

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<sup>53</sup> By Dr Tom Altobelli. Available online at <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026515.pdf>

An efficient, capable and independent Bar is crucial to solicitors in serving the needs of their clients, and the maintenance of open and courteous communication is vital. Nevertheless, the primary responsibility of ensuring that clients are well served and receive full value for their legal dollar falls on the solicitor.

9. The Guide goes on to identify why solicitors should use barristers. Four functions of specialist advocates are identified. They are:
- (1) they offer specialist skills, including forensic skills and a mastery of the rules of evidence that comes from extensive experience in advocacy;
  - (2) they provide second opinions based not just on expertise but on independence and objectivity;
  - (3) they can bring a fresh view to an issue, which may help in changing the client's perception for the better; and
  - (4) barristers help solicitors manage their workload. Often it makes more sense economically for a solicitor to stay in the office and see new clients, than for the solicitor to be preparing a case, or instructing a barrister in mentions or routine matters that can be delegated.

#### **D. Values Espoused by the Profession**

10. Independence is amongst the important values of the legal profession in Australia. As explained by Michael Kirby AC CMG, a former Justice of the High Court of Australia, this “*requires that lawyers be free to carry out their work without interference or fear of reprisal*”.<sup>54</sup> That reflects the fact that “[l]awyers have a duty, within the law, to advance the interests of their clients fearlessly and to assist the courts in upholding the law”.<sup>55</sup>
11. The ABA Model Rules similarly stress the importance of fearlessness:
37. A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.
12. Furthering the administration of justice is also amongst the important values of the legal profession in Australia. Barristers have “*an overriding duty to the Court to act with independence in the interests of the administration of justice*”,<sup>56</sup> and they “*must*

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<sup>54</sup> The Hon. Justice Michael Kirby AC CMG, “Independence of the Legal Profession: Global and Regional Challenges” (20 March 2005, speech at Presidents of Law Associations in Asia Conference), at [http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_20mar05.html](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_20mar05.html)

<sup>55</sup> Ibid.

<sup>56</sup> ABA Model Rules (as at 11 May 2013), rule 25.

*not deceive or knowingly or recklessly mislead the Court*".<sup>57</sup> The ABA Model Rules also state:

68. A barrister must not:

(a) advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

(b) coach a witness by advising what answers the witness should give to questions which might be asked.

13. The importance of independent, fearless and principled advocates who have a duty to further the administration of justice is also reflected in the Bar Rules made by the NSW Bar Council. The preamble to those rules states:

**These Rules are made in the belief that:**

1. The administration of justice in New South Wales is best served by reserving the practice of law to officers of the Supreme Court who owe their paramount duty to the administration of justice.

2. As legal practitioners, barristers must maintain high standards of professional conduct.

3. The role of barristers as specialist advocates in the administration of justice requires them to act honestly, fairly, skilfully, diligently and bravely.

4. Barristers owe duties to the courts, to other bodies and persons before whom they appear, to their clients, and to their barrister and solicitor colleagues.

5. Barristers should exercise their forensic judgements and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients.

6. The provision of advocates for those who need legal representation is better secured if there is a Bar whose members:

(a) must accept briefs to appear regardless of their personal prejudices;

(b) must not refuse briefs to appear except on proper professional grounds; and

(c) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

7. Barristers should be free to choose how they lawfully practise as barristers except only in those cases where the unchecked exercise of that freedom would threaten harm to the greater public interest that barristers' conduct be honourable, diligent, especially skilled, disinterested and competitive and that access to barristers' services be enhanced.

14. The emphasis on duties relating to the administration of justice; to the courts and diverse tribunals before which barristers appear; and to their clients and to barrister

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<sup>57</sup> Ibid, rule 26.



and solicitor colleagues, indicates the distinctiveness of the role and function of a barrister. The specific reference to the role of barristers as ‘specialist advocates’ also points to their distinctive role.

## **E. Level of Independence of Advocates**

15. The ABA Model Rules give guidance on the independence expected of barristers in their work. They provide:<sup>58</sup>

41. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client’s and the instructing solicitor’s wishes where practicable.

42. A barrister will not have breached the barrister’s duty to the client, and will not have failed to give appropriate consideration to the client’s or the instructing solicitor’s wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:

(a) confine any hearing to those issues which the barrister believes to be the real issues;

(b) present the client’s case as quickly and simply as may be consistent with its robust advancement; or

(c) inform the court of any persuasive authority against the client’s case.

43. A barrister must not make submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the barrister’s personal opinion on the merits of that evidence or issue.

16. The independence of barristers in Australia has also been recognised by the courts. For instance, the High Court of Australia in 2005 decided a case concerning whether the rule providing for immunity against civil actions for negligence on the part of advocates and other practising lawyers for court-related work was essential to uphold their independence of action and duties to the courts. A majority of the High Court concluded that it was.<sup>59</sup>

## **F. Aspects of the Profession Undergoing Reform**

17. The regulation of the legal profession and the provision of legal services in Australia is a State, and not a Federal, responsibility. However, many barristers, solicitors and law firms practise across State and Territory borders, and the requirement to comply with multiple and sometimes quite different regimes imposes regulatory burdens and compliance costs.

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<sup>58</sup> Ibid.

<sup>59</sup> See *Ryan D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1.

18. This situation led the professional bodies, regulators and governments to embark in the 1990s upon a national ‘model laws’ project to attempt to harmonise the various State and Territory laws to achieve maximum consistency.<sup>60</sup> All the States and Territories apart from South Australia have now enacted local Legal Profession Acts based upon the national model laws that were agreed by the Standing Committee of Attorneys-General in 2004.
19. That was a significant achievement but the harmonisation served to highlight the many remaining differences. Thus, the Council of Australian Governments (“COAG”) agreed in April 2009 to establish a taskforce to prepare nationally uniform legislation and to recommend the regulatory structures that are required to achieve a uniformity of regulatory practice across the various State and Territory jurisdictions.
20. The taskforce presented COAG with its recommendations and a draft Legal Profession National Law in December 2010. The States and Territories apart from Western and South Australia signed up in principle to the proposed national reforms when COAG met in February 2011 and it was widely believed that the new arrangements would commence in the participating jurisdictions on 1 July 2013. However, the agreement has since unravelled.
21. In October 2012, Queensland made it known that the Queensland government would not participate in the national scheme and the project has progressed in NSW and Victoria only, notwithstanding the decision of other States and Territories not to commit to the Uniform Laws at present.

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<sup>60</sup> See for example the information on these initiatives provided online by the Law Council of Australia (available online at <http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/national-profession-project/coag-national-legal-profession-reform>) and by the Law Society of NSW (available online at <http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ruleslegislation/nationalreform/>).

## II. ENGLAND AND WALES

### A. Structural Organisation of the Bar

1. Whilst England and Wales currently have a so-called “split profession”, i.e. two separate routes for qualification as a solicitor and as a barrister, in practice solicitors have been able to obtain the same rights of audience as barristers by qualifying as solicitor-advocates since 1 January 1991.<sup>61</sup> Further, solicitors can easily re-qualify as barristers with the permission of the Bar Council, upon successfully completing advocacy and ethics exams and undertaking a period of pupillage of up to a year. Similarly, barristers are able to be employed by firms of solicitors, commercial organisations or by the government.
2. The Bar nevertheless remains a separate legal profession of specialist referral advocates and advisers. The Bar Council indicates that there are currently over 15,000 practising barristers, of which approximately 12,000 are self-employed. The remaining 20 per cent (c. 3,000) are employed and work in-house for an employer in industry, commerce or central or local government.<sup>62</sup>
3. The role of an employed barrister can vary greatly depending on his or her employer. Many will work in specialist legal departments advising only the organisation they work for. This paper focuses only on the role and function of the self-employed referral Bar.
4. While the academic stage of training as a solicitor and a barrister is the same,<sup>63</sup> the professional training received by these two branches of the legal profession is different. Currently, in order to qualify as a barrister, students who have completed their academic stage must complete the Bar Professional Training Course (“BPTC”) and undertake one year of pupillage. Further, prior to undertaking the BPTC, each student wishing to become a barrister must join one of the four Inns of Court.

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<sup>61</sup> The date of coming into force of s. 27 of the Courts and Legal Services Act 1990.

<sup>62</sup> See the Bar Council website at <http://www.barcouncil.org.uk/about-the-bar/facts-and-figures/statistics/#AllBarStats>. By contrast, as at 31 July 2013 there were 158,644 solicitors on the Roll, of which 127,676 held practising certificates (allowing them to practise). See the Bar Council website at <http://www.barcouncil.org.uk/about-the-bar/facts-and-figures/statistics/#AllBarStats>. In other words, there are currently around 10 times as many practising solicitors as self-employed barristers in England and Wales.

<sup>63</sup> Both need to have completed an undergraduate degree or a postgraduate course in law.

5. The Inns, which are voluntary societies, continue to hold exclusive rights of admission to the Bar. Historically, all powers exercised by the Inns over admission and discipline of barristers were delegated to them by the judges.<sup>64</sup> The judges' power appears to have originated from a decree by King Edward I made in 1292 placing a duty on the "*Lord Chief Justice of the Court of Common Pleas and the rest of his fellow justices*" to "*provide and ordain ... certain attorneys and lawyers, of the best and most apt for their learning and skill, who might do service to [the King's] court and people*", in other words, to ensure that only fit and proper persons could appear in any of the King's courts.<sup>65</sup> Over a period of time, the judges' powers of admission to, and prohibition from, practice at the Bar came to be delegated to the Inns of Court although the duty exercised by the Inns remained "judicial in nature" and subject to the so-called "visitorial jurisdiction" of judges.<sup>66</sup> By the middle of the 17<sup>th</sup> century the judges accepted the work of the Inns as the machinery enabling the judges to be satisfied as to the fitness of persons who have the right of audience before the courts.
6. Despite a number of changes to the regulation of the Bar, most notably, pursuant to the Legal Services Act 2007 which led to the creation of the specialist body regulating barristers - the Bar Standards Board - the historical role of the Inns to call and disbar barristers was preserved. Section 207 of the Legal Services Act 2007 defines a "barrister" as "*an individual who (a) has been called to the Bar by an Inn of Court, and (b) is not disbarred by an order of an Inn of Court.*"
7. The Bar Council is an unincorporated association which represents barristers in England and Wales. The Bar Standards Board ("BSB") is an independent regulatory arm of the Bar Council. The BSB's Constitution provides that "*the BSB is responsible for performing all regulatory functions (as defined in section 27(1) of the Legal Services Act 2007) of the Bar Council.*" Thus the disciplinary rules to which all

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<sup>64</sup> See *Rex v Benchers of Gray's Inn ex p William Hart* (1780) 1 Doug KB 353: "*The original institution of the Inns of Court no where precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the Crown. They are voluntary societies, which, for ages, have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the Bar, is delegated to them from the Judges, and, in every instance, their conduct is subject to their control as visitors.*"

<sup>65</sup> See *In Re S* [1970] 1 QB 160, at 168G-H and 174B.

<sup>66</sup> *In Re S* [1970] 1 QB 160, at 169B-170F and 174B-G. Notably, the visitorial jurisdiction of judges has recently been abolished by s. 24 of the Crime and Courts Act 2013 and barristers will now appeal disciplinary findings against them to the High Court rather than to a Panel of High Court judges sitting as Visitors.

barristers must adhere are made by the BSB, following an approval by an overarching legal services regulator, the Legal Services Board (“LSB”).<sup>67</sup>

8. The Council of the Inns of Court (“COIC”) is an unincorporated body separate and distinct from the Bar Council which exercises disciplinary powers over barristers. These include conducting disciplinary hearings and deciding on the “sentence” (e.g. disbarment, suspension or a fine) for breach of the disciplinary rules. The COIC derives its powers from the resolution by the judges made on 26 November 1986 and the BSB’s Constitution. The power to carry into effect any “sentence” rests with the Inn to which the barrister is called. This is reflected in the text of the resolution of the judges delegating powers to the COIC which states that *“any sentences decided upon or recommended by the Council of the Inns of Court ... shall be pronounced and carried into effect by the appropriate Inn.”*
9. The Inns of Court play a significant role in the barrister’s professional development and education during the professional training part of their career. However, their role becomes diminished (essentially to that of a dining hall and a library) once a barrister commences practice. The main significance of the Inns is that they are the principal providers of funding for student members. For pupils and junior barristers, the Inns provide compulsory advocacy training and the Inns’ expertise in advocacy training is unparalleled. The training is usually provided by senior members of the Inn, both judges and practitioners, who volunteer their services, and is based on the Hampel method.<sup>68</sup> In addition, student members of the Inns have to complete a number of compulsory “dining” sessions before being called to the Bar. Some barristers, usually senior QCs and judges become “benchers” of the Inn and thus get involved in its administration.

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<sup>67</sup> The Legal Services Board was created as an oversight legal services regulator by the Legal Services Act 2007. Pursuant to s. 20(6) of the Legal Services Act 2007, the Bar Council, as an approved regulator, is granted a power to *“authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant approved regulator”*, so long as its *“regulatory arrangements”* are approved by the Legal Services Board in accordance with s. 20(2)(a) and Part 3 of Schedule 4.

<sup>68</sup> A method whereby only one particular aspect of advocacy performance is identified as that needed to be addressed with a demonstration by the trainer and a repeat performance by the trainee focusing on addressing that particular aspect. It is named after Professor George Hampel, formerly a Justice of the Supreme Court of Victoria in Australia.

10. Currently the great majority of self-employed barristers in England and Wales practise from a particular set of chambers.<sup>69</sup> Essentially the chambers set up allows barristers to share their expenses, such as office rent, office facilities and staff salaries, whilst remaining self-employed and independent practitioners. Each set of chambers has its own constitution or a set of rules which govern the affairs of its members. The chambers as a whole (or more specifically, the head of chambers on behalf of all others in chambers) employs clerks who are responsible for agreeing the barristers' fees and for allocating work that comes into chambers (but only in those cases where clients have not specified their preference). Clerks are also involved in marketing chambers to different firms of solicitors. Traditionally, clerks were responsible for distributing the work to all members of chambers. This is no longer the case and barristers have to do a lot of work to build up their own practices.
11. The majority of chambers are based in one of the Inns and most chambers' names can be traced to the location of their original or existing premises within the Inns. Thus for most London barristers, the Inns remain the physical setting of their work. They would usually lunch in Hall at one of the Inns and use the Inns' libraries.
12. The Legal Services Act 2007 has paved the way to structural changes in the Bar by liberalising the ways in which barristers are permitted to practise. Thus, since 2010 barristers have been permitted to become managers and partners with other lawyers and non-lawyers in Legal Disciplinary Practices ("LDPs") regulated by the Solicitors Regulation Authority ("SRA") and in other "recognised bodies" regulated by the Council for Licensed Conveyancers. Barristers can also act in a "dual capacity" as both self-employed and employed simultaneously (though not in the same case), subject to certain provisos. While this has not led to drastic changes to the traditional structural set up of the Bar, a number of barristers have pioneered new ways of practising. For instance, a number of junior criminal barristers together with a solicitor and a professional practice manager set up a barrister-led LDP (regulated by the SRA) named Artesian Law. The firm specialises in advocacy services, traditionally provided by barristers, but competes for work with solicitors.

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<sup>69</sup> But see paragraph 12 below on the recent structural changes to the way in which barristers are able to practise.

## **B. Primary Role/Function of Advocates**

13. The Bar remains a unique legal profession whose members specialise in advocacy and specialist litigation and legal advice. While the role of litigation solicitors and barristers has become blurred over time, advocacy tends to be undertaken primarily by the Bar.
14. The Cab Rank Rule, which professionally obliges barristers to accept instructions from all clients regardless of any personal dislike of the identity of the client or the nature of their case, means that barristers tend to be exposed to a much wider variety of cases than solicitors (whose firms may be precluded from acting for certain clients due to corporate conflict of interest). The emphasis on advocacy both during the training and later stages of the barrister's career makes them well-placed to provide not only specialist advocacy services but also advice on litigation generally.
15. Often, so long as no actual conflict of interest arises, barristers would have experience of working for different sides of the disputes, for instance, for defence and prosecution in different criminal trials, for government and claimants in different judicial review applications, and for banks and consumers in banking litigation. The knowledge of arguments capable of being deployed by both sides to the dispute enables barristers to give accurate advice on the prospects of success of the particular arguments as well as on the strategy of conducting litigation in general. Within the litigation team advising a particular client, barristers play the role of specialist advisors on technical issues (both legal and procedural) that arise in litigation.
16. Advocacy services provided by barristers are not limited to oral advocacy. Written advocacy and written pleadings play a significant role in any litigation. For instance, a client would be prevented from advancing a legal argument at trial, if that argument had not been previously pleaded (sometimes even if the judge considers that argument to be the answer to the entire case). Often cases are settled before going to trial. In those cases, the client can only articulate the strength of his case in writing, whether through pleadings and skeleton arguments or letters. This type of written advocacy can often be more effective than oral advocacy in assisting clients to reach a favourable outcome of their case without the need to go to trial.

17. In addition, barristers advise on whether a particular course of action the client wishes to adopt is compliant with the law. Such advice is usually obtained in order to avoid litigation and thus barristers' unique knowledge of arguments that tend to succeed in court makes them well-placed to provide such advice.
18. Finally, the Bar is also a source of specialist legal advice for firms who do not have the requisite expertise in-house. By outsourcing legal advice to a barrister specialising in a particular field, small law firms are able to provide a seamless legal service to their clients without the need to employ solicitors specialising in niche practice areas.
19. Examples of the type of work a barrister may do are:
  - (1) Advocacy (oral and written);
  - (2) Drafting documents, such as pleadings and responses to a letter before action;
  - (3) Advising in writing or in conference;
  - (4) Representing clients in mediation and arbitration;
  - (5) Negotiating on behalf of the client (this would normally apply to negotiations at the "doors of the court"); and
  - (6) In certain limited circumstances, investigating and collecting evidence and corresponding on behalf of the client (see para. 23 below).

### **C. Working Relationship with Solicitors**

20. The traditional relationship between barristers and solicitors is characterised by the description of the Bar as a "referral profession". Essentially this means that a barrister is approached by a solicitor (referred to as the "professional client") to act on behalf of the solicitor's lay client. The lay client, who traditionally was unable to instruct a barrister (due to the restriction preventing barristers from accepting instructions from lay clients), remained the client of a solicitor. Because of this barristers did not traditionally (and still rarely do) compete for clients with solicitors.
21. The traditional rule that barristers cannot accept instructions from lay clients was relaxed in 2004. The Public Access Scheme established in 2004 allowed a barrister to be instructed directly by a lay client, provided the barrister had more than 3 years'



practising experience, was properly trained and had registered with the Bar Council as a public access practitioner.<sup>70</sup> However, public access does not put barristers on par with solicitors. The fact that barristers are now able to accept instructions directly from clients does not impact on the scope of the work that barristers are able to undertake. The biggest restriction that continues to operate is that barristers are not allowed to conduct litigation on behalf of their client without appropriate authorisation. Those who breach this prohibition would be committing a criminal offence under the Legal Services Act 2007.<sup>71</sup> The BSB has indicated that the following actions would constitute conducting litigation:<sup>72</sup>

- (1) Issuing proceedings or notices of appeal;
- (2) Filing documents at court or serving documents on another party;
- (3) Acknowledging service of proceedings;
- (4) Giving your address as the address for service.

22. However, barristers are able to advise their clients on how to take all of the above steps.<sup>73</sup>

23. Certain other restrictions exist in respect of investigating and collecting evidence and corresponding on behalf of clients:

- (1) Barristers must not conduct a case in court if they have previously investigated or collected evidence unless they believe that the investigation and collection of evidence is unlikely to be challenged. Usually therefore the task of investigating and collecting evidence would be carried out by solicitors in conjunction with the lay client.
- (2) While barristers are permitted to engage in correspondence between the parties as per the decision in *Andre Agassi v Robinson* [2005] EWCA Civ 1507, in which the Court of Appeal held that correspondence is not part of the conduct

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<sup>70</sup> Cordery on Legal Services (looseleaf), Division E, Section 2D, para. 905.

<sup>71</sup> The Public Access Scheme Guidance for Barristers at para. 10.

<sup>72</sup> Ibid, at para. 12. Although certain limited steps, such as lodging documents and skeleton arguments for hearings and sealing court orders is permitted to be done by barristers and is traditionally done by barristers' clerks.

<sup>73</sup> The Public Access Scheme Guidance for Barristers at para. 13.

of litigation, this will often be impractical. The BSB guidance provides that barristers may only conduct correspondence if satisfied that it is in the client's best interest and the barrister has "*adequate systems, experience and resources for managing the correspondence*".<sup>74</sup> While solicitors have systems for logging incoming and outgoing correspondence and dealing with urgent correspondence in the absence of the relevant fee earner, self-employed barristers may not be able to offer the same service. Accordingly, it would be extremely rare for barristers to engage in correspondence on behalf of the lay clients (although barristers do regularly comment on correspondence sent by the solicitors).

24. A "licensed access" scheme, an initiative by the Bar Council which enables organisations with appropriate experience and expertise to use the specialist advice and advocacy services of a barrister without the intervention of a solicitor, provides another erosion of the traditional "referral" nature of the Bar. This scheme, however, is limited only to those organisations which are deemed by the BSB to have sufficient experience and expertise to instruct barristers directly and does not affect the nature of the work undertaken by barristers.
25. Thus despite the developments of the public access and the licensed access scheme, there have in fact been few changes to the traditional relationship between solicitors and barristers. Given the legal and practical limitations on conducting litigation by the self-employed Bar, litigation solicitors can continue to instruct barristers for specialist advocacy services and litigation advice safe in the knowledge that the solicitors' relationship with their clients will remain intact. Further, where lay clients and foreign firms do seek a barrister's advice directly, that barrister may well need to refer those clients to solicitors due to the fact that the self-employed Bar is unable to conduct litigation or receive or handle client funds.
26. Accordingly, the only perceptible shift in the working relationship between the Bar and the solicitors is that solicitors can now expect to receive referrals of work from barristers. A barrister may properly recommend a lay client to instruct a solicitor and suggest appropriate names if the barrister has reasonable grounds to believe that the

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<sup>74</sup> The Public Access Scheme Guidance for Barristers at para. 9 and Rule C130 and Guidance C24 and C71 in the The Bar Standards Board Handbook.

solicitor is competent to do the work. The barrister receives no fee for the referral and the solicitor is free to instruct another barrister.<sup>75</sup>

#### **D. Values Espoused by the Profession**

27. It would be hard to improve on the following summary:<sup>76</sup>

Wherever, in London or on Circuit, in whatever field of law we practise, and whether employed or self-employed, excellence and quality are bywords for the Bar of England and Wales. We each have different strengths. But we are bound together by common values:

- Our support for the Rule of Law
- Our commitment to access to justice
- Our maintenance and preservation of the highest ethical and professional standards, and
- Our commitment to the efficient and effective delivery of legal services.

28. In addition to these, the following values, all of which are essential to the maintenance of the rule of law, could be added:

(1) Independence;

(2) Integrity; and

(3) Excellence.

29. Finally, one of the significant values which all barristers subscribe to is adherence to the Cab Rank Rule – the principle that every barrister, no matter how skilled and experienced, is available to be instructed on behalf of any litigant or accused person in any court or tribunal.

#### **E. Level of Independence of Advocates**

30. Independence is perhaps one of the most valued qualities of the referral Bar. However, unlike judicial independence, the concept of independence of advocates is not easy to define. The Charter of Core Principles of the European Legal Profession (the “Charter”) compiled by the Council of Bars and Law Societies of Europe (“CCBE”) lists as its first core principle “*the independence of the lawyer, and the*

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<sup>75</sup> Cordery on Legal Services (looseleaf), Division E, Section 2D, para. 908.

<sup>76</sup> From the inaugural speech of the then current Chairman of the Bar, Michael Todd QC, delivered on 5 December 2011.

*freedom of the lawyer to pursue the client's case.*" This principle is then explained as follows:

A lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed without this independence from the client there can be no guarantee of the quality of the lawyer's work. The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer.

31. Thus, according to the CCBE, the following aspects of the concept of advocate's independence are significant:
  - (1) The Bar's collective independence to regulate its members;
  - (2) The Bar's independence from the State; and
  - (3) The advocate's individual independence from his clients, business associates, and "other powerful interests".
32. The Legal Services Act 2007 removed the self-regulation of the Bar.<sup>77</sup> Moreover, each of the independent regulators of the legal profession is subject to the supervisory jurisdiction of the overarching regulator, established under the Legal Services Act 2007, the LSB. Accordingly, the Bar of England and Wales no longer has independence in the first sense of this concept, i.e. collective independence to regulate its members.
33. On the other hand, the Bar of England and Wales is independent of the State, in the sense that the State has no say in the process of admission to the Bar, which continues to be overseen by the Inns.
34. At the same time as removing the Bar's ability to regulate itself, the Legal Services Act 2007, confirmed that "independence" of lawyers remains at the forefront of the Government's concern by imposing a duty on all legal regulators to act in a way

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<sup>77</sup> Section 27 of the Legal Services Act 2007 requires approved regulators to separate their regulatory functions from their representative functions. Accordingly, on 1 January 2006, the Bar Council established the BSB and delegated the discharge of its regulatory functions to the BSB.

which is compatible with the “regulatory objectives”.<sup>78</sup> The relevant “regulatory objectives” listed in s. 1 of the Legal Services Act 2007 mention the concept of “independence” in three places:

- (1) By section 1(1)(f) the “*regulatory objectives*” include that of “*encouraging an independent, strong, diverse and effective legal profession*”;
- (2) Section 1(1)(h) lists among the “regulatory objectives” that of “*promoting and maintaining adherence to the professional principles*”. The relevant “*professional principles*” are then listed in s. 1(3) and include:
  - (a) that “*authorised persons*” (i.e. solicitors and barristers) should act with “*independence and integrity*”; and
  - (b) that persons who exercise a right of audience before any court or conduct litigation in any court should comply with their “*duty to the court to act with independence in the interests of justice.*”

35. The Act, however, does not establish the order of priority between these principles of independence and other “*regulatory objectives*”, which include, amongst others, promoting and protecting the public interest, the interests of consumers, promoting competition in the provision of legal services, supporting the rule of law, and improving access to justice. For the most part, they would be in harmony. But where they are not, it would be up to the regulators to establish a balance between them.<sup>79</sup>
36. Further, pursuant to s. 188 of the Legal Services Act advocates and litigators have a statutory duty to the court “*to act with independence in the interests of justice*”.
37. The requirement of independence is also emphasised in the compulsory Code of Conduct rules applicable to barristers.<sup>80</sup> One of the core duties of a barrister is maintaining independence.<sup>81</sup> Another core duty is observing the barristers’ “*duty to the court in the administration of justice*”.<sup>82</sup> This duty to the court is specifically stated to override any other core duty, if and to the extent the two are inconsistent.

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<sup>78</sup> Sections 3 (in relation to the LSB) and 28 (in relation to the BSB, SRA and other “*approved regulators*”) of the Legal Services Act 2007.

<sup>79</sup> See *Lumsdon v Legal Services Board* [2014] EWHC 28 at [56].

<sup>80</sup> See The Bar Standards Board Handbook, 1<sup>st</sup> edition, January 2014 (the “BSB Handbook”).

<sup>81</sup> See The BSB Handbook, Part B, Core Duty 4.

<sup>82</sup> See BSB Handbook, Part B, Core Duty 1.

This duty to the court to act with independence was further explained by Lord Hoffmann in *Hall v Simons* [2002] 1 AC 615 at 686E:

Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case. They may not make imputations of dishonesty unless they have been given the information to support them. They should not waste time on irrelevancies even if the client thinks that they are important.

38. In the context of criminal trials, Lord Bingham summarised the duty of prosecuting counsel as follows in *Randall v The Queen* [2002] 1 WLR 2237 at [10]:

The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice: *R v Puddick* (1865) 4 F & F 497, 499; *R v Banks* [1916] 2 KB 621, 623. The prosecutor's role was very clearly described by Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 Can CC 263, 270:

“It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings”

39. The twin duties of acting independently in the best interests of the lay client and in the interests of justice are also enshrined in the Bar Code of Conduct.

40. Rule C3 provides that:

You owe a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which you may have (other than obligations under criminal law). It includes the following specific obligations which apply whether you are acting as an advocate or are otherwise involved in the conduct of litigation in whatever role...:

1. you must not knowingly or recklessly mislead or attempt to mislead the court;
2. you must not abuse your role as an advocate;
3. you must take reasonable steps to avoid wasting the court's time;
4. you must take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions;
5. you must ensure that your ability to act independently is not compromised.

41. Pursuant to Outcome C6 barristers must “*maintain standards of honesty, integrity and independence*” and be “*seen as so doing*”. Guidance C18 contains examples of how a barrister may be seen as compromising his or her independence, which include:

- (1) Offering, promising or giving any commission or referral fee or a gift to a client, professional client or other intermediary;
- (2) Lending money to a client, professional client or other intermediary;
- (3) Accepting money, as a loan or otherwise, from a client, professional client or other intermediary, unless it constitutes a payment for the barrister's professional services;
- (4) A gift voluntarily offered by a current, prospective, or former client, professional client or other intermediary should be rejected if it "*would reasonably lead others to think that [the barrister's] independence had been compromised*";
- (5) Similarly, the giving or receiving of entertainment "*at a disproportionate level*" should not be offered or accepted if "*it would lead others reasonably to think that [the barrister's] independence had been compromised*".

42. The importance of the principle of barristers' independence has recently been thrust to the forefront by the judicial review challenge to the lawfulness of the Quality Assurance Scheme for Criminal Advocates ("QASA") introduced by three regulators of criminal advocates, the BSB, the SRA and the Institute of Legal Executives ("ILEX") Professional Standards. The Claimants, four criminal barristers, argued that the scheme, which relied on assessments of advocates' competence during live trials by judges conducting the trials, was unlawful due to *inter alia* the fact that it interfered with the constitutional principle of advocates' independence from the judiciary. The Claimants relied on the dicta by Lord Hobhouse in *Medcalf v Mardell* [2003] 1 AC 120 at [51]-[52]:

51 ... It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed. The judicial system exists to administer justice and it is integral to such a system that it provide within a society a means by which rights, obligations and liabilities can be recognised and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional advocate is central to achieving this outcome, particularly where the judicial system uses adversarial procedures.

52. It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. In England the professional rule that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite in a manner too often taken for granted this constitutional safeguard. Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the Executive, the Judiciary or by anyone else. Similarly, situations must be avoided where the advocate's conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest.

43. By drawing parallels with cases on judicial independence, it was suggested by the Claimants and accepted by the Divisional Court in *Lumsdon v Legal Services Board* [2014] EWHC 28 that the principle of independence of advocates required advocates to be, and also perceived to be, independent from judges and, further, that situations in which the advocates' "*hopes and fears*" are vested in judges should be avoided. The Divisional Court held that the assessment of advocates' competence by judges as envisaged by QASA did not offend this principle of independence of advocates. However, both the correct formulation of the principle and the application of that principle to the proposed terms of QASA are currently on appeal to the Court of Appeal, whose decision on this issue is not expected until the next judicial term, i.e. October-November 2014.
44. Nevertheless, the importance of the independence of advocates is clearly at the forefront of both the legislators' and judges' minds in England and Wales. Thus the Divisional Court in *Lumsdon v Legal Services Board* at [1] confirmed that:

It is a critical test of the freedom inherent in our democratic society that those accused (usually by the State) of committing criminal offences can and should be represented by capable criminal advocates, independent in spirit who, subject to the rules of law and procedure which operate in our courts and to the dictates of professional propriety, are prepared to put the interests of their clients at the forefront and irrespective of personal disadvantage. Similarly, advocates instructed to prosecute crime must be impartial, balanced and fair. These are the values, to the great advantage of the rule of law in this country, that have long been embedded in the practice of advocates before our criminal courts. Those who have the responsibility for the regulation of advocates (whether barristers or solicitors) are imbued with the same sense of the centrality of independence and mindful both of the need to maintain standards and the critical importance of supporting professional independence.

## **F. Aspects of the Profession Undergoing Reform**

45. On 25 June 2014, the BSB applied to the LSB for approval of the change to its rules, which would allow the BSB to establish an entity-regulation regime. However, unlike the SRA, the BSB specifically chose to limit itself to regulating those entities which



provide only legal services and whose owners are also managers.<sup>83</sup> In addition, the BSB stated that it intends to regulate only those entities in which 50 per cent or more of owners and managers are entitled to exercise rights of audience in the Higher Courts.<sup>84</sup> In other words, the BSB's proposal would allow the establishment of advocate-led entities with lower regulatory costs and burdens than those currently imposed by the SRA. Essentially, this would give barristers wishing to provide specialist litigation and advocacy services a choice between operating on a self-employed basis from chambers or from an entity as employees or owners/managers. In time, this could lead to significant changes in the traditional structure of the Bar.

46. Two other significant reforms are the introduction of a compulsory accreditation scheme for criminal advocates, QASA, and the proposal to abolish the Cab Rank Rule.
47. QASA is the regulators' response to the government's calls for regulation of advocates' competence, and has been discussed in paras. 42-43 above. It has currently been introduced for criminal advocates only and, while the regulators have previously stated that similar schemes would be rolled out for the rest of advocates, it is unclear what form those other schemes would take. The accreditation scheme for criminal advocates was introduced in response to a perceived view by the judiciary and the public that the quality of criminal advocacy is falling and to reassure the public that only advocates competent to do so would be able to represent them in criminal trials. QASA requires each criminal advocate to register at one of four levels (Level 1 being reserved for the minor offences usually heard in Magistrates' Courts and Level 4 including the most complex Crown Court cases, such as murder and terrorism) and then undergo an assessment during the first two to three live trials they conduct at their chosen level. The assessment is carried out by the judge hearing the case, and an advocate who fails two out of three assessments would not be able to undertake work at a level at which he had been found to be incompetent. The lawfulness of the scheme is currently being challenged by the Bar by way of judicial review (see para 42 above). The operation of the scheme has been suspended until the outcome of the

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<sup>83</sup> See BSB's Entity Regulation Policy Statement at para. 11.

<sup>84</sup> Ibid, at para. 14 (a).

judicial review (and all appeals) is known and thus it is unclear when (and in what form) the scheme will come into force.

48. Another possible reform which has been negatively received by the Bar is the proposal by the LSB to abolish the Cab Rank Rule. The proposal was supported by a report written by professors John Flood and Morten Hviid and commissioned by the LSB (the “Flood/Hviid Report”). This report was criticised by a number of practitioners<sup>85</sup> who emphasise the importance of the Cab Rank Rule in ensuring that even unpopular clients can secure representation by an advocate of their choice. They also highlight the benefit of the rule to the public in niche and specialist areas, such as banking and regulatory law, where its absence would create a real risk that major players (e.g. banks or regulators) would demand exclusivity, thus depriving consumer claimants of much of the talent available at the Bar.

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<sup>85</sup> See, for instance, the paper by Michael McClaren QC, Craig Ulyatt and Christopher Knowles “The ‘Cab Rank Rule’: A Fresh View”.

### III. HONG KONG

#### A. Structural Organisation of the Bar

1. Hong Kong has a split profession. All students wishing to qualify as solicitors or barristers must complete a Bachelor of Laws (LLB) degree and a Postgraduate Certificate in Law. Following this academic stage, those wishing to become solicitors undertake a 2 year training contract with a law firm and those wishing to become barristers undertake a period of pupillage of not less than 12 months, of which at least 3 months must be spent on civil and 3 months on criminal practice.<sup>86</sup>
2. All barristers are self-employed practitioners who are not permitted to form partnerships.<sup>87</sup> Pursuant to the Code of Conduct of the Bar of the Hong Kong Special Administrative Region (“Code of Conduct”), a barrister may not practise unless he or she is a member of professional chambers or is temporarily permitted the use of professional chambers.<sup>88</sup> In addition, a barrister may not be a member of more than one set of professional chambers in Hong Kong.<sup>89</sup>
3. From 30 January 2012, certain solicitors (with five years post-qualification practice, of which at least two must be in Hong Kong) may apply for the right of audience in the high courts upon completion of the eligibility requirements, such as passing the advocacy test.<sup>90</sup>

#### B. Primary Role/Function of Advocates

4. The primary role of barristers in Hong Kong is similar to that of barristers in other jurisdictions: representing clients in court, giving advice in connection with litigation and advising on specific legal issues which are connected to litigation. Barristers must also help their clients resolve their disputes by any alternative means. Thus pursuant to para. 116A of the Code of Conduct, barristers have a duty “*to consider with his or her clients the possibility of attempting to resolve a dispute or any particular issue thereof by way of mediation*”.

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<sup>86</sup> See Annex F to the “Independent criminal advocacy in England and Wales” report by Sir Bill Geoffrey.

<sup>87</sup> Code of Conduct of the Bar of the Hong Kong Special Administrative Region (updated as of 5 August 2013) (“Code of Conduct”), para. 28.

<sup>88</sup> Ibid, at para. 25.

<sup>89</sup> Ibid, at para. 27.

<sup>90</sup> [www.scmp.com/article/991314/solicitors-high-courts-end-year](http://www.scmp.com/article/991314/solicitors-high-courts-end-year).

5. In addition, the Chairman of the Hong Kong Bar Association, Paul Shieh SC, has stated that one of the functions of the Bar is to properly inform the public of the significance of the Rule of Law “*so that, even though they do not like the rulings of the Courts in particular cases they will learn to respect the independence of the judiciary as an immovable bedrock of Hong Kong, and learn to treasure a truly independent Bar.*”<sup>91</sup>

### **C. Working Relationship with Solicitors**

6. The Hong Kong bar is a referral bar. A barrister in Hong Kong cannot act in a professional capacity except upon the instructions of a solicitor, the Director of Legal Aid or the Government.<sup>92</sup> In addition, a barrister may also obtain instructions from a member of a professional body approved by the Bar Council for the purpose of “Direct Professional Access work”.<sup>93</sup>
7. Subject to a few limited exceptions, a barrister may not appear in court or discuss a case, take instructions from or give advice to a lay client, unless the person instructing him is present.<sup>94</sup> Thus, barristers must maintain a good professional relationship with their instructing solicitors.
8. However, in order to preserve the independence of the Bar, barristers are not permitted to “*have a seat in the office of any person authorised to instruct [them] or in the office of the company, firm or other body of which such person is a director, partner, member or employee.*”<sup>95</sup>

### **D. Values Espoused by the Profession**

9. The Hong Kong bar recognises the importance of the existence of an independent bar and its duty to serve the entire public (and not just the fee paying public) in fearlessly

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<sup>91</sup> Speech of the Chairman of the Hong Kong Bar Association at the opening of the legal year, 13 January 2014, at para. 20.

<sup>92</sup> Code of Conduct, para. 50(a).

<sup>93</sup> Ibid, at para. 50(b).

<sup>94</sup> Ibid, at para. 142.

<sup>95</sup> Ibid, at para. 90.

upholding the principles of the rule of law.<sup>96</sup> As the former chairman of the Hong Kong Bar Association, Kumar Ramanathan SC, remarked:<sup>97</sup>

The Bar proudly sees it as its public duty to be in the vanguard in defending the Judiciary's independence at all times and to ensure that the Administration governs in conformity with and in accordance with the Rule of Law, rather than Rule by Law.

10. Similarly to barristers in other ICAB jurisdictions, Hong Kong barristers are bound by the Cab Rank Rule, which is enshrined in para. 21 of the Code of Conduct:

A practising barrister is bound to accept any brief to appear before a Court in the field in which he professes to practise at his usual fee having regard to the type, nature, length and difficulty of the case.

11. Again, similarly to the position in England and Wales (and other ICAB jurisdictions), barristers owe a “*divided loyalty*” to their clients and to the court. Thus a barrister “*must not knowingly deceive or mislead the Court*”.<sup>98</sup> Barristers must also “*at all times act with due courtesy to the Court*” before which they appear.<sup>99</sup>

#### **E. Level of Independence of Advocates**

12. Independence of the bar and the judiciary is one of the core values espoused by the Hong Kong bar. Kumar Ramanathan SC explained the Hong Kong bar's commitment to independence as follows:<sup>100</sup>

Historically, one of the Bar's greatest strengths has been that its members have been utterly independent of any commitment other than to the Rule of Law. An independent judiciary is closely connected to and dependent on the independent legal profession as a whole, which itself depends on the independence of law. ... As we move forward into new and challenging times ahead, the Hong Kong Bar and the community as a whole must respond promptly and courageously to any attempt, deliberate or otherwise, that seeks to undermine the independence and autonomy of our Courts within the autonomy granted under the Basic Law. ...

I believe it is important to emphasise that the independence of the Bar is as valuable to the client as it is to the community at large. To the client it gives an assurance of such accuracy as knowledge and skill can contribute; to the community, it gives the service of law applying the law in the manner in which the law is intended to be applied. It is independence that makes the barrister essential to the administration of justice according to law. This is independence that cannot be bought in a market; independence that will not be bartered for money, or for privilege, status or even for a

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<sup>96</sup> The Bar Newsletter, February 2013, “Words from the Honourable Chief Justice Ma”.

<sup>97</sup> Speech of the Chairman of the Hong Kong Bar Association at the opening of the legal year 2013, 14 January 2013, at para. 5.

<sup>98</sup> Code of Conduct, para. 130.

<sup>99</sup> Ibid, at para. 133.

<sup>100</sup> Speech of the Chairman of the Hong Kong Bar Association at the opening of the legal year 2013, 14 January 2013, at paras. 7 – 8, 11 (adopting, in part, the words of a former Chief Justice of Australia, Hon Sir Gerard Brennan AC KBE, “Profession or Service Industry: The Choice” Australian Bar Association, 18 August 1996).

momentary success. In my view, it is this characteristic of independence that, more than any other facet, ... stamps the Bar as a profession and not a service industry!

13. The value of independence is also reflected in the Code of Conduct, which provides that a barrister may not accept instructions in any case where “*by reason of his connection with the client it would be difficult for him to maintain his professional independence*” or where “*by reason of his connection with the Court or a member thereof the impartial administration of justice might appear to be prejudiced.*”<sup>101</sup> Similarly, a barrister may not appear as Counsel in a matter in which he himself is a party or has a significant pecuniary interest,<sup>102</sup> or give a commission or a present to any person who introduces professional work to him.<sup>103</sup>

**F. Aspects of the Profession Undergoing Reform**

14. The Code of Conduct was recently amended to tidy up loose ends, re-present existing provisions in a more systematic manner and include new provisions to reflect and cater for the ever-changing nature of the barristers’ practice.<sup>104</sup>

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<sup>101</sup> Code of Conduct, paras. 58-59.

<sup>102</sup> Ibid, at para. 60.

<sup>103</sup> Ibid, at para. 92.

<sup>104</sup> Annual report of the Chairman of the Bar Council for 2013.

## IV. IRELAND

### A. Structural Organisation of the Bar

1. The Law Library is the central and primary place of practice for the Bar of Ireland. Rule 8.2 of the Code of Conduct of the Bar of Ireland provides that it is desirable that all practising Barristers be members of the Law Library. There is no Chambers system in Ireland.
2. Barristers do not receive instructions from clients directly; their work comes through solicitors.<sup>105</sup> However, since May 1990 the Bar Council has authorised some bodies and their members to have Direct Professional Access (“DPA”) to members of the Bar of Ireland in non-contentious matters.<sup>106</sup> Furthermore, the Voluntary Assistance Scheme is the pro bono scheme of the Bar Council of Ireland which makes voluntary legal assistance available directly from barristers to:
  - (1) Charities;
  - (2) Non-government organisations; and
  - (3) Civic society groups such as the Money Advice and Budgeting Service (“MABS”) and Citizens Information.
3. Barristers do not handle clients’ funds<sup>107</sup> or provide safe custody of original documents. Each practitioner is a sole trader, and entering into partnerships with other barristers is forbidden.<sup>108</sup>

### B. Primary Role/Function of Advocates

4. The Bar Council of Ireland defines the barristers’ role for members of the public as follows:<sup>109</sup>

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<sup>105</sup> Rules 3.8 and 3.9 of the Code of Conduct of the Bar of Ireland.

<sup>106</sup> The scheme does not extend to contentious matters (for example, court appearances). The scheme means members of professional bodies (known as “approved professional bodies”) can instruct barristers directly without going through a solicitor.

<sup>107</sup> Rule 2.19 of the Code of Conduct of the Bar of Ireland.

<sup>108</sup> See Rule 7.14 and Rule 8.6 of the Code of Conduct of the Bar of Ireland. Barristers are permitted to share premises, however, as per Rule 7.13 of the Code of Conduct of the Bar of Ireland: “*Subject to compliance with the rules of this Code and instruments made under it, a Barrister shall not have breached the Code of Conduct merely by sharing any facility, premises or cost of practice, including any capital or operating cost, with one or more other Barrister. For the avoidance of doubt, a Barrister is entitled to so share in a location not administered by the Bar Council.*”

As specialist legal advisers and courtroom advocates, barristers are trained to be independent and objective. Barristers draft the pleadings for court, prepare legal submissions in writing and/or orally, ask the questions in court of the witnesses called on behalf of their client (“examination-in-chief”) and cross-examines the witnesses of the other party (“cross-examination”). A good cross-examination helps the jury or judge to make their decisions.

A well-argued case can be influential in persuading the judge that your case is a good one. A barrister’s training in advocacy and, above all, experience, can make a big difference to the outcome of a case.

Armed with specialist skills in court and in negotiation, a barrister is in a position to advise his or her client on the strengths and weaknesses of their case and whether to fight the case or settle it through negotiations.

5. Barristers must fearlessly defend their clients’ interests while maintaining the overriding duty to the Court of ensuring the administration of justice, as the following **rules of the Code of Conduct of the Bar of Ireland provide:**

**Rule 5.4:** Barristers when conducting a case must not assert their personal opinion of the facts or the law. Barristers must not act as the mere spokesperson for the client or the instructing solicitor and must exercise the independent judgement called for during the case, and where practicable after appropriate consideration of the client’s and the instructing solicitor’s desires.

**Rule 5.7:** Subject to the provisions of the Code Barristers should defend the interests of their client in a way which they consider to be to the client’s best advantage and within the limits of the law.

### **C. Working Relationship with Solicitors**

6. Barristers specialise in providing an advisory and/or advocacy service for which they are briefed by a solicitor, or other body that has DPA.<sup>110</sup>
7. Barristers should be attended in court by instructing solicitors, subject to certain exceptions.<sup>111</sup> Barristers may not have a room in a solicitor’s office. They may not have a retainer or enter into any agreement to do all the work of a solicitor’s office. They may not work in or be an employee of a solicitor’s office.<sup>112</sup>
8. Barristers also play a watchdog role in ensuring that the client is protected in the case of conflicts between a client and the solicitor who has instructed a barrister.<sup>113</sup>

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<sup>109</sup> [http://www.lawlibrary.ie/viewdoc.asp?fn=/documents/aboutus/generalinfo.htm&m=3#What is\\_a\\_Barrister\\_](http://www.lawlibrary.ie/viewdoc.asp?fn=/documents/aboutus/generalinfo.htm&m=3#What_is_a_Barrister_)

<sup>110</sup> See Rule 4.1, 4.2 and Rule 4.4 of the Code of Conduct of the Bar of Ireland.

<sup>111</sup> Rule 5.15 of the Code of Conduct of the Bar of Ireland.

<sup>112</sup> See Rules 4.14, 4.15 and 4.16 of the Code of Conduct of the Bar of Ireland.

<sup>113</sup> Rule 3.2(a) of the Code of Conduct of the Bar of Ireland.



#### D. Values Espoused by the Profession

9. The independence of the Irish Bar, discussed below, is something on which its members have long prided themselves. The duty to avoid conflicts, for instance arising by virtue of their connection with the client or the subject matter, is a related value.<sup>114</sup> Barristers will act for the Government one day and against the Government the next. The only restrictions on a barrister's ability to act are the Code of Conduct and availability to carry out the work.
10. The Cab Rank Rule means that the poorest client in the most rural part of Ireland can engage the services of the best advocate at the Bar, and is espoused in Rule 2.14 of the Code of Conduct of the Bar of Ireland:

Having regard to the anticipated length and complexity of a case and having regard to their other professional commitments and the provisions of this Code of Conduct Barristers are bound to accept instructions in any case in the field in which they profess to practice (having regard to their experience and seniority) subject to the Payment of a proper professional fee. A Barrister may be justified in refusing to accept instructions where a conflict of interest arises or is likely to arise or where they possess relevant or confidential information or where there are other special circumstances.

11. There is an “*overriding duty*” to the Court to ensure in the public interest that the proper and efficient administration of justice is achieved and barristers must assist the Court in the administration of justice.<sup>115</sup> Barristers also owe a duty to avoid deceiving or knowingly misleading the court.<sup>116</sup>
12. The duty to fearlessly uphold the interests of the client is a key value, and barristers must do so “*without regard to their own interests or any consequences to themselves or any other person*”.<sup>117</sup> There are limits to the barrister's duties to the client. For instance, a barrister is not required to run arguments with no reasonable chance of success,<sup>118</sup> or continue acting where the client's behaviour is so offensive that the professionalism of the barrister has been impugned.<sup>119</sup> The duty to avoid discrimination against any person seeking to avail of barrister services also

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<sup>114</sup> See Rules 3.11, 3.12 and Rule 3.16 of the Code of Conduct of the Bar of Ireland.

<sup>115</sup> Rule 2.2 of the Code of Conduct of the Bar of Ireland.

<sup>116</sup> See also Rule 5.3 and 5.9 of the Code of Conduct of the Bar of Ireland.

<sup>117</sup> Rule 3.1(a) of the Code of Conduct of the Bar of Ireland.

<sup>118</sup> Rule 3.7 (b) of the Code of Conduct of the Bar of Ireland.

<sup>119</sup> Rule 3.10 of the Code of Conduct of the Bar of Ireland.

features,<sup>120</sup> as does the duty of confidentiality in relation to all things told to a barrister by his or her client.<sup>121</sup>

#### **E. Level of Independence of Advocates**

13. No barrister is employed by any firm of solicitors, any department of government or any professional body. The general principles of independence are espoused in the following rules of the Code of Conduct of the Bar of Ireland:

**Rule 1.1:** Barristers shall uphold at all times the standards set out in the Code and shall conduct themselves in accordance with the standards of conduct expected of Barristers in their practice and it is their duty to be independent and free from any influence, especially such as may arise from their personal interests or external pressure, in the discharge of their professional duties as Barristers.

**Rule 2.1:** Subject to these Rules, Barristers as members of an Independent Referral Bar hold themselves out as willing and obliged to appear in Court on behalf of any client on the instructions of a solicitor and to give legal advice and other legal services to clients.

**Rule 2.3:** Barristers must promote and protect fearlessly and by all proper and lawful means their client's best interests and do so without regard to their own interest or to any consequences for themselves or to any other person including fellow members of the legal profession.

14. There are many Code of Conduct Rules which stress the necessity of avoiding conflicts, arising from personal interests or external pressure, such as for example the following:<sup>122</sup>

**Rule 2.5:** The many duties to which Barristers are subject require their absolute independence, free from all other influence, especially such as may arise from their personal interests or external pressure. Barristers must therefore avoid any impairment of their independence and be careful not to compromise their professional standards in order to please their client, the Court or third parties. This independence is necessary in non-contentious matters as well as in litigation.

#### **F. Aspects of the Profession Undergoing Reform**

15. **The Legal Services Regulation Bill 2011 is close to enactment and provides for huge changes to the way in which Irish barristers work.** The Bill provides for *inter alia*:

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<sup>120</sup> Rule 3.1(b) of the Code of Conduct of the Bar of Ireland.

<sup>121</sup> Rules 3.3(a), 6.2 and 8.10 of the Code of Conduct of the Bar of Ireland.

<sup>122</sup> See also Rule 2.6 of the Code of Conduct of the Bar of Ireland which provides that in order to perform their functions with due independence and in a manner which is consistent with their duty to participate in the administration of justice, barristers are excluded from occupations which conflict with the duties contained in the Code of Conduct.

- (1) A new, independent, Legal Services Regulatory Authority (“LSRA”) with responsibility for oversight of both legal professions;
  - (2) An independent complaints structure to deal with complaints about professional misconduct;
  - (3) The removal of restrictions on barrister – barrister “*legal partnerships*”,<sup>123</sup> barrister – solicitor “*legal partnerships*” and multi-disciplinary partnerships (“MDPs”).
16. There is a concern that the proposed LSRA will introduce a considerable level of bureaucracy and cost into the legal system.<sup>124</sup> Furthermore, the Minister will have a role in approving and amending codes of conduct for legal practitioners, and the Bar Council of Ireland argues that this undermines the independence of the LSRA and the independent system of regulation which is intended to be set up under the Bill. This power also interferes with the fundamental principle that the legal profession should be independent of the Executive branch of Government.<sup>125</sup>
17. There are also concerns that the proposed alternative business structures could destroy the independent Bar. Certain parts of the Bill appear to prohibit barristers who wish to continue to practise as sole practitioners in an independent Bar from associating solely with other such barristers, and there have been calls for these provisions to be removed from the Bill.<sup>126</sup>
18. The Bar Council has cautioned against the immediate introduction of MDPs and has proposed that a proper consultation and research function be conferred on the LSRA so that it can better inform itself and the Minister as to whether MDPs should be introduced in Ireland at all and, if so, in what form.<sup>127</sup>

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<sup>123</sup> The concept of “*legal partnership*” is not defined and it is not known how such partnerships will be established, nor how they will operate.

<sup>124</sup> David Nolan SC, “Reforms must not jeopardise integrity of our legal system” Irish Independent, 25 November 2013, available at <http://www.independent.ie/opinion/analysis/reforms-must-not-jeopardise-integrity-of-our-legal-system-29781533.html#sthash.rgm8aAQ0.dpuf>.

<sup>125</sup> <https://portal.lawlibrary.ie/Legal%20Services%20Regulation%20Bill/LSRB26062014.pdf>, at 5.

<sup>126</sup> Ibid, at 7.

<sup>127</sup> Ibid, at 8.

## V. NAMIBIA

### A. Structural Organisation of the Bar

1. The structural organisation of the legal profession in Namibia is summarised as follows by the Society of Advocates of Namibia:<sup>128</sup>

Up to 1995 the legal profession in Namibia used to be divided into advocates (barristers), and attorneys (solicitors). No dual practice was permitted.

Since the promulgation of the Legal Practitioner's Act, Act no. 15 of 1995, the previous division of the legal profession into advocates and attorneys was removed. Legal practitioners can now operate in all fields of law formerly reserved for advocates.

The profession of 'Advocate' was however 'retained' in the sense that provision was made for existing advocates, as well as members intending to specialise in this field to continue to practice as such on condition that such legal practitioners be exempted from holding a Fidelity Fund Certificate as is required of all other legal practitioners in terms of Section 67 of the Act.

Accordingly advocates continue to render service, on a referral basis, as before, to clients who seek the specialised services offered by these members of the legal profession in Namibia.

### B. Primary Role/Function of Advocates

2. The primary role and function of advocates in Namibia can be summarised as follows:<sup>129</sup>

Advocates are primarily experts in the art of presenting and arguing cases in court.

Until 1995 only advocates had audience and the right to present cases in the higher courts such as the High Court and the Supreme Court of Namibia. Since then all legal practitioners have the right of audience in these courts.

In a great number of cases however litigants are still represented by advocates. This requires a mastery of the law and the facts of the case, good judgment and the ability to present a case clearly and coherently. It means that an advocate must conscientiously prepare every case by reading, seeking advice and clearly defining the issues, which need decision.

Advocates also provide legal opinions to assist the drafting of legal documents that are required in every walk of life, be it commercial, industrial or domestic.

An important part of the advocate's work is providing legal assistance to needy clients by way of legal aid and amicus curiae appearances in court. What this means is working for the good of society and/or at reduced rates and in some cases without remuneration.

Members of the Society of Advocates of Namibia are also engaged in a wide-ranging number of other activities such as serving on the Council of the Law Society of Namibia, its various sub-committees and lecturing at the University of Namibia. Advocates are also actively engaged in the training of candidate legal practitioners in that they also lecture at the Justice Training Centre in Windhoek. The present Chief

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<sup>128</sup> Quoting from <http://www.namibianbar.org/NamLegal.htm>.  
<sup>129</sup> Ibid.

Justice of the Republic of Namibia as well as the first Chief Justice appointed after Independence where former members of the Namibian Bar.

### **C. Working Relationship with Solicitors/Attorneys**

3. The difference between Advocates and Attorneys has been explained in these terms:<sup>130</sup>

The attorney, like a general practitioner is a person with whom you first make contact when you have a legal problem. Therefore, an attorney needs to be readily accessible to everyone, and the service he or she supplies needs to be broad enough to cover a wide field of legal problems. This means that in general, attorneys are not always able to provide a specialised service in every field of law in which they may be asked to act.

Advocates, like medical specialists, have specialised expertise in various areas of the law, such as in constitutional law, labour law, criminal law, the law of contract etc, but they remain primarily experts in advocacy and court work, that is the art of presenting cases in court. A duly qualified trial lawyer or advocate is an indispensable element in each trial as in a truly qualified advocate legal knowledge, forensic skills, professional ethics and good court- room etiquette should be blended in total union in the furtherance of the administration of justice.

Should a client choose to seek the assistance of such a specialist in addition to the services of the legal practitioner he has already engaged, the attorney then, in turn, enlists an advocate on the client's behalf, to [re]present the client in court and/or to advise him or her as may be necessary.

### **D. Values Espoused by the Profession**

4. The Society of Advocates of Namibia identifies the importance of advocates as follows:<sup>131</sup>

Legal representation in the courts is a fundamental right of Namibians and all other litigants. It is vital that such representation should come from as broad a cross- section of Namibian society as possible. This service is essential and is available to the government, every organization and every citizen, rich or poor, weak or powerful, which wishes to enforce its rights, or which seeks to be protected from the tragedy of incorrect prosecution or unjust treatment. That the parties to litigation can be referred to specialized legal practitioners remains essential in the maintenance of a just and fair society. It is the advocate's duty to use his expertise to ensure that people's freedom is in no way compromised, nor their rights denied.

An important tradition which exist at the bar is the obligation on advocates to take all work offered to them, provided that they are available to do it and that the work falls within their area of expertise. In this way, everyone has access to the best available services, irrespective of the merits of a case or the popularity of the cause.

Generally speaking legal practitioners, whether practising with or without a fidelity fund certificate, remain as much part of the courts in which they practice as the judges who preside over them. Their duty is not only to their clients but also to the court. Although they are not court employees and practise independently in private practice, they are often loosely referred to as officers of the court, to emphasise their duty to the administration of justice and the court's disciplinary relationship with its practitioners.

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

5. As these statements demonstrate, key values espoused by the profession in Namibia include the promotion of the rule of law and of access to justice; the Cab Rank Rule according to which every citizen has the same rights of access to and assistance from officers of the law; and the observance by legal officers of a higher duty to the Court, designed to ensure the integrity of the legal profession.
6. These values can be further identified in the Legal Practitioners Act 1995, which includes amongst the objects of the Law Society of Namibia the requirement “*to maintain and enhance the standards of conduct and integrity of all members of the legal profession*” and “*to further the development of law as an instrument of social engineering and social justice*”;<sup>132</sup> and also in the statement of intent of the Society of Advocates of Namibia, which provides:<sup>133</sup>

As a body of independent practitioners who act on a referral basis, the Bar is committed to providing specialised legal representation at fair fees to all persons who require those services.

By providing this representation, as well as assisting with the protection of human rights and supporting access to justice for indigent persons as well as alternative dispute resolution, the Bar strives to serve all the people of Namibia.

As in the past and in pre-independence times, the Bar will continue to strive towards attainment of justice for all according to the rule of law and the protection of human rights, now enshrined in the Constitution and to strongly support reforms designed to achieve this goal.

The Bar is committed to:

- the maintenance and preservation of an independent judiciary;
- the maintenance and preservation of the rule of law;
- ensuring that the Bar is representative of all sections of the Namibian population;
- maintaining the high standards, professional integrity and independence which are the established hallmarks of the Bar;
- support the expansion of legal services to all who require them in order to provide greater access to justice.

## **E. Level of Independence of Advocates**

7. Independence is valued in advocates, as set out in the statement of intent of the Society of Advocates of Namibia, which refers to advocates in Namibia as “*independent practitioners*”, before going on to identify amongst the commitments of the Bar in Namibia that of:<sup>134</sup>

*maintaining the high standards, professional integrity and independence which are the established hallmarks of the Bar; ...*

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<sup>132</sup> Legal Practitioners Act 1995 ss 41(a) and (c).

<sup>133</sup> Drawing from <http://www.namibianbar.org/NamLegal.htm>.

<sup>134</sup> Ibid.

**F. Aspects of the Profession Undergoing Reform**

8. The Law Society of Namibia is focusing on continuing professional development, in line with its mission to improve the standards of legal practice.<sup>135</sup> It is also working at present to streamline the Justice Training Centre system, to make the training of candidate legal practitioners more practical, to uplift standards, and to ensure the efficient functioning of the independent Disciplinary Committee.<sup>136</sup>
9. Recent changes to the High Court Rules (effective from April 2014) have also seen a greater emphasis being placed on early identification of the real issues in the case, on the speedy finalisation of cases, as well as on alternative dispute resolution.<sup>137</sup>

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<sup>135</sup> See eg <http://lawsocietynamibia.org/content/about-the-law-society/law-society-offices#ajx/content/news/press-statements-2014/lsn-president-s-remarks-on-high-court-year-opening-2014>.

<sup>136</sup> Ibid.

<sup>137</sup> See eg <http://lawsocietynamibia.org/content/about-the-law-society/law-society-offices#ajx/content/news/press-statements-2014/judge-president-remarks-on-high-court-year-opening-2014>.

## VI. NEW ZEALAND

### A. Structural Organisation of the Bar

1. In New Zealand, all legal practitioners are admitted to the High Court of New Zealand as barristers and solicitors. To be admitted, a candidate must have completed a Bachelor of Laws (LLB) degree and have undertaken a Professional training course.
2. Once admitted, New Zealand legal practitioners have flexibility in their modes of practice. Most lawyers, including those who practise only as solicitors, hold practising certificates as ‘barristers and solicitors’. This entitles them to act as solicitors and to appear in all courts and tribunals in New Zealand.<sup>138</sup> There is also a separate referral Bar.
3. The referral Bar is the third of the main groups of legal practitioners in New Zealand, being:<sup>139</sup>
  - (1) solicitors who work in private practice, either on their own account (in sole practice, in partnership with others in a firm of solicitors or as a director of an incorporated law firm) or as employed solicitors;
  - (2) solicitors who work ‘in house’, employed by a government department, corporate body, or professional association; and
  - (3) barristers sole, who practise as sole practitioners on a self-employed basis (“barristers”).
4. Barristers (including QCs) currently make up about 12% of all practitioners.<sup>140</sup> They tend to practise in sets of chambers with other barristers sole, which allows for the sharing of common overheads and encourages camaraderie amongst those at the independent Bar.
5. Barristers may, with a few exceptions, accept instructions only from solicitors.<sup>141</sup> This can be seen in rules 14.2 – 14.3 of the Lawyers and Conveyancers Act (Lawyers:

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<sup>138</sup> See rule 14 of the 2008 Client Care Rules.

<sup>139</sup> See <http://www.lawsociety.org.nz/for-lawyers/legal-practice>.

<sup>140</sup> LawTalk, Issue #836, 28 February 2014, available online at [http://issuu.com/nzlawsociety/docs/lawtalk\\_836\\_web?e=5224343/6910111](http://issuu.com/nzlawsociety/docs/lawtalk_836_web?e=5224343/6910111).

<sup>141</sup> See rule 14 of the 2008 Client Care Rules.



Conduct and Client Care) Rules 2008 (“2008 Client Care Rules”), which defines “Practice as a barrister sole” in the following terms:

14.2 A lawyer who holds a practising certificate as a barrister sole must not —

- (a) practise as a solicitor; or
- (b) carry out the transactional aspects of conveyancing; or
- (c) act as a general agent or attorney in respect of a client’s affairs; or
- (d) undertake the work of a real estate agent; or
- (e) receive or hold money or other valuable property for or on behalf of another person; or
- (f) practise in partnership or in an incorporated law firm unless the barrister sole is the only voting shareholder of the incorporated law firm.

14.3 A barrister sole may practise from a set of rooms or chambers and join with other barristers sole in sharing secretarial and support services for their practices, including the employment of another lawyer who holds a practising certificate as a barrister sole.

## **B. Primary Role/Function of Advocates**

6. As set out in rule 13 of the 2008 Client Care Rules, the foremost duty of any advocate in New Zealand is to the court:<sup>142</sup>

13. The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.

7. Reflecting its importance, the duty to the administration of justice has been described as “*arguably the most foundational of all the duties of lawyers*” in New Zealand,<sup>143</sup> with the core value of acting “*with integrity*” being at the heart of this responsibility.<sup>144</sup>

8. The overriding duty to the administration of justice is further broken down in the 2008 Client Care Rules (*inter alia*) into duties of fidelity to the court (rule 13.1); to protect the processes of the court and the dignity of the judiciary (rule 13.2); to keep the client advised of alternatives to litigation that are reasonably available (rule 13.4); and not to attack a person’s reputation in court or court documents without good cause (rule 13.8)

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<sup>142</sup> See also rules 2.1 – 2.2 of the 2008 Client Care Rules.

<sup>143</sup> Duncan Webb “Ethics, Professional Responsibility and the Lawyer”(2ed, 2006) at p. 443.

<sup>144</sup> Ibid, at 444.

9. In the performance of all of those more specific duties, advocates are expected to assist the courts in the achievement of justice. As Duncan Webb has explained:<sup>145</sup>

The Courts depend heavily on lawyers who appear before them for several reasons. The lawyer may be more knowledgeable in the specific area of law than the judge. Lawyers are able to specialise, whereas judges, with the exception of those in specialist Courts, are usually generalists. Lawyers can reduce a case to the core issues for presentation and know what information is admissible in evidence. Without such assistance the Court would be inundated with information much of which would be inadmissible or irrelevant, and would have to spend considerable time determining the real issues.

Lawyers also screen cases brought to Court and the facts presented. When a case has little or no hope of success it is incumbent on a lawyer to inform the client accordingly. Even when the case is a good one a lawyer should look for alternative ways for the client to vindicate his or her rights such as by a negotiated settlement or other non-litigious means of dispute resolution. When the possibility of success is truly remote the lawyer should usually try to discourage the client from bringing hopeless litigation. Similarly, a lawyer has a duty to ensure false information is not knowingly laid before the Court and that witnesses tell the truth. This includes adherence to the Court's rules about disclosing information to the opposing side.

10. Justice Fogarty has similarly spoken of the duty of advocates to assist in the delivery of justice through the provision of capable, informed, and dispassionate counsel:<sup>146</sup>

Society has justice systems to institutionalise and civilise punishments and other consequences for unlawful antisocial behaviour. Ultimately, safe and orderly societies depend on access to justice which is delivered dispassionately. Our long common law history repeatedly shows that judges find confidence in their judgment because of the assistance of capable, informed, and dispassionate counsel. There is a strongly held judicial belief, that the quality of justice depends on the quality of counsel, and of their work.

11. Whilst the responsibilities just noted are common to all advocates in New Zealand, barristers are uniquely subjected to them, as specialists in advocacy, and they rightly are expected by other practitioners and by the judiciary to lead by example in these areas.

12. In addition to possessing the forensic skills necessary for the conduct of trials, the practice of modern barristers extends to the provision of pre-litigation advice, including advice on how to avoid litigation. That is in addition to core litigation work, which commonly includes helping to formulate litigation strategy, drafting pleadings, engaging in pre-trial processes, preparing written submissions and presenting submissions orally to courts and tribunals.

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<sup>145</sup> Ibid, at 422.

<sup>146</sup> *Orlov v National Standards Committee No.1* [2014] NZHC 257 at [19].

### C. Working Relationship with Solicitors

13. As in other ICAB jurisdictions, there is an interdependent, symbiotic relationship between barristers and instructing solicitors in New Zealand. In particular barristers:

- (1) offer specialist skills, including forensic skills and a mastery of the rules of evidence that comes from their experience in written and oral advocacy;
- (2) provide independence in the conduct of litigation that a solicitor could not. This can be seen in the Supreme Court's holding in 2010 that litigation solicitors in practice in law firms "*should not appear as counsel if the correspondence with which they are associated is in issue in the litigation*",<sup>147</sup> a holding that can be seen as a corollary to rule 14.12 of the 2008 Client Care Rules which requires that "*Correspondence between parties on matters relating to litigation should normally be carried out between the instructing barristers and solicitors*";
- (3) provide second opinions based not just on expertise but on independence and objectivity;
- (4) bring a fresh view to an issue, which may help in changing the client's perception;
- (5) help solicitors to manage their workload.

14. In performing those tasks, rule 14.11 of the 2008 Client Care Rules requires a barrister to keep his or her instructing solicitor informed of the progress of all briefs and generally to deal with clients and witnesses only with the consent of the instructing solicitor:

A barrister sole must keep his or her instructing lawyer reasonably informed of the progress of the brief. A barrister sole should normally seek the consent of the instructing lawyer before interviewing the client or witnesses.

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<sup>147</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444, at [51] per Tipping J; and see also to the same effect at [147]-[149] per Wilson J.

## D. Values Espoused by the Profession

15. All New Zealand practitioners must comply with the following fundamental obligations:<sup>148</sup>

- to uphold the rule of law and to facilitate the administration of justice in New Zealand;
- to be independent in providing regulated services to clients;
- to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients;
- to protect, subject to overriding duties as officers of the High Court and to duties under any enactment, the interest of clients.

16. Those fundamental obligations inform more specific professional obligations to:<sup>149</sup>

- act competently, in a timely way, and in accordance with instructions received and arrangements made;
- protect and promote [the client's] interests and act for [the client] free from compromising influences or loyalties;
- discuss with [the client their] objectives and how they should best be achieved;
- provide [the client] with information about the work to be done, who will do it and the way the services will be provided;
- charge [the client] a fee that is fair and reasonable and let [the client] know how and when [the client] will be billed;
- give [the client] clear information and advice;
- protect [the client's] privacy and ensure appropriate confidentiality;
- treat [the client] fairly, respectfully and without discrimination;
- keep [the client] informed about the work being done and advise [the client] when it is completed;
- let [the client] know how to make a complaint and deal with any complaint promptly and fairly.

17. In the majority of instances, where barristers are instructed through solicitors, these obligations will apply in light of the relationship that barristers have with instructing solicitors in terms of rule 14.11 of the 2008 Client Care Rules (quoted in para 14 above).

18. Barristers are also unique in being subject to a much more specific Cab Rank Rule than solicitors.<sup>150</sup> The Cab Rank Rules applying specifically to barristers seek to ensure that the courts and justice are accessible to all, consistently with the rule of law. They provide:<sup>151</sup>

14.9 A barrister sole must not do anything to induce persons to suppose that the barrister sole retains a connection with any practice of which he or she was previously a member, or to suppose that there is any connection between the barrister sole and that practice or any other practice.

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<sup>148</sup> Section 4 of the Lawyers and Conveyancers Act 2006, as quoted at p 3 of the 2008 Client Care Rules.

<sup>149</sup> Quoting from the Preface to the 2008 Client Care Rules.

<sup>150</sup> The general rules for refusing to accept instructions are set out in rule 4.1 of the 2008 Client Care Rules.

<sup>151</sup> Quoting rules 14.9 – 14.10 of the 2008 Client Care Rules.

14.10 A barrister sole must not have an arrangement that restricts the complete freedom of a lawyer holding a practising certificate as a barrister and solicitor to instruct any counsel the lawyer or the client selects.

14.10.1 This rule does not affect the right of a barrister sole to accept a general retainer from a lawyer holding a practising certificate as a barrister and solicitor on behalf of a particular client.

19. Finally, all practitioners have a responsibility to promote and maintain proper standards of professionalism in their dealings, which includes treating other practitioners with respect and courtesy.<sup>152</sup> As noted above, professional courtesy is a particular hallmark of the independent Bar in New Zealand. Those at the Bar are not only civil and courteous to each other, but they strive for camaraderie. It is one of the strengths of the Bar, in particular, that barristers can fight each other in Court and then sit down for a drink or a meal together.

#### **E. Level of Independence of Advocates**

20. As noted above, barristers must be independent and must observe the Cab Rank Rule.
21. The importance of the independence of the profession more generally is underscored in Chapter 5 of the 2008 Client Care Rules, titled “Independence”. It sets out in rule 5 the following obligation for all practitioners in New Zealand:

A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.

22. This requires all practitioners to exercise independent judgement and to provide independent advice to clients (rules 5.1 – 5.3). It also requires all practitioners to ensure the avoidance of conflicts of interest (rules 5.4 – 5.12 and 6.1 – 6.4). The exercise of independent judgment, uncompromised by general retainers or law firm conflict of interest policies, is a particular hallmark of the independent Bar, and represents one of its distinctive values.
23. Through such independence the public is able to have confidence in a barrister in particular “*as advocate to prepare the case skillfully, to exercise judgment in presenting the facts to the Court and to be articulate in presenting the litigant’s arguments*”.<sup>153</sup>

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<sup>152</sup> See Chapter 10 of the 2008 Client Care Rules.

<sup>153</sup> Quoting Duncan Webb “Ethics, Professional Responsibility and the Lawyer” (2ed, 2006) at p. 422.

**F. Aspects of the Profession Undergoing Reform**

24. A new intervention rule was adopted by the NZ Bar Association and the NZ Law Society in April 2014. It is awaiting the approval of the Minister of Justice.<sup>154</sup>
25. Under the previous intervention rule, a barrister had to accept instructions only from a solicitor and was not able to accept instructions directly from a lay client. There were some exceptions to the rule but they were relatively narrow. The new intervention rule provides a greater range of exceptions for when a barrister may accept instructions directly.

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<sup>154</sup> LawTalk, Issue #840, 28 April 2014, available online at <http://www.lawsociety.org.nz/lawtalk/issue-840/from-the-law-society>.

## VII. NORTHERN IRELAND

### A. Structural Organisation of the Bar

1. There are over 700 self-employed barristers in independent practice in the Bar Library in Belfast. There are no chambers. Employed barristers are also recognised as practising barristers under the Code of Conduct for The Bar of Northern Ireland.<sup>155</sup> Employed barristers are allowed to appear in court on behalf of their employer but not in courts to which the Bar has exclusive rights of appearance, i.e. the High Court and the Court of Appeal.<sup>156</sup>
2. Associations between barristers are not permitted,<sup>157</sup> nor are associations between barristers and solicitors.<sup>158</sup> Other alternative business structures are similarly prohibited, as is the external ownership of law firms.
3. Under present rules, solicitors can provide many of the services of barristers. Solicitors do not have automatic rights of audience in the High Court, but they can undertake a specialist advocacy course that enables them to provide such services. However, this course does not entitle solicitors to appear in the High Court or the Court of Appeal. Barristers cannot offer such services as conveyancing, the administration of estates, and, generally speaking, anything that involves access to clients' monies.
4. Professor Sir George Bain describes the market as follows:<sup>159</sup>

[T]he market for advocacy services in Northern Ireland is “competitive” in the economists’ sense of that term: a large number of sellers (barristers) offer, without any collusion between them, a relatively homogenous product (advocacy services) to a large number of buyers (solicitors).

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<sup>155</sup> Rule 1.09 of the Code of Conduct for The Bar of Northern Ireland: “Every barrister in independent practice shall be a member of the Bar Library.” Rule 1.10: “The Bar Council may, in its discretion, grant an exemption from the requirement that a barrister shall be a member of the Bar Library.” Rule 3.02 (a): “A “practising barrister” is a barrister who is either a barrister in independent practice or an employed barrister who has a current practising certificate.”

<sup>156</sup> Barristers employed by the Public Prosecution Service appear in both the Magistrates’ Courts and in the Crown Court. They are not permitted to wear wigs and gowns.

<sup>157</sup> Rule 10.06 and Rule 10.07 of the Code of Conduct for The Bar of Northern Ireland.

<sup>158</sup> Rule 21.03 of the Code of Conduct for The Bar of Northern Ireland.

<sup>159</sup> See para. 6.39 of the 2006 Report, “Legal Services in Northern Ireland, Complaints, Regulation, Competition.”

## **B. Primary Role/Function of Advocates**

5. The Bar Council of the Bar of Northern Ireland describes the role of barristers in the following terms:<sup>160</sup>

As specialists in providing high quality legal representation, barristers aim to provide access to justice for all. Services range from advocacy and representation in court to providing written advice, negotiation and mediation.

Barristers provide objective advice on the prospects of success and the evidence available with a high level of strategic and tactical awareness. This can involve:

- directing the preparation of cases and advising on the legal issues that may arise
- providing advice to the client about their case
- advising on strategy at all stages of the Court process
- researching relevant law
- drafting documents to assist the Court
- assisting in identifying expert witnesses
- appearing at applications at which cases are managed by the court or tribunal
- representing the client at the hearing, presenting written and oral submissions and cross-examining witnesses.

6. Barristers must not state their personal opinion of the facts or law according to Rule 9.06 of the Code of Conduct, and Rule 9.07 states that a barrister is “*personally responsible for the conduct and presentation of a case in court*”. Rule 9.08 provides that in all cases a barrister must ensure that the court is informed of all relevant decisions and legislative provisions of which the barrister is aware, whether the effect thereof is favourable or unfavourable towards the contention for which the barrister argues.

## **C. Working Relationship with Solicitors**

7. Rule 12.01 of the Code of Conduct for The Bar of Northern Ireland states that a barrister must not permit a professional client (the solicitor or member of a recognised professional body by whom a barrister in independent practice is retained or instructed) to limit the barrister’s discretion as to how the best interests of the client can be served.

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<sup>160</sup> <http://www.barofni.com/page/what-do-barristers-do>.



8. A barrister must avoid compromising his professional relationship with the professional client by over-familiarity.<sup>161</sup> A barrister may attend at the office of a professional client in order to consult with witnesses, peruse documents or inspect equipment relevant to the case. When attending at solicitors' offices, a barrister must ensure that his independence is not compromised and must not take instructions or record witness statements.<sup>162</sup> If a barrister believes that evidence exists that the professional client has failed to perform his professional duties properly, he should inform the lay client accordingly.<sup>163</sup> If a lay client asks a barrister to act on his behalf, the barrister should advise the lay client to instruct a solicitor. If it is an urgent matter, the barrister may contact the solicitor that the lay client proposes to instruct.<sup>164</sup>

#### **D. Values Espoused by the Profession**

9. Independence and the duty to avoid conflicts are key values espoused by the profession, as discussed below. Practising barristers are subject to the Cab Rank Rule. If they are requested to work on a case, they must take it providing they are available and the client is prepared to pay their professional fees, as the following Code of Conduct Rules detail:

**Rule 4.08:** A barrister in independent practice is under a duty to accept a brief to appear in any court in which that barrister holds out for practice (having regard to experience and seniority) and to mark a proper and reasonable professional fee having regard to the length and difficulty of the case.

**Rule 4.10:** Where a barrister has accepted a brief he must not return it to the professional client or transfer it to another barrister simply because he has received a more lucrative assignment.

10. Barristers' responsibilities include a duty to the Court to ensure the proper administration of justice, considered to be their primary duty.<sup>165</sup>
11. Barristers have a duty to promote the interests of their clients fearlessly. The manner in which a barrister can assist the client who is undergoing "the litigation experience" is prescribed:

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<sup>161</sup> Rule 12.02.

<sup>162</sup> Rule 12.03.

<sup>163</sup> Rule 16.01.

<sup>164</sup> Rule 16.08.

<sup>165</sup> Rule 4.01 of the Code of Conduct for The Bar of Northern Ireland. See also Rule 9.01 ("A barrister must not misstate the law knowingly nor conceal from the court any authority known or believed to be relevant") and Rule 9.02 ("A barrister must not misstate any fact or state as a fact any matter which there are no reasonable grounds for believing can be proved nor should he cross-examine any witness upon a basis which he does not reasonably believe to be true.")

**Rule 4.02:** It is a fundamental obligation of a barrister to ensure that every aspect of the lay client's interests is properly represented and protected without fear or favour.

**Rule 4.03:** A barrister must ensure that the privacy and dignity of the lay client are maintained at all times.

**Rule 4.04:** A barrister should envisage what the litigation experience is like for the lay client and assist the client by:

- a. explaining carefully the procedures and issues in the case in language that the client can understand including how the client should conduct themselves as a witness but avoiding any attempt to coach him;
- b. ascertaining and addressing anxieties about the litigation;
- c. inviting questions about the litigation and providing answers, where possible;
- d. explaining the strength and weaknesses in the client's case;
- e. advising the client as to the advantages and disadvantages of negotiations and settlement and the availability of alternative dispute resolution;
- f. ensuring that the client is never misled or bullied in order to obtain authority to settle its case;
- g. ensuring the waiting periods are explained;
- h. where a case is lost, explaining to the client what happened and advising as to an appeal.

12. The duty of confidentiality<sup>166</sup> is stressed as an important value and there is also a duty to avoid discrimination.<sup>167</sup>

#### **E. Level of Independence of Advocates**

13. Barristers have both an expectation of independence and a duty of independence, as exemplified in the following provisions of the Code of Conduct for The Bar of Northern Ireland:

**Rule 4.06:** A barrister in independent practice shall remain independent of all intrinsic pressures and personal interests.

**Rule 4.07:** A barrister must exercise his own professional judgment as to how to conduct a case. He must not accept directions from anyone but should be in a position to explain the approach he has taken.

**Rule 15.03:** A barrister shall not give a commission or a present to any person who introduces or provides professional work or accept a present of such value or in such circumstances as may lead to a reasonable inference that his independence may be compromised.

14. Independence also connotes a duty to avoid conflicts.<sup>168</sup>
15. The Bar Council of the Bar of Northern Ireland states: "Our value and strength lies in our firm commitment to justice, our constant pursuit of excellence and unashamed dedication to independence."<sup>169</sup>

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<sup>166</sup> Rule 5.13 of the Code of Conduct for The Bar of Northern Ireland.

<sup>167</sup> Rule 5.04 of the Code of Conduct for The Bar of Northern Ireland.

<sup>168</sup> See Rule 4.09: "A barrister should refuse to accept a brief where special circumstances such as a conflict of interest or the possession of relevant and confidential information exists." See also Rule 5.06, Rule 13.05, Rule 13.07, and Rule 13.08.

<sup>169</sup> <http://www.barofni.com/page/the-bar-of-northern-ireland>

## **F. Aspects of the Profession Undergoing Reform**

16. In September 2005, the government decided to publish a consultation document, *Regulation of Legal Services in Northern Ireland*. It set out a number of questions to be answered on regulation, complaints handling, and competition. The paper also signalled the government's intention to set up a Review Group under the chairmanship of Professor Sir George Bain.
17. The Bain Report was published in late November 2006, and contained a total of 42 recommendations across the three key headings of complaints, regulation and competition. Bain's recommendations were not as radical as those in the Clementi report for England and Wales, which led to the introduction of the Legal Services Act 2007. It was recommended that the complaints-handling function of the professional bodies be retained, subject to a substantial degree of reform, including a move towards lay majority committees chaired by lay persons, enhanced oversight, and increased transparency in the system. Bain did not recommend a regulatory body akin to the Legal Services Board (in England and Wales) to regulate the professions. He found that the professional bodies had a reasonably good record of self-regulation, however, it was recommended that there should be greater transparency and oversight of this regulation. Bain also cautioned against the creation of alternative business structures in a small jurisdiction, and said that this risked negative effects on choice and access to justice.<sup>170</sup>
18. The Draft Legal Complaints and Regulation Bill gives effect to some of the Bain recommendations. It creates the post of a Legal Services Oversight Commissioner; and also sees the professional bodies being responsible for setting up and maintaining complaints committees, with lay chairs and lay majorities.

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<sup>170</sup> See Committee for Finance and Personnel Draft Legal Complaints and Regulation Bill: DFP Briefing, 18 September 2013, available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2013-2014/September-2013/Draft-Legal-Complaints-and-Regulations-Bill-DFP-Briefing>.

## VIII. SCOTLAND

### A. Structural Organisation of the Bar

1. The legal profession in Scotland is divided into two branches – advocates and solicitors. Advocates are sole practitioners who work independently of each other. They are “*available for instruction and bound to accept instruction by any party or person in Scotland, or beyond, where they are qualified and available to accept such instruction*”.<sup>171</sup> There are just over 460 advocates.<sup>172</sup> All advocates have rights of audience before the UK Supreme Court and the Supreme Courts of Scotland, the Court of Session (civil cases) and the High Court of Justiciary (criminal cases). From 1990 certain solicitors have also been able to obtain rights of audience in those courts.<sup>173</sup> Both solicitors and advocates have rights of audience before the lower courts, the Sheriffs Courts (civil and criminal cases) and the Justice of the Peace courts (less serious criminal offences).
2. All independent referral advocates work from the Faculty of Advocates which is the primary place of practice for the Bar in Scotland. The Faculty of Advocates is an independent body of lawyers who have been admitted to practise as advocates before the courts of Scotland. It has been in existence since 1532 when the College of Justice was set by Act of the Scots Parliament,<sup>174</sup> although its origins are believed to predate this event. The Faculty is self-regulating, and, similarly to the historical position in England and Wales, the courts delegate to the Faculty the task of preparing persons for admission as Advocates.
3. Most lawyers in Scotland qualify first as solicitors. In order to qualify as a solicitor, students are required to complete a Bachelor of Laws (LLB) degree, followed by a Scottish Diploma in Professional Legal Practice. They are then required to undertake a traineeship of 24 months with a solicitors firm in order to qualify as a solicitor. Most

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<sup>171</sup> A response by the Faculty of Advocates to the Scottish Government Policy Statement on Regulation and Business Structures in the Scottish Legal Profession, May 2008, p. 3.

<sup>172</sup> See the Faculty of Advocates home page <http://www.advocates.org.uk/>.

<sup>173</sup> Section 24 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 created a route for solicitors to qualify for a grant of rights of audience in the higher courts when they have sufficient training and experience. Solicitors wishing to attain higher rights of audience are required to complete, to the satisfaction of the Council of the Law Society of Scotland, a course of training in evidence and pleading, demonstrate knowledge of the practice and procedure and of professional conduct in regard to the court in question, and satisfy the Council that the solicitor is a fit and proper person to have a right of audience in the higher courts.

<sup>174</sup> See <http://www.advocates.org.uk/profession/index.html>

aspiring advocates choose to stay with a solicitors firm longer than the 24 months traineeship period. This allows them to build up contacts among instructing solicitors and to gain advocacy experience in the Sheriff Court.

4. Those wishing to qualify as advocates must join the Faculty of Advocates, pass the Faculty's examinations in Evidence, Practice and Procedure and complete an eight or nine months period of unpaid practical training, known as devilling, with an experienced advocate (a devil master). At the end of the devilling period, an advocate will undergo an assessment, including of his or her oral and written advocacy skills, before being formally admitted as a member of the Faculty of Advocates.
5. Pursuant to the Guide to the Professional Conduct of Advocates published by the Faculty,<sup>175</sup> advocates cannot enter into partnership with each other or any other person "*in order to preserve a Bar of independent Advocates*".

#### **B. Primary Role/Function of Advocates**

6. According to the Faculty of Advocates,<sup>176</sup> "*advocates are specialists in the art of advocacy, which is the expert presentation of a case in court and also involves advising clients on every aspect of litigation.*" Thus the work of an advocate is not confined to appearing in court.

Typically, an advocate may be called upon to advise a pursuer or a defender on the potential merits of a claim, to identify the possible legal grounds of any action or defence, and to advise on the lines of inquiry and investigation which should be pursued in order to advance or resist the claim, as well as to appear in court to examine and cross-examine witnesses or to make legal submissions. Effective advocacy – and success or failure in a litigation – depends as much on these steps as on the "day in court".<sup>177</sup>

7. Advocates are also asked to provide opinions on a wider range of legal problems which do not involve court disputes.

#### **C. Working Relationship with Solicitors**

8. All advocates act in performance of an office and have no contractual relationship with their lay clients.<sup>178</sup> Thus an advocate cannot perform any act which must, in law, be performed by the client or by someone empowered to act as the client's agent, such

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<sup>175</sup> See Guide to the Professional Conduct of Advocates, 5<sup>th</sup> edn., October 2008, para. 1.2.5.

<sup>176</sup> The Faculty of Advocates, "A career at the Scottish Bar", p. 3.

<sup>177</sup> Evidence by Faculty of Advocates to the Justice Committee of the Scottish Parliament on Courts Reform (Scotland) Bill, 21 March 2014, para. 4.

<sup>178</sup> Guide to the Professional Conduct of Advocates, para. 1.2.3.

as a solicitor. This is why an advocate is generally instructed by a solicitor. Advocates' specialist and independent services are available to any instructing solicitors.

9. In addition, pursuant to the Direct Access Rules (October 2006), an advocate may accept instructions from a person or body set out in the Appendix to those rule, such as members of the Law Societies of England and Wales and Northern Ireland, public authorities, members of other professions recognised for this purpose by the Faculty and parliamentary agents.
10. Advocates' specialist and independent services are available to any instructing solicitors or direct access clients by reason of the Cab Rank Rule. Thus small firms of solicitors can enhance the service they provide to their clients by reason of their direct access to the diverse talent at the Bar.
11. The Faculty of Advocates states that solicitors may wish to take advocate's advice or assistance in the following circumstances:<sup>179</sup>
  - (1) Where pressure of business prevents the busy practitioner from devoting the necessary time to the problem;
  - (2) Where the practitioner realises he does not have sufficient expertise in advocacy or the legal field concerned;
  - (3) Where the practitioner considers that the problem might benefit from an independent review which would not cut across the existing solicitor-client relationship.
12. All advocates have a duty to respect the independence of solicitors, in particular, their freedom to instruct a counsel of their choice or to change counsel at any time without explanation or apology.<sup>180</sup> An advocate must also respect the fact that the solicitors' relationship with the lay client is different, and likely to be more continuous, than that of the advocate. Thus an advocate should not do anything, beyond the requirements of

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<sup>179</sup> See "The Role of Counsel" link on the Faculty of Advocates website.

<sup>180</sup> Guide to the Professional Conduct of Advocates, para. 4.1.

professional ethics, to upset the client/solicitor relationship or destroy the trust the client has in the solicitor.<sup>181</sup>

#### **D. Values Espoused by the Profession**

13. The Introduction to the Guide to the Professional Conduct of Advocates provides that:

The work of an Advocate is essentially the work of an individual practitioner whose conscience, guided by the advice of his seniors, is more likely to tell him how to behave than any book of rules.

14. The Faculty views the legal services provided by its members as being more than a commodity. Advocates are concerned with the maintenance of the rule of law and effective access to justice. Thus advocates take account of the duties they owe to the court and the legal system in general just as much as their duties to individual clients.

15. According to the Guide to the Professional Conduct of Advocates (para. 2), the general principles which guide the professional conduct of an advocate are:

- (1) Independence (as to which see Part E below);
- (2) Trust and personal integrity, as to which it is provided that “*relationships of trust can only exist if an Advocate’s personal honour, honesty and integrity are beyond doubt*”;<sup>182</sup> and
- (3) Confidentiality, since “*it is of the essence of an Advocate’s function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence*”.<sup>183</sup>

16. Another core value of an independent referral bar is the Cab Rank Rule. The rule “*requires a member of the Faculty of Advocates (the rule is not binding on solicitors or solicitor-advocates) to accept instructions in any field in which he or she professes to practice, including instructions to appear in any court where he or she is admitted to practice, on being offered a reasonable fee*”,<sup>184</sup> whatever the advocate’s views of

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<sup>181</sup> Ibid, at para. 4.2 - 4.4.

<sup>182</sup> Ibid, at para. 2.2.

<sup>183</sup> Ibid, at para. 2.3.

<sup>184</sup> A response by the Faculty of Advocates to the Scottish Government Policy Statement on Regulation and Business Structures in the Scottish Legal Profession, May 2008, p. 3.

the client or the client's case.<sup>185</sup> The Cab Rank Rule serves two purposes. It preserves the advocate's independence from his client, which is essential for the proper performance of the advocate's professional duties. It also facilitates access to justice. As Lord Pearson observed in the House of Lords:<sup>186</sup>

It is easier, pleasanter and more advantageous professionally for (advocates) to represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter.

17. In addition, an advocate owes a duty of loyalty to the Faculty and his or her fellow members<sup>187</sup> and a duty of courtesy to the court.<sup>188</sup> As to the latter, the Guide to the Professional Conduct of Advocates provides:<sup>189</sup>

Discourtesy is as offensive in Court as it is outside, and is equally detrimental to the reputation of Counsel with the bench, to the interests of the client and to public confidence in the administration of justice. ... There is a long-standing tradition of mutual trust and Courtesy between the Bench and Bar which must be respected.

#### **E. Level of Independence of Advocates**

18. The principle of independence of advocates, as interpreted by the English courts, applies with equal force in Scotland.
19. In addition, the Faculty of Advocates Guide to the Professional Conduct of Advocates lists independence as one of the core values of an advocate and explains the concept as follows:<sup>190</sup>

The many duties to which an Advocate is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as is the impartiality of the judge. An Advocate must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his clients, the Court or third parties.

20. Further, and in contrast to the position in England and Wales where barristers are free to form partnerships, the Faculty believes that the maintenance of the ban on

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<sup>185</sup> Guide to the Professional Conduct of Advocates, para. 8.3.1.

<sup>186</sup> *Rondel v Worsley* [1969] 1 AC 191 at 275.

<sup>187</sup> Guide to the Professional Conduct of Advocates, para. 3.1.

<sup>188</sup> *Ibid.*, at para. 6.4.

<sup>189</sup> *Ibid.*, at paras. 6.4.1 and 6.4.3.

<sup>190</sup> Guide to the Professional Conduct of Advocates, para. 2.1.1.



advocates forming partnerships is vital for the preservation of an independent referral bar.<sup>191</sup>

**F. Aspects of the Profession Undergoing Reform**

21. The proposal to increase the competence of the Sheriff Court to £150,000 and to create a Sheriff Appeal Court caused concern to the profession since it would transfer almost half of the cases currently heard in the higher courts to the Sheriff Court, where clients are usually represented by solicitors. If advocates are unable to follow these cases to the Sheriff Court, it has been argued that this would cause individual barristers to leave the Bar, thus diminishing the choice and quality of representation available to litigants in Scotland.<sup>192</sup>

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<sup>191</sup> A response by the Faculty of Advocates to the Scottish Government Policy Statement on Regulation and Business Structures in the Scottish Legal Profession, May 2008, p. 5.

<sup>192</sup> Evidence by Faculty of Advocates to the Justice Committee of the Scottish Parliament on Courts Reform (Scotland) Bill, 21 March 2014, paras. 45-47.

## IX. SOUTH AFRICA

### A. Structural Organisation of the Bar

1. The advocates' profession in South Africa is a referral profession. Clients approach an attorney who, in turn, instructs an advocate. Attorneys are engaged directly by clients, acting as managers of litigious cases. Although both attorneys and advocates may appear in the High Court of South Africa, the attorneys brief an advocate when specialist litigation is required. Attorneys form professional companies and firms and practise in partnership with each other. Advocates are individual practitioners and never form partnerships.<sup>193</sup>
2. The "Bar" is the name traditionally used for Societies of Advocates. There are ten Bars affiliated to the General Council of the Bar of South Africa. Each Bar is an independent association governed by an elected Bar Council. Advocates may become members of the Bar. Advocates who join the Bar keep chambers together in sets of chambers where they enjoy a collegial professional life.

### B. Primary Role/Function of Advocates

3. The General Council of the Bar of South Africa describes the work that an advocate does in the following terms:<sup>194</sup>

An advocate, as a specialist in courtcraft and legal opinions:

- Uses verbal and writing skills to understand, to explain and to persuade.
- Reads many documents and digests a lot of factual information.
- Researches the law in books and on computer databases.
- Uses listening skills to digest the stories told by clients in a consultation and to the evidence given by witnesses in court.
- Diagnoses from the facts and the law what exactly is the question to be decided.
- Drafts pleadings which state in very careful terms what the issues are that the court or the arbitrator must decide.
- Gives advice on problems and explains difficult choices to attorneys and to clients in opinions.
- Negotiates with colleagues over the settlement or the conduct of cases.
- Guides witnesses to give their evidence by asking questions and tests the truth and value of the evidence given by witnesses by cross-questioning them.
- Drafts arguments setting out the facts and law relevant to the decisions to be decided.
- Argues a case for a client to persuade a Judge or Magistrate or Arbitrator.

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<sup>193</sup> Rule 4.16 of the Uniform Rules Of Professional Ethics: Partnerships: "*No relation in the least degree resembling partnership in practice is permissible.*"

<sup>194</sup> <http://www.sabar.co.za/legal-career.html>

### **C. Working Relationship with Solicitors**

4. Rule 5.1.1 of the Uniform Rules Of Professional Ethics provides:

Counsel may render professional service for reward only if briefed to do so.

5. Advocates do not receive briefs directly from clients, and thus all their work is referred to them by other lawyers. Private sector practicing firms of attorneys brief advocates on a case-by-case basis. The State Attorney, who represents Government Departments, also briefs advocates in a similar way.

### **D. Values Espoused by the Profession**

6. The Bar is committed to certain values as set out in its vision statement:<sup>195</sup>

The Bar identifies itself fully with the ideals, aspirations and challenges presented by the new democratic South Africa.

As a body of independent practitioners, the Bar is committed to providing specialised legal representation, at fair fees, to all persons who require such services.

By providing this representation, as well as facilities for the protection of human rights, access to justice for indigent persons and alternative dispute resolution, the Bar serves all the people of South Africa.

We shall continue to strive towards the attainment of justice for all according to the Rule of Law and to support reforms designed to achieve this goal.

7. Advocates adhere to a Cab Rank Rule, which entails, according to the General Council of the Bar of South Africa, that:<sup>196</sup>

[A]ny person no matter how grievous a crime they are accused of, how poor or rich they may be or however unpopular they may be politically, is entitled to the services of an advocate, and it is unethical for an advocate who is available to take a case to refuse to do so because the advocate disapproves of the person's acts or behaviour.

8. Rule 2.1 of the Uniform Rules Of Professional Ethics on the Duty to Accept Briefs sets out that:<sup>197</sup>

Counsel is under an obligation to accept a brief in the Courts in which he professes to practise, at a proper professional fee, unless there are special circumstances which justify his refusal to accept a particular brief. In particular, every person who is charged before the Court has a right to services of counsel in the presentation of his defence. Subject to what has been said above, it is the duty of every advocate to whom the privilege of practising in Courts of Law is afforded, to undertake the defence of an accused person who requires his

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<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> See also Rule 2.1.1: Counsel may decline a specialist brief if he considers himself not competent to accept the brief.

services. Any action which is designed to interfere with the performance of this duty is an interference with the course of justice.

9. Counsel are subject to an overriding duty not to mislead the Court, as contained in Rule 3.2 of the Uniform Rules:

Counsel's duty to divulge to the Court material facts of which he has knowledge is governed on the one hand by his overriding duty not to mislead the Court, and on the other by his duty not to disclose to any person including in a proper case the Court itself, information confided to him as counsel. The application of this principle in particular circumstances and the question of when counsel may be said to have knowledge of facts may be difficult to resolve, and in such cases counsel should refer to the Bar Council for guidance.

10. The duty to the client is also stressed in Rule 3.1 of the Uniform Rules and fearlessness and courage in representing the client are key values:

According to the best traditions of the Bar, an advocate should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person.

Counsel has the same privilege as his client of asserting and defending the client's rights and of protecting his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation, that can legitimately, according to the principles and practice of law, conduce to this end; and any attempt to restrict this privilege should be jealously watched.

11. Rule 4.12 of the Uniform Rules commands that ill-feeling and arguments between counsel should be avoided, emphasising that collegiality and civility are important values:

Clients, not counsel, are the litigants. Whatever may be the ill-feeling existing between clients it should not be allowed to influence counsel in their conduct and demeanour towards each other or towards suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is improper to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

#### **E. Level of Independence of Advocates**

12. One of the most important values of the profession of advocacy is its uncompromising independence. Rule 3.5 of the Uniform Rules Of Professional Ethics provides:

##### **Professional as Opposed to Personal Interest**

3.5.1 Counsel should not become personally, as opposed to professionally, associated with his client's interest. He should not, e.g., stand bail for his client, nor take part in a public movement for his reprieve

13. There is a duty to avoid briefs which could cause embarrassment:<sup>198</sup>

**Rule 5.5 Briefs which could cause Embarrassment**

5.5.1 Counsel is not obliged to accept a brief if he has previously accepted a brief to advise another person on or in connection with the same matter. He is precluded from doing so:

- (a) if any confidential information having any bearing whatsoever on the matter in question was disclosed to him as a result of his first brief; or
- (b) if it might reasonably be thought by the person first advised that, if counsel were to accept the second brief, he would be prejudiced.

14. Rule 5.6.1 provides that a brief should not be accepted if counsel occupies or previously occupied a position with respect to the client or an opposing litigant which “*compromises, or which might reasonably be expected to compromise, counsel’s independence.*”
15. The General Council of the Bar of South Africa states that the independence of advocates is a “*source of professional pride to the Bar*” and a guarantee against conflicts of interest. It is noted that the advocates’ status as sole practitioners enable them to market their professional services without additional administration costs.<sup>199</sup>

**F. Aspects of the Profession Undergoing Reform**

16. The Legal Practice Bill creates the Legal Practice Council, an overarching regulatory and governing body for both attorneys and advocates. Section 7 of the Bill as passed by the National Assembly provides that the Council shall consist of the following members:<sup>200</sup>

- (a) 16 legal practitioners, comprising of 10 practising attorneys and six practising advocates, elected in accordance with the procedure prescribed by the Minister ...
- (b) two teachers of law, one being a dean of a faculty of law at a university in the Republic and the other being a teacher of law...
- (c) ... three fit and proper persons designated by the Minister, who, in the opinion of the Minister and by virtue of their knowledge and experience, are able to assist the Council in achieving its objects;
- (d) one person designated by Legal Aid South Africa; and
- (e) one person designated by the Board, who need not necessarily be a legal practitioner.

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<sup>198</sup> See also Rule 5.5.2: Opinion given to the Other Side.

<sup>199</sup> <http://www.sabar.co.za/advocates.html>

<sup>200</sup> <http://www.lssa.org.za/upload/Legal%20Practice%20Bill%20B20d-2012final.pdf>

17. Concerns have been expressed in relation to the effect of the Legal Practice Bill on the independence of the legal profession and on the rule of law. The late Chaskalson CJ spoke out against the Bill in the following terms:<sup>201</sup>

The legal profession has a duty to itself and to the people of our country to do all that it can to protect its independence. That involves ensuring that its rules and practices are in the public interest and facilitate access to courts by the public and in particular by those whose need is the greatest, by promoting the culture of independence and professionalism in practitioners, by explaining to the general public the role of an independent legal profession in protecting democracy, and by raising its voice against measures calculated to erode that independence. The Legal Practice Bill in its present form is such a measure.

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<sup>201</sup> Izak Smuts SC, “The Legal Practice Bill – access to justice or executive control?” *Advocate*, April 2013, at 26, available at <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp25-28.pdf>, at 26-27.

## X. ZIMBABWE

### A. Structural Organisation of the Bar

1. Prior to 1981 the profession was divided into two branches: attorneys and advocates.<sup>202</sup> Since the Legal Practitioners Act 1981 was enacted, it has been fused.<sup>203</sup>
2. In consequence, any registered legal practitioner who is in possession of a valid practising certificate issued by the Law Society has rights of audience in any court in which persons are entitled by law to legal representation.<sup>204</sup>
3. Notwithstanding this modern position under the Legal Practitioners Act 1981, there is still in practice a *de facto* divided profession in Zimbabwe, as there are lawyers who practise as advocates and voluntarily regulate themselves in the same way as advocates or barristers in a system with a divided profession.<sup>205</sup>

### B. Primary Role/Function of Advocates

4. Consistent with the values espoused by the Profession (see Section D below), advocates' functions include promoting justice, defending human rights and advancing the Rule of Law. As litigation specialists, they bring specialist knowledge and experience to these tasks. They are also at the forefront of protecting the rights and interests of individuals against the State, including in litigation seeking to advance individuals or causes unpopular to the State.

### C. Working Relationship with Solicitors

5. This is not a prominent issue in Zimbabwe, in light of the nature of the profession (as to which, see Section A above).

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<sup>202</sup> Lovemore Madhuku "An Introduction to Zimbabwean Law" (Weaver Press, 2010), 85.

<sup>203</sup> See [http://www.nyulawglobal.org/globalex/zimbabwe.htm#\\_The\\_Legal\\_Profession](http://www.nyulawglobal.org/globalex/zimbabwe.htm#_The_Legal_Profession).

<sup>204</sup> Legal Practitioners Act 1981, s 8(2)(a).

<sup>205</sup> Lovemore Madhuku "An Introduction to Zimbabwean Law" (Weaver Press, 2010), 87.

## **D. Values Espoused by the Profession**

6. The legal profession in Zimbabwe is committed to advancing the Rule of Law and justice.<sup>206</sup>
7. The Law Society, consistent with those commitments, has amongst its strategic objectives the creation of a human rights culture in Zimbabwe and a strong commitment to the Rule of Law and the independence of the legal profession.<sup>207</sup> Hence its “Mission and Vision” statements include:<sup>208</sup>

Promote justice, defend human rights, rule of law and the independence of judiciary.

8. As to the conduct expected by the profession of its members, including its specialist advocates, honesty, integrity and reliability are all important. This can be seen in *Hayes v The Bar Council* 1981 ZLR 183 (A) at 199-200, where Fieldsend CJ explained in the context of admission to the profession that:

So far as possible the court must be satisfied that an applicant will be able with honesty and balance to perform the duties of an advocate to the advantage of those he is called upon to represent. ... In addition, the profession of advocate and attorney requires the utmost good faith from practitioners and from all aspirant practitioners ... An advocate, whose main duty it will be to represent his clients before the courts, must be a person in whose reliability and integrity the court must be able to place complete trust, it always being remembered that an advocate owes a duty at least as much to the court as to his client. And the court must be satisfied that he will not by his behaviour do anything to bring the courts or the profession into disrepute.

## **E. Level of Independence of Advocates**

9. As noted above, the legal profession is committed to the Rule of Law and justice.<sup>209</sup>
10. Lawyers have been targeted by the State on account of belonging to the legal profession. The 2011 annual report of the President of the Law Society, for example, notes with concern:<sup>210</sup>

...the increase in the militia backed interference with administration of justice and the unresolved problem of political violence and harassment of the public. Selective prosecution and recurring persecution of human rights defenders and journalists has also concerned Council. This undermines rule of law, the very foundation of civilised society.

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<sup>206</sup> Tinoziva Bere, President, Law Society of Zimbabwe, “President’s Report” (December 2012), at <https://www.lawsociety.org.zw/documents/official-a-statutory.html>.

<sup>207</sup> See Open Society Initiative for Southern Africa, <http://www.osisa.org/law/zimbabwe/law-society-zimbabwe-lsz>.

<sup>208</sup> See <https://www.lawsociety.org.zw/component/content/article/5-mission-and-vision.html>.

<sup>209</sup> Tinoziva Bere, President, Law Society of Zimbabwe, “President’s Report” (December 2012), at <https://www.lawsociety.org.zw/documents/official-a-statutory.html>.

<sup>210</sup> Tinoziva Bere, President, Law Society of Zimbabwe, “President’s Annual Report” (November 2011), at <https://www.lawsociety.org.zw/documents/official-a-statutory/10-president-annual-report-2011.html>.



There are recurring attacks on the Law Society of Zimbabwe especially in certain media. There has been recent resurgence of physical attacks upon lawyers lawfully engaged in service of their clients.

11. More recently, the 2013 elections witnessed a clampdown on civil society organizations and human rights defenders including lawyers.<sup>211</sup> The NGO Lawyers for Lawyers has reported:<sup>212</sup>

Lawyers are routinely threatened and harassed, often by members of ZANU-PF party of Robert Mugabe, but also by the police and law enforcement authorities. Law firms are regularly searched. It is made difficult for lawyers to visit their clients and act for them, for example by stopping them at the gate of a prison or having their clients disappear. Several lawyers have been arrested and tortured.

12. Prominent human rights lawyer Beatrice Mtetwa has also spoken of the problem of fewer lawyers going to court to represent clients for fear they will be arrested.<sup>213</sup>

## **F. Aspects of the Profession Undergoing Reform**

13. The Law Society has drafted a Constitution intended to codify *inter alia* the role and functions the legal profession performs. It proposes:<sup>214</sup>

### **132 Legal profession**

(1) The legal profession is an integral part of the administration of justice and the rule of law, and legal practitioners have the right, subject to any law regulating their profession

(a) to perform all their professional functions without intimidation, hindrance, harassment or improper interference;

(b) to consult their clients freely;

(c) not to be prejudiced through being identified with their clients or their clients' causes as a result of discharging their functions; and

(d) to appear before and represent their clients in any court or tribunal in which legal representation is permitted.

(2) Legal practitioners must not be prosecuted or held liable for relevant statements made by them reasonably and in good faith in pleadings or submissions to a court, tribunal or authority.

(3) Legal practitioners must be given ready access to documents, records and information held by officers and institutions of the State at all levels, to enable the legal practitioners to provide effective legal assistance to their clients.

(4) Legal practitioners are entitled to form and join self-governing professional associations to represent their interests, to regulate their discipline, to promote their continuing education and training, and to protect their professional integrity.

14. The Law Society's draft Constitution remains to be accepted by the State.

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<sup>211</sup> *Zimbabwe Human Rights, Rule of Law and Democracy 2013 Annual Report* (8 January 2014), at <http://www.hrforumzim.org/publications/annual-reports/zimbabwe-human-rights-rule-of-law-and-democracy-2013-annual-report/>.

<sup>212</sup> See <http://www.advocatenvooradvocaten.nl/countries/zimbabwe/>.

<sup>213</sup> See [http://www.zimbabwesituation.com/news/zimsit\\_beatrice-mtetwa-speaks-out/](http://www.zimbabwesituation.com/news/zimsit_beatrice-mtetwa-speaks-out/).

<sup>214</sup> At <https://www.lawsociety.org.zw/documents/official-a-statutory/9-constitution-draft.html>.