

WORLD BAR CONFERENCE

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QUALITY STANDARDS, COMPETENCE AND THE INDEPENDENT BAR

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The issue of the maintenance of quality has been of growing importance for the Bar of England and Wales in recent years. I will discuss first how the Bar has maintained quality in the past and the issues that are likely to arise in the future.

The referral Bar

The Bar has always been a relatively small profession of expert advocates and specialist advisers. It acts as a resource for solicitors all over the country to enable them to provide services to their clients which it would not be economic for them to provide in-house. The number of barristers in self-employed practice is just over 10,000. This is approximately 10% of the number of solicitors, reflecting the relatively limited fields in which barristers operate. It is important to note the numerical dominance of small firms of solicitors in the profession in England and Wales: 80% of all solicitors practise in firms with four partners or less. The referral Bar is vital to them if they are to conduct litigation.

As the legal system developed, it became an important feature of the Bar that it acts only on a referral basis. It could only accept instructions from solicitors or other authorised individuals. The economic reason for this was that it allowed barristers to concentrate on their advocacy and specialist skills and meant that they were not burdened with the administration and other support that is necessary for dealing directly with clients and handling their day-to-day affairs. It was also seen at one stage as a means of ensuring the independence of the advocate from the client. With the acceptance that solicitors may appear in the higher courts, that latter argument has been weakened: but in serious crime, which can raise the most acute ethical problems

with dishonest and manipulative clients, it is still the case in England that the defence advocate is almost invariably a barrister at one remove from the lay client.

These restrictions have helped the Bar maintain and built high standards. In the first place, the concentration on their specialist skills enables them to provide services of the highest quality: many criminal practitioners spend the overwhelming majority of their time in court and specialist advisers do nothing else but advise on one particular area of the law. This must mean that they provide a more efficient and better service to clients than the individual who only dabbles in a particular area or appears in court now and then.

Secondly, the fact that a barrister can only be instructed by a relatively small group of people (most of whom are, themselves, reasonably well versed in legal matters) means that there is strong pressure on the barrister to perform well. A barrister is a self-employed sole practitioner. Nobody is under any obligation to instruct him or her. If a barrister does not perform adequately in court, it is unlikely that the solicitor or other professional person will instruct that barrister again. Many barristers find that in their early years they are unable to attract the work that is necessary to keep them in business. This is often because solicitors simply do not regard them as being as good as their colleagues. This is a brutal example of market forces but it is effective.

Clearly, however, it is not enough simply to rely on market forces to maintain standards. It is essential that the Bar attracts candidates of a high quality and that barristers are trained to an appropriate level before they are let loose on clients.

Recruitment

The Bar still has considerable cachet as a career and there is no shortage of applicants applying for places on the Vocational course. Nevertheless, the fact that there are many difficulties and hurdles in the way of a successful career at the Bar can put off candidates who come from disadvantaged or minority backgrounds. It is crucial that the Bar does not become the preserve of the rich white Englishman.

The Bar is addressing this in a number of ways: first through scholarships to the brightest candidates. Secondly some Chambers finance their trainees through the vocational course: and we are considering what further steps may be taken to improve the funding of students taking that exam. Finally, from the end of this year we will require all Chambers to pay their pupils for the year's pupillage. We also provide strong guidance to Chambers on fair and appropriate recruitment procedures so that candidates are not rejected for the wrong reasons.

We also monitor carefully the quality of pupillage. We have prepared checklists which set out what, for pupils ought to have undertaken during their pupillage. We have panels who visit Chambers to look at the quality of pupillage and who can raise complaints with us if there are any difficulties.

Finally, we think that it is vital that, for the first three years following pupillage, barristers work in an environment in which they have access to advice and guidance should they need it. We require them to practise from the office of a lawyer of at least 6 years standing and who also has full rights of audience. We believe that this provides barristers with the support they need in the early years of practice so that if difficulties arise they are able to find guidance. They also gain the administrative support of another practitioner and the opportunities for mistakes which are the result of inexperience or lack of resources are reduced. The Law Society has a comparable "three year rule" for new solicitors.

Maintaining standards

Having set the initial basis for entering practice at the Bar, the more difficult question comes with maintaining quality. It is a question that is exercising a number of professions at the moment and one which the Bar has not yet completely resolved. As I have said, the precarious nature of a career at the Bar and the scrutiny that barristers come under from solicitors and their self-employed status, provide strong incentives for barristers to maintain their competence and keep up to date.

We cannot, however, rely on this entirely. We have introduced compulsory continuing education for all barristers of less than three years' practice and will be

extending this to the entire Bar by 2004. This provides an important incentive for barristers to keep up to date and, even, improve. While I know that some barristers will not see the need for such compulsion, many of us realise that the demands of a busy practice do not enable us to keep up to date as much as we would like. This rule requires us to do so. It can be fulfilled by lecturing and writing as well as by attending courses. I am not sure whether today's proceedings qualify – I hope so.

The question of setting standards of quality is very much more difficult. How do you judge the quality of work of one individual in a profession which is notorious for differences of opinion, where there is very rarely an obviously correct answer in advance and where a barrister is selected for his personal qualities and judgement? Indeed, how do you objectively define and measure successful advocacy at all? The Office of Fair Trading published a report last year saying that we should allow advertising both of comparative fee rates and of comparative success rates. We made the change requested in respect of comparative fee rates, though I have not noticed a plethora of such adverts. But on comparative success rates we dug our collective heels in, and the OFT have – unusually – accepted that we are right. Comparative success rates are almost always misleading. Every case is different; most civil cases settle; and the most talented barristers tend to get the most difficult cases.

Quality Mark

On the other hand, it is equally understandable that clients (particularly when the Bar is moving towards direct access in some cases) and those who are funding cases, demand that they should have some way of being sure that the individual being instructed is of the appropriate quality.

In England and Wales, the Legal Services Commission (which administers the legal aid scheme) is developing a scheme called Quality Mark. This scheme looks at the administrative systems in solicitors' offices and Chambers: it considers against set criteria whether Chambers have adequate management structures for running Chambers, proper procedures for dealing with recruitment and distribution of work and, generally, are a viable entity. The scheme builds on the Bar's own BarMark

scheme (which has been in place since 1999). It argues that good administration can be taken as a proxy for the quality of advice.

The Bar has been heavily involved in the negotiations for this scheme. We are firmly of the view that it is important that good practice should be encouraged. It is firmly for the benefit of the Bar - one set of Chambers in implementing our BarMark scheme saved itself £70,000 per year. Equally, however, we are concerned to ensure that such schemes should not be over-bureaucratic and should meet the situation of the Bar. We do practise in a different way from solicitors and any administrative requirements should recognise this.

At the moment, both schemes are voluntary but the Legal Services Commission has not ruled out the possibility that in the long term Quality Mark might become a compulsory requirement for any set of Chambers wishing to undertake publicly funded work. We view this with some suspicion and would be very concerned at any attempt to limit the availability of barristers to the public.

Other mechanisms

This deals with administration. What about quality of advice? As I have said, there are grave difficulties in attempting to deal with this. The Law Society has introduced a number of accreditation schemes to identify practitioners that have expertise in particular areas. Such schemes often involve examinations to test knowledge and require a substantial level of experience in dealing with cases which is evidenced by a portfolio of work. References can also be required from those who are able to vouch for the expertise of the individuals.

The Bar has set up a voluntary scheme for immigration work but we have strong reservations about extending it further. Such schemes can be anti-competitive in that they can be perceived to be operated by an internal clique or to prevent people moving from one specialism to another. It can also be invidious to make judgements on the quality of one's competitors. We are looking at whether these reservations can be overcome but there are substantial costs in setting up such schemes and little evidence of demand for it from the Bar or from those instructing us.

As a final mechanism for maintaining quality, we have our complaints system. This is now substantially more than a system for dealing with dishonesty or other serious misconduct. We have the power to take action on complaints where, although the barrister's conduct does not amount to misconduct, it has fallen below what we would expect of a barrister. We call this "inadequate professional service" (IPS) and can require a barrister to apologise, to reduce or repay fees and also to pay compensation of up to £5000 to the complainant. We believe that the ability to deal with such complaints sends signals to the Bar that they must maintain the standard of service that they provide. It is refreshing that we need to use such powers in only a handful of cases and that the complaints that we receive do not of themselves seem to call into question the overall high quality of the services provided by barristers. This is the result of outstanding training and a very strong sense of professionalism. It also follows from the self-employed status of barristers - you provide a good service or you have no work.

Nevertheless, it is clear that there is scope for more to be done. We may need to look at accreditation in individual fields of work and there may be other initiatives to consider. But the requirements of such schemes must not be so bureaucratic or discouraging that barristers are impeded from providing a good service by form-filling, or prevented from moving from one area of practice to another by the hurdles they have to overcome.

We have avoided the crises of self-regulation which have affected solicitors and doctors in recent years. But we are never complacent. We would be fools if we were.