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THOMSON REVIEW

RIGHTS OF AUDIENCE IN THE SUPREME COURTS IN SCOTLAND

MARCH 2010

To have standard qualifications, codes of conduct, monitoring and complaints procedures, whilst maintaining separate business models

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Rights of Audience in the Supreme Courts in Scotland

EXECUTIVE SUMMARY

Background

On 18th February 2009 the Appeal Court of the High Court of Justiciary issued its decision in the case of *Alexander Woodside - v - Her Majesty's Advocate.* In remarks in his decision, the Lord Justice Clerk, Lord Gill made a number of observations about the roles and responsibilities of solicitors and solicitor advocates both in relation to the case and more generally. He suggested that it would be opportune for there to be a review of the workings of the system overall. Chapter 1 discusses the case in more detail. In May 2009 the Cabinet Secretary for Justice, Kenny MacAskill MSP, announced that a review of rights of audience in the Supreme Courts in Scotland would be undertaken and on 28th September 2009 the Scottish Government appointed Ben Thomson to conduct such a review.

Terms of reference

The terms of reference are for the Review to consider the operation of the system of rights of audience in the Supreme Courts for the purposes of making recommendations to improve the regulation of such rights of audience. The Review should have particular regard to the desirability of applying common principles in relation to the exercising of rights of audience by all practitioners appearing before the Supreme Courts, and fair competition between solicitor advocates and advocates. Of paramount importance is to ensure the proper administration of justice. The Review is to recommend any improvements which might be made to the regulation of such rights of audience, and to make any related observations or findings. A copy of the news release of 28th September 2009 which includes the terms of reference is at Appendix 2.

Methodology

The Review timetable and process were set to allow the final Review report to be published in time for its contents to be available during the early stages of the passage of the Legal Services (Scotland) Bill.

In conducting the Review, three areas that had been highlighted by Woodside were the focus of consideration. These were:-

- the training, qualification, accreditation and regulation of solicitor advocates and advocates;
- exploring and comparing the complaints procedures applicable to solicitor advocates and advocates; and
- issues concerning the management of perceived conflicts of interest for solicitor advocates and advocates.

The Review was conducted in two phases. The first phase involved the Review team consulting a wide range of bodies and individuals connected with the Scottish legal system. A list of meetings is attached as Appendix 3. Meetings were conducted on a non-attributable basis to allow those giving their views to do so openly. During this phase a number of formal written submissions were made, although not all of those consulted at this stage chose to or were asked to provide any information or views in writing. The preliminary report was written and those who had met the Review team were invited to comment. A copy of the preliminary report was also made available online through the Scottish Government website for wider comment.

The second phase was to receive comments on the preliminary report, consider those responses, and if appropriate have further meetings, and address any comments that the Review team considered relevant in the final report.

Findings of fact

Findings of fact are summarised in Chapter 2. The findings of fact helped the Review team to put the largely subjective views and observations expressed by interviewees into an objective perspective.

Views and observations expressed by interviewees

1. Some solicitor advocates feel that some advocates and some members of the bench consider that they are - and treat them as - second class pleaders;

2. This perception is supported by views expressed to the Review team by certain advocates and members of the judiciary including assertions that:-
    - the advocates' training system is better than that of solicitor advocates, and therefore the quality of the advocacy of advocates in court is higher;
    - the oversight and regulation of conduct and behaviour of solicitor advocates in court does not exist, compared with the ability to refer to the Dean if intervention is needed in respect of advocates;

3. There were also views expressed by certain advocates and members of the judiciary that a number of practices by solicitor advocates were of concern, in particular that solicitors should not be allowed to instruct a solicitor advocate in the same firm, nor enter into mutually supporting cross referral arrangements with solicitor advocates in other firms. Solicitors noted that advocates are not precluded from entering into retainer arrangements with clients whereby they agree not to represent another client against that client, nor are they prohibited from developing close relations with and taking the majority of their instructions from a small number of law firms;

4. The practice of solicitor advocates switching between being a senior on a matter one day and a junior with another senior on a different matter another day (often referred to as "switching") was met with general disapproval;

5. A frequent answer given to why solicitor advocates are reluctant to apply to become a QC is that solicitor advocates perceive that although they may be able

to satisfy the requirement to demonstrate sufficient experience in court practice and the ability to lead in the most significant cases, the process is biased towards ensuring that advocates with a certain number of years of experience all become QCs (if they so wish) regardless of the extent of their court practice. They are uncomfortable that their performance and eligibility is reviewed exclusively by members of the judiciary who are themselves members of the Faculty, and that there is therefore no reference to the many other aspects of their practice that does not relate to appearing in court;

6. A number of solicitor advocates, advocates and members of the judiciary expressed concerns that the disciplinary procedure relating to solicitor advocates is too formal, bureaucratic and takes too long to allow the resolution of matters that may need to be dealt with more expeditiously;

7. Members of the judiciary are generally reluctant to formally raise either with the Faculty or the Society, matters of concern relating to the behaviour or conduct of those appearing before them. The Faculty process whereby the concerns of the judiciary can be raised with the Dean, who can then pursue the matter in his own name, recognises this reluctance. It is regarded as a prompt way to remedy problems that can arise with advocates in court that cannot be resolved by the relevant judge. However, there is concern that the informal disciplinary procedure through the Dean (in relation to advocates) should not replace the complaints system through the Complaints Commission and that matters raised and dealt with informally with the Dean should nonetheless be recorded on the individual advocate's personnel file held by the Faculty;

8. As the Society requires members of the judiciary to raise complaints formally, some members of the judiciary and some solicitor advocates felt that the Society processes do not encourage or make it easy for the judiciary to make their views heard. There is a desire by some of the judiciary, and also by some solicitor advocates for a quick and less formal route similar to that through the Dean for members of the Faculty, for use to address any concerns about solicitor advocates, either individually or with regards to particular practices that were developing. It was noted that the Dean also plays a role in advising and supporting advocates if they had concerns about a particular member of the judiciary and solicitor advocates expressed the view that they would welcome an equivalent for them;

9. Lady Smith's role as liaison judge is generally not well known, and it appears not to be used as a route by the judiciary to raise issues such as those highlighted in the Woodside case;

10. As a general view, the "mixed doubles" rule, that until recently prevented advocates and solicitor advocates working together in the same team, led to the practice of solicitor advocates designating themselves as senior in certain cases (particularly those funded by criminal legal aid) where arguably their experience was insufficient for the seriousness or complexity of the case. This self designation may have caused confusion for users of the court (including those accused of criminal offences) as the use of the term "senior counsel" is confusing and may be misleading. Advocates and solicitor advocates expressed the view

that the mixed doubles rule has probably had an adverse affect on the professional development both of members of the Faculty and solicitor advocates;

11. Members of the judiciary particularly noted that having lifted the prohibition on mixed doubles, the Faculty and Society should be live to the issues that have been identified by a number of commentators and ensure that they provide guidance on the issues raised in having a team that includes both advocates and solicitor advocates (including clarification of which member of the team is responsible for what);

12. The practice of those pleading in the Supreme Courts absenting themselves from court without cause (and suitable cause rarely arises but may arise when the appeal court require the presence of counsel who appeared in the original trial at a time that conflicts with another matter) was a practice that was met with general disapproval, and the common view was that it should not be permitted;

13. The general view was that the Society's response, firstly to the decision in Woodside, and secondly to the complaint made by Mr Woodside to the Society did not provide reassurance of the Society's willingness to regulate solicitor advocates appropriately. Concerns were expressed, including by solicitor advocates, that the Society simply dropped the matter based on the fact that neither Mr Woodside nor the judges in the case had made a formal complaint and the original trial had taken place a number of years ago. It was generally considered unfortunate that the Society did not consider it appropriate to examine the facts of the case more closely, nor to investigate the general concerns being raised in the case;

14. Public awareness of the operation of the courts and the different branches of the profession is generally considered to be poor;

15. There appears to be some confusion and concern amongst some of the judiciary and advocates about the differences in the professional rules of conduct (such as the ability to take witness statements) between advocates and solicitor advocates;

16. General support was expressed for enhancing the role of the judiciary in setting standards, both in establishing the competence of those appearing in the Supreme Courts, and also in articulating and enforcing appropriate standards in the courts. It was generally acknowledged that the judiciary is the appropriate institution to carry out this role, but that sufficient time and resource should be made available to allow the judiciary to effectively discharge this responsibility;

17. It was a common observation that the Society does not appear to have closely monitored and observed the impact of the introduction of extended rights of audience. Issues such as self certification as senior were generally perceived as damaging to the reputation of the Society and to whether it is meeting its obligations as regulator, acting not just in the interests of the profession but of the public;

18. Advocates expressed strong views that their duties in court are very different to solicitor advocates duties in court. Solicitor advocates expressed equally strong views that their duties are the same and that all those appearing in court have a number of potentially conflicting duties that occasionally need to be balanced, but that ultimately professional duties to the court must prevail;

19. Solicitor advocates expressed the view that Rule 3 which requires them to explain the advantages and disadvantages of instructing an advocate and a solicitor advocate is merely a replication of the professional duty to give their clients best advice. Solicitors who do not have solicitor advocates in their firm expressed a concern that Rule 3 meant pointing out to a client the option of going to a competing law firm who did employ solicitor advocates.

Philosophy

It is our fundamental principle that any recommendations we advance should lead to better service for all court users in the administration of justice in the Supreme Courts in Scotland. In particular, we have sought to ensure that any changes we recommend reduce the risk that any litigant should suffer an injustice on account of his being inadequately represented.

There is a balance to be achieved between establishing common standards that will ensure consistency and reduce confusion for all court users, whilst at the same time maintaining competition between alternative sources of people capable and qualified to plead in the Supreme Courts.

The balance we have sought is to retain the separate identities, systems and business models of advocates and solicitor advocates but to recommend that all pleaders in the Supreme Courts should have one standard qualification process to be able to appear, one code of conduct as it relates to appearance work, a common monitoring process and one system of complaints.

Recommendations

“Same qualification; same code of conduct; same monitoring and same complaints procedure”

We were fortunate to have the opportunity to discuss the general direction of the following recommendations with a number of people we met. We were interested to note that there was considerable support for trying to standardise qualifications and codes of conduct. We appreciate that there is a great deal of detail that needs to be worked out in order to implement the recommendations. We have not sought to be prescriptive in the areas that we consider are best left to those who know the minute details, but have instead tried to describe the overall outcome we believe will improve the current system.

1. *Training and qualification*

A universal standard examination for admission as a pleader in the Supreme Courts in Scotland should be established. The establishment of the test criteria and

examination would be overseen by the Lord President, working closely with the Faculty and the Society.

We are not recommending the creation of another regulator or other body. Indeed it may be that, absent considering the funding and resourcing issues which we comment on below, little if any regulatory provision is required to carry out this recommendation if the relevant bodies (namely the Lord President, the Faculty and the Society) were to accept it.

Common terms of description should be created for those who have passed the examination, and the Review team have used the term “a Pleader” in this report.

The test should raise the threshold of knowledge and skill required to appear in the Supreme Courts, both for advocates and for solicitor advocates.

The test should be structured in such a way that it does not act as a block for a particular group. By way of example it should not be designed so that one of the requirements is that applicants have been assessed as having satisfactorily completed 9 months unpaid devilling (as defined in Chapter 2, para 10). This opens the way for further competition to allow other professionals who can meet the threshold required to obtain rights of audience in the Supreme Courts. The test should be suitable to examine other professionals including legal professionals from other jurisdictions.

We are not persuaded that it is necessary for all potential Pleaders to go through the same training programme, as distinct from examination. That, we consider, fails to recognise the distinct and equally relevant professional backgrounds and experiences from which solicitors advocates and advocates come.

The test for a Pleader would comprise 3 elements:-

- Knowledge – to test the applicant’s knowledge of ethics, procedure and evidence as applicable in the Supreme Courts;
- Practical ability – to test the applicant’s technical ability in relevant areas of Supreme Court business;
- Experience – to establish that the applicant has relevant experience, as evidenced by reference to, and examination of performance in relevant cases.

Admission by the Court of Session as an advocate would not necessarily entitle the advocate to rights of audience in the Supreme Courts. Likewise, the grant of extended rights of audience to a solicitor advocate by the Society would not suffice. Of course it would be open to the Faculty and the Society to amend their criteria so that passing the test to become a Pleader is required in order to be admitted as an advocate or granted extended rights of audience as a solicitor. That would be up to the Faculty and the Society.

Grandfathering arrangements will need to be put in place to provide that those already with rights of audience in the Supreme Courts at the date of introduction of the standard examination continue with those rights, subject to the recommendations

below in connection with continuous and ongoing performance review to maintain rights of audience in the Supreme Courts.

Transfer between membership of the Faculty and the Society should then become merely procedural. Status as a Pleader in one branch of the profession would enable an individual to maintain that status following transfer to the other branch of the profession.

As the Lord President already oversees the appointment process for QCs, we recommend using the same structures that create the universal examination for Pleaders, to create a more transparent standard and examination for the appointment of senior pleaders, namely QCs, from both branches of the legal profession. There is no reason why the same structures cannot also contribute to the process for appointment to the judiciary.

More should be done to encourage solicitor advocates to apply to become QCs and also to eventually become judges. The barriers to application should be more closely examined and addressed. We have not sought in this review to conduct that work.

The Review team recommend an immediate end in criminal work to the practice of solicitor advocates self certifying as senior. Appearing as a senior in a case is a particular skill and it should only be performed by those with the requisite ability. No one should appear in criminal work as a senior or hold themselves out as capable of appearing as a senior unless they are either a QC or accredited senior solicitor advocate for criminal work, as presently implemented by the Society and the Legal Aid Board. Once there is a universal standard for senior pleaders, then no one would be permitted to hold themselves out as a senior unless they were a senior pleader in either criminal work or civil work.

For the avoidance of doubt, the Review team do not have any concern about someone who is a senior (either QC or accredited) stepping down to act as a junior.

2. *Maintenance of status as Pleader/QC*

It is in the interests of all parties that those who appear in the Supreme Courts remain skilled in the role that they perform. All Pleaders and QCs should be reviewed on a regular cycle. Every three or five years would seem appropriate. This recommendation should not be subject to any grandfathering arrangements and the review should apply to all those who wish to retain their rights of audience.

The review structure should operate under the auspices of the Lord President, again working closely with the Faculty and the Society, setting review criteria that are consistent with the examination to qualify as a Pleader or QC. Peer feedback, as well as feedback from the judiciary, should be included as part of the process. Ultimately, Pleader reviews may also assist in building a collection of materials to support the appointment process for QCs and also for the judiciary.

Unsatisfactory review would lead to the loss of rights to appear in the Supreme Courts. Any process would require to be designed with appeal arrangements to satisfy any challenge to the decisions and to the structure. Loss of status to plead

would not necessarily lead to loss of status as QC, but rights of audience would be lost.

3. *Resources needed to implement universal examination and reviews*

The Review team recognise that the first and second recommendations will involve substantial judicial input and time, as well as appropriate administrative support, and input from others in the legal profession. Whilst presently a number of members of the judiciary support either the Faculty or the Society (or both) in their training and examination programmes, generally this is not done in judicial time.

Clearly there will be a cost and resource impact for the courts including ensuring that:-

- the Lord President has appropriate systems and resources to support the activities we are recommending should be his responsibilities;
- the members of the judiciary have the training, support and infrastructure, as well as time in their calendar, to undertake the reviewing activity we are recommending;
- an appeal structure for qualification and maintenance of Pleader status is established and supported.

It should be noted that we are not recommending public funding of any of the training needed in order to prepare for the Pleader examination. Presently the Faculty pay for the training programme that they provide to aspiring members of the Faculty. During that period advocates are unpaid. Solicitors applying for extended rights of audience pay for their training and examination programme which is organised by the Society. Suitable training programmes for the Pleader examination could be run by any competent body.

4. *Common Code of Conduct and Standards*

All Pleaders and QCs should be on a level footing before the Supreme Courts. The professional organisation to which they belong should be of no matter and, consequently, there should be one code of conduct for all.

At present the code of conduct for advocates is set out in the Faculty guide, and the code of conduct for solicitor advocates is set out in their various conduct rules. Essentially, both are approved by the Lord President. The two codes are identical or similar in a number of areas, and there seems little reason to have different codes. We recognise that there are areas of difference – such as the rules relating to precognosing witnesses – and if the respective regulatory bodies wish to impose more restrictive discipline on their members then that is a matter for them. However, the matter of the regulation of those more restrictive conditions would not be a matter for the regulatory body to regulate, not for the courts who would have one code to consider.

There should be common standards for all Pleaders, ranging from how a Pleader dresses and is addressed by the court, to the legal aid rules. We can find no reason for the continued distinction in court.

5. *Complaints Process*

The role of the Complaints Commission should be amended and to some extent enhanced to provide for one process for solicitors and advocates, (and there appears no reason to differentiate between those with and those without extended rights of audience). All complaints, whether they appear to be service complaints, conduct complaints or both, should continue be made to the Complaints Commission, who should conduct the initial investigation. This is a change from the present arrangements, where the Complaints Commission only investigate and attempt to address service complaints.

As at present, service complaints should be resolved by the Complaints Commission at that stage. Complaints that relate to conduct should, once investigated by the Complaints Commission proceed through one disciplinary process working with the relevant professional body responsible for the individuals in question. If the Complaints Commission, in conjunction with the relevant professional body, decide that that matter should be referred to tribunal, then there should be one tribunal, applicable to both branches of the profession, under the auspices of but separate to the Complaints Commission. The consequences should be consistent and consistently applied to both branches of the profession.

The informal role of the Dean should be replicated for those regulated by the Society. Judges should be able to approach a nominated person, established by a process operated by the Society, as the senior representative of solicitor advocates. This person should have the authority to resolve problems relating to a solicitor advocate in court that the judge is not able to resolve themselves in their own court. Like the informal process for approaching the Dean in relation to advocates, this should not be a bureaucratic process and not be categorised as a formal complaint. However, there should be a proper record of approaches relating to advocates and solicitor advocates held by the respective regulatory body and should be included as part of the information on monitoring of performance.

The ability of the Faculty and Society to raise a complaint should continue, and they should be each encouraged to take a more proactive role in the upholding of professional standards. The Complaints Commission should also have the right to raise such complaints.

6. *The Rule 3 issue*

Solicitors have ethical obligations towards their clients, including acting in the client's best interests. This obligation is reiterated in Rule 3 specifically with regards to representation of the client in court. We see no reason why this specific obligation should not continue in place.

Anyone instructed by an individual (including advocates with regard to instructions received under the direct access arrangements) should ensure as part of their client care arrangements that they can demonstrate that the options open to them with regards to representation in court have been explained properly to clients. The options and advice, as well as the client's decision should be recorded on the client

file. The main objective should not be the maximising of fees for the law firm, but providing the client with advice on the best and most cost effective options for them.

The Faculty and the Society should treat any complaint that the obligation to act in accordance with Rule 3 has not be adhered to in a similar way to other complaints of professional misconduct.

Related to the Rule 3 issue is the question of whether a solicitor should be able to instruct a solicitor advocate in their own firm. The benefits to clients include, for example a solicitor who has represented a client in the sheriff court can continue to do so in the High Court of Justiciary, or commercial clients being able to benefit from a "one stop shop" for commercial litigation. These benefits seem to us to outweigh any drawbacks and we see no issue with this practice. However, this has to be in the context of full observance of Rule 3 by the solicitor.

7. *Implementation and monitoring of extended rights of audience*

A number of the consequences of the introduction of extended rights of audience may not have been anticipated at the outset, and still remain something of a problem. In light of the views we heard, we recommend that the Society should be more proactive in monitoring, regulating and engaging in resolving issues that come to light in the operation of the extended rights of audience. We further recommend that the Society and Faculty should consider carefully, and clearly articulate, how they will monitor and observe the impact of any changes introduced following our recommendations, in order that issues arising in future can be speedily identified and resolved.

8. *Other courts*

The Review has focused on the Supreme Courts in Scotland. Nevertheless, the Review team recognise that there may be an impact for Scottish cases being heard in the Supreme Court in London (formerly the House of Lords).

It appears logical that only those with then current rights of audience in the Supreme Courts in Scotland, should enjoy rights of audience in the Supreme Court in London, but we recognise that that is a matter for the Supreme Court in London.

It is also logical that the approach that the Review team have adopted in this report could apply to those with rights of audience in other courts in Scotland, such as the Sheriff Courts. The Review team have not however considered this in any detail.

9. *Implementation*

We recommend that once a decision is taken on the format of a fully implemented system, the move to that system should be done as quickly as possible. We do not recommend a phased implementation and we see no merit in selective implementation.

CHAPTER 1 WOODSIDE

1. The case of Woodside concerned an appeal by Alexander Woodside against a conviction of murder on 5th August 1998 at Glasgow High Court. The grounds of appeal[1] were twofold, namely (1) that his solicitor should not have represented him in circumstances where he had a conflict of interest and (2) that the defence at the trial was conducted incompetently by reason of a failure to call, examine or cross-examine effectively a number of witnesses, and by the absence from part of the trial of his solicitor. The decision in the appeal was given on 18th February 2009.

2. The Lord Justice Clerk, Lord Gill, issued a long opinion on the case and refused the appeal on both grounds. Lord Osborne and Lord Nimmo Smith agreed with Lord Gill and with his reasons, and made a number of short observations in support of Lord Gill's opinion.

3. The first ground, being an allegation of a conflict of interest, arose as a result of the fact that the appellant's mother, Mrs Woodside, had been a client of Livingstone Brown, who were engaged to represent the appellant, and that they had acted for both parties (albeit on unrelated matters). No evidence was put forward to show that the past connection with Mrs Woodside had any detrimental effect on the defence, and this ground of appeal failed.

4. The second ground required the court to consider the scope of an *Anderson* appeal which requires, in the words of Lord Gill[2], the appellant:

"*[to] demonstrate that there was a complete failure to present his defence either because his counsel or solicitor advocate disregarded his instructions or because he conducted the defence as no competent practitioner could reasonably have conducted it…That is a narrow question of precise and limited scope."*

Lord Gill noted that:

"The advocacy…seems to have lacked a certain finesse…But an Anderson appeal is not a performance appraisal in which the court decides whether this question should or should not have been put; or whether this line of evidence or that should or should not have been pursued."

5. The court considered the alleged failures to call, examine and cross-examine effectively a number of witnesses, and in each case concluded that the defence decision as to how to handle the witness was a reasonable one. They also considered the absence of the appellant's solicitor advocate, Mr Brown, for a day, and concluded that it did not have any detrimental result.

6. Lord Gill then took the opportunity to examine a number of aspects of rights of audience that the appeal raised and in his concluding remarks[3] noted that:

[1] Para 42.
[2] Para 45.
[3] Para 80.

"[t]his appeal has highlighted problems of rights of audience that seem not to be unique to this case. I think that it would be opportune if there were to be a review of the working of the system overall."

Lord Gill had, earlier in his remarks,[4] considered the role and responsibilities of solicitors and solicitor advocates and noted[5] that whilst:

"[w]e are not concerned with the policy considerations that lay behind [the introduction of extended rights of audience] but it is right that we should comment where weaknesses in the operation of it may put the interests of justice at risk….There is reason to think that some of the practices for which counsel for the appellant has criticised [the original defence team] may be widespread among solicitors who practice in this area of the law".

7. Whilst Lord Gill was critical of one of the solicitors, Mr McGlashan, for his lack of courtesy and obstructive behaviour in providing certain information and documents for the appeal hearing, he felt[6] that whilst the other two, Messrs Brown and McSherry:

"may have erred in certain aspects of their duty, their errors have arisen from a failure in the understanding of their duty rather than from any improper reason."

He went on to note that he:

"raise[d] the matters of professional practice ...only out of a concern that every person accused of serious crime should have access to the best available advice and representation and should be defended with the highest standards of professional competence and diligence."

8. The first issue that Lord Gill discussed related to the code of conduct and highlighted a number of obligations on a solicitor including (1) his obligation in accordance with Rule 3 to explain to his client the advantages and disadvantages of instructing a solicitor advocate or counsel (2) arranging his affairs to avoid a reasonably foreseeable clash of commitments (3) ensuring that he is present in court until the trial or hearing is concluded (4) if he is a senior, then only being absent if he is satisfied that his junior would be present and able to deal properly with matters arising.

He noted that the relevant code of conduct did not define "senior" and "junior" and that:

"in practice there is no concept of seniority other than for the purpose of charging fees…The matter of fees is of no concern of this court, except where it may have a bearing on the due administration of justice. The undisputed evidence in this appeal is that when two solicitor advocates appear together, the nominal leader, whether or not he is senior to his

[4] Paras 64-80.
[5] Paras 66-67.
[6] Paras 67.

colleague in any respect, and regardless of his experience, is paid as if he were a Queen's Counsel. Such a solicitor advocate may have little experience and may be ineligible for silk. That rule creates an incentive that may not be in the interests of justice."[7]

Lord Osborne also raised this concern when he noted that:

"[t]he present arrangements in which two solicitor advocates may appear in one case, with one acting as senior and the same solicitor advocates may appear in another case, with the other acting as senior, seem to me unsatisfactory and to undermine the confidence which a senior should be able to command."[8]

9. Lord Gill then went on to consider the question of Rule 3. He concluded that it had been disregarded in this case, and that Mr Brown had decided at the outset that he would defend the appellant in court acting as solicitor advocate, and Mr McGlashan would be instructing solicitor; no other option was put to the appellant and even when a message was relayed to Livingstone Brown that the appellant wished to be defended by senior counsel, that option was not discussed with him. Lord Gill noted that:

"An obvious weakness in Rule 3…was…that while it imposed a professional obligation, it provided no practical safeguard against it being ignored."[9]

Lord Osborne agreed and noted that:

"it must be a matter for consideration by the relevant authority as to how the proper operation of this desirable Rule should be reinforced. At the present time it may be that any breach of it simply goes undetected with the consequence that the vital interests of a client in what may be, for him, a very serious situation, may be damaged."[10]

Lord Nimmo Smith noted on the question of Rule 3 that:

"[p]aragraph 3 [of Article 6 of the European Convention on Human Rights] provides that everyone charged with a criminal offence has certain minimum rights, including the right to defend himself in person or through legal assistance of his own choosing. Any such choice, to be effective, must be fully informed and based on objective advice directed to the best interests of the accused, not those of his legal representatives, and must demonstrably be so. It is to be hoped that the relevant Rules will be re-examined to ensure that this fundamental requirement is met."[11]

[7] Paras 69-70.
[8] Para 84.
[9] Para 72.
[10] Para 85
[11] Para 88

10. Lord Gill was, however, even more concerned by the fact that a solicitor advocate may accept instructions from his own firm and felt that:

> *"[i]t is difficult to see how a solicitor who has rights of audience, or whose partner or employee has such rights, can give his client disinterested advice on the question of representation. There may be an incentive for him not to advise the client of the option of instructing counsel, or a solicitor advocate from outside his firm, in circumstances where either of those options might be in the client's best interest. Even if the solicitor conscientiously advises the client that he or his partner or employee should defend him, the informed observer may reasonably doubt the objectivity of that advice".*[12]

11. Lord Gill next went on to consider that the relationship of employment might inhibit a solicitor from placing the same demands, such as for attendance in court, on a solicitor advocate in the same firm, as a solicitor might demand of a member of the Bar. This led him to:

> *"doubt whether the practice illustrated by this case properly reflects the assumptions on which [the introduction of extended rights of audience] was based."*[13]

12. He also felt that the practice of self-certification as a senior to represent accused persons in the High Court in a serious trial regardless of his experience and skill:

> *"is a matter for concern. [There is] no safeguard to protect the accused in such a case from being defended by an inexperienced solicitor advocate whose reach exceeds his grasp."*[14]

13. The question of mixed representation was also considered by Lord Gill. This arises where a solicitor instructs a team of senior and junior where one of the team comes from the Bar and one is a solicitor advocate. Lord Gill felt that this presented problems for the administration of justice and:

> *"[t]he court has a legitimate interest in being able to identify a clear point of responsibility for decisions taken in the course of a trial. In general, I think that there are dangers where the defence in a serious trial is in the hands of two lawyers who are governed by separate codes of conduct and are subject to separate disciplinary jurisdictions, not least since the Law Society may, at its discretion, waive compliance by a solicitor advocate with any of the [Code of Conduct Rules]."*[15]

Lord Osborne elaborated on this point in his short opinion and said that:

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[12] Para 73
[13] Para 74.
[14] Para 75.
[15] Para 77.

> *"it is essential that arrangements should be established, in terms of which, in such situations, there is clarity as to which of more than one practitioner involved is to be recognised as the senior. Plainly, responsibilities attach to the position of being the senior representative of an accused person, which do not attach to his or her junior*." [16]

Lord Gill's final observations related to the question of absence from trial, and he:

> *"fail[ed] to see how any practitioner could be justified in absenting himself from any part of a murder trial except in an emergency. Mr Brown chose to absent himself on Law Society business. This was a dereliction of his duty to his client."* [17]

[16] Para 84.
[17] Paras 78-79

CHAPTER 2 SUMMARY FINDINGS OF FACT

Background

1. The Lord President is the head of the Supreme Courts and the Judiciary and Courts Act formally devolved control of the management of all courts including the lower courts to the judiciary, headed by the Lord President and acting through the offices of the Scottish Courts Service. In accordance with section 2(1) of the Judiciary and Courts Act, the Lord President is the head of the Scottish Judiciary and as such responsible for ensuring the efficient disposal of all court business.

2. Advocates are self employed, and operate using and paying for the facilities available at the Faulty. Solicitors tend to operate through partnerships, either practicing as a partner or as an employee.

3. The Faculty is a referral bar where the majority of instructions come from solicitors. The size of the Scottish bar has almost doubled in the past 30 years (from 250 to approximately 460 practising members). In certain circumstances, known as “direct access”, instructions can be taken other than from solicitors.

Rights of Audience

4. Rights of audience in the Supreme Courts were extended to solicitors on certain conditions nearly 20 years ago by section 24 of the Law Reform Act. Although the Law Reform Act does not introduce the term “solicitor advocate”, that term is used in this report to refer to solicitors who have been granted such rights under the Law Reform Act.

5. The regulations applying to those solicitors seeking extended rights of audience are contained in rules issued periodically by the Society, a statutory body, in accordance with the Law Reform Act – namely prepared by the Society and endorsed by the Lord President.

6. The Society has a committee known as the Rights of Audience Committee. This Committee discharges a number of the functions of the Council of the Society under the Solicitors Act. This includes the granting and refusing of rights of audience for solicitors in the Supreme Courts. In the past the Committee has liaised with the Lord President over the rules and processes involved in granting extended rights of audience. They have also reviewed those rules. This was last done in 2001-2002.

7. An advocate is entitled to practice because he has been admitted to the public office of advocate by the Court of Session. The Faculty is on the record as saying that it is important that advocates continue to be regulated by a judiciary independent from the executive. The regulations applying to admission as advocate is operated on a day to day basis by the Dean on behalf of the Faculty but requiring the approval of the Court of Session. Changes to practice rules require the approval of the Lord President. The Legal Services (Scotland) Bill

makes provision at Chapter 2 of Part 4 to place the regulation of the Faculty on a statutory footing, and provides that the Court of Session be responsible for admitting (and removing) persons from the office of advocate and, along with the Faculty, for regulating the professional practice, conduct and discipline of advocates. The Court can decide how its responsibilities will be exercised and whether by the Lord President or the Faculty.

8. There are procedures laid down to allow, subject to meeting appropriate criteria (which may include further training and examination), a solicitor or solicitor advocate to become an advocate, and vice-versa.

9. The entry qualifications, training and exam programme for admission as solicitor advocate or advocate are different. As a general rule, following completion of a traineeship in a law firm, an advocate spends 9 months, during which period he is not paid, taking part in the Faculty training programme and undertaking practical training (known as "devilling") supervised by experienced members of the Scottish bar (known as "devil masters") This programme was substantially overhauled in the early 1990s and is designed, run and paid for by the Faculty. Prior to that date the training was simply practical training working for devil masters. A solicitor advocate has to demonstrate to the Society that he has sufficient experience of appearing in the sheriff courts (historically this level was set at 5 years of experience), and then must take part in training and examination over a number of weekends. The cost of this is borne by the solicitor.

10. On admission, an advocate is entitled to appear in both the High Court of Justiciary and the Court of Session. A solicitor advocate may choose to obtain extended rights of audience in either the High Court of Justiciary , the Court of Session or both the High Court of Justiciary and the Court of Session, and a separate examination system applies to each of criminal practice and civil practice.

11. In 2009, there were approximately 10,500 solicitors with practicing certificates, of which approximately 143 have extended rights of audience in the Court of Session and 171 in the High Court of Justiciary.

12. The tables below were provided by the Society to show the number granted extended rights of audience each year by age range and average age of solicitors:

<u>Table 1: Solicitor advocates with rights in the High Court of Justiciary (criminal)</u>

Age	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09
20-29	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0
30-39	7	11	1	3	2	2	3	4	3	6	8	7	6	5	11	1	1
40 - 49	12	11	5	0	0	2	0	1	4	2	6	5	1	8	11	3	2
50+	2	2	0	0	2	0	0	0	0	2	2	3	1	1	1	1	0
Average age	*43*	*41*	*41*	*32*	*44*	*40*	*34*	*35*	*40*	*40*	*42*	*42*	*38*	*42*	*38*	*39*	*41*

Table 2: Solicitor advocates with rights in the Court of Session (civil)

Age	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09
20-29	0	0	0	1	0	0	0	0	0	0	0	0	2	2	0	2	0
30-39	6	4	6	2	1	1	9	4	3	1	3	11	6	4	2	7	11
40-49	5	4	3	2	2	1	2	1	1	2	2	3	3	5	3	4	4
50	0	1	0	0	1	0	0	1	0	2	0	0	0	1	1	1	0
Average age	*38*	*41*	*39*	*37*	*43*	*38*	*37*	*38*	*36*	*46*	*38*	*37*	*36*	*38*	*42*	*37*	*37*

13. There is no quantitative evidence available, such as number of complaints or performance monitoring, that allow any conclusions to be drawn that either solicitor advocates or advocates, as a group, are more or less capable as pleaders.

14. The rules of the Society as they relate to Continuing Professional Development do not make provision for specific Continuing Professional Development to be undertaken by solicitor advocates relating to their exercising extended rights of audience. All solicitors have an obligation to undertake Continuing Professional Development and the same rules apply to all solicitors.

15. The Society of Solicitor Advocates is not a regulatory body. It is an association comprised of those solicitor advocates who wish to join it. It pursues the self set objective of representing the interests of solicitor advocates including lobbying the Society for changes to the regulatory rules pertaining to solicitor advocates. For example, in 2008 it lobbied the Society at its Annual General Meeting to dispense with Rule 3.

16. There is no research available that analyses the use or otherwise by solicitor advocates of their extended rights of audience on either the civil or criminal side. Solicitor advocates with rights of audience in the Court of Session benefit from being able to use those rights to sign off on pleadings, where other solicitors without rights of audience would need to instruct an advocate or another solicitor advocate to sign the pleadings. Civil proceedings do not always end with the solicitor advocate appearing before the court not least because the matter may settle. By contrast, solicitor advocates with rights of audience in the High Court of Justiciary have the opportunity to appear before that court in all cases in which they are instructed, even if only to deal with a guilty plea.

Codes of Conduct and Standards

17. A solicitor advocate is bound by the regulations that apply to all solicitors and is entitled to undertake and conduct work in the same manner as solicitors. This is particularly relevant as it relates to dealings with the accused and witnesses in criminal matters, where members of the Faculty are bound by different rules.

18. There are different codes of conduct for solicitor advocates and advocates. Both codes are approved by the Lord President. In practice however there appears to be little difference between the two codes of conduct.

19. There are different rules and conventions that apply to solicitor advocates and to advocates in their dealings in court, relating to a number of areas including forms of address and style of dress.

20. There is no rule of procedure or court that requires a solicitor advocate, when appearing in court in that capacity, to have a solicitor sitting behind them to give instructions.

21. The Solicitors Practice Rules sets out the standards of conduct applicable to all solicitors. These include an obligation to act in their client's best interests, although they must balance this duty with (amongst other things) the duties they have to others (such as the courts and others in the legal profession), the law and their duty to remain independent. Where there is a conflict between the client's wishes and the solicitor's duties, the solicitor may have to refuse to do what a client asks.

22. The Guide provides that an advocate must always act in what he perceives, in his professional judgement, to be the best interests of the client, subject to observance of all rules of law and professional conduct.

23. Rule 3 provides that a solicitor should advise a client of "the advantages and disadvantages of instructing appearance by a solicitor advocate and by counsel respectively". The Society does not monitor compliance with Rule 3. There is no corollary to Rule 3 for advocates taking instructions under the direct access arrangements.

24. An advocate must take a case unless already booked or the matter is one where he feels that he is not best placed technically to appear. In the event that an advocate cannot be found to appear on a matter, the Dean will find someone to appear. This is known as the cab rank rule. There is no equivalent to the cab rank rule for solicitor advocates.

Complaints

25. The disciplinary procedure for solicitor advocates is the same as for solicitors. Since 1st October 2008, all complaints against legal professionals are handled in the first instance by the Complaints Commission. Complaints are categorised as either relating to conduct or to service. If the complaint is categorised as relating to conduct, it is then passed to the Society and ultimately if considered appropriate having been through the Society's procedure, to the Solicitors' Discipline Tribunal. Service complaints are handled by the Complaints Commission who seek to find a resolution between the parties. The Complaints Commission has not yet reported on the first year of activity. The Society, in its Journal and annual report, and Solicitors' Discipline Tribunal in its annual report, both report details of their work as it relates to complaints.

26. The disciplinary procedure for advocates is also operated in the first instance by the Complaints Commission, who then refer conduct complaints to the Dean. Until the introduction of the Complaints Commission, complaints were not categorised into service or conduct, but since 2008, the Complaints Commission

has dealt with service complaints and sought to find a resolution between the parties. The Faculty do not publish details of their work relating to complaints.

27. No complaints about solicitor advocates have ever been reported to the Solicitors' Discipline Tribunal by the Society. The Society does not analyse the detail of complaints made in such a way that any information specifically about solicitor advocates acting in that capacity is available.

28. A complaint was made by Alexander Woodside to the Society. The Review team have been advised by the Society that they cannot provide details of the complaint without Mr Woodside's consent. However, they did advise the Review team that the matter was left with Mr Woodside to revert to the Society. The Society provided the Review team with an extract of the minutes of the Client Care Committee Meeting which considered Mr Woodside's case after the decision in the Appeal Court. That minute noted that the remarks in the decision "were not really a criticism of the individual solicitors, so much as raising general issues of concern with the solicitor advocate system. Taking also into account the fact that the events to which this matter relate are of at least ten years vintage, the Committee did not consider that there were any issues *prima facie* of professional misconduct worthy of investigation. In coming to this view, the Committee also noted that their Lordships had chosen not to make a complaint against the solicitor advocates which they would have been entitled so to do and also that the system for solicitor advocates had moved on somewhat during the intervening period".

29. Both the Society and the Faculty have the powers to raise and pursue complaints against their own members in their own name.

30. In the event that a member of the judiciary has a concern with the conduct or behaviour of an advocate in court, they may raise the matter with the Dean, who will, if it relates to a complaint, route it to the Complaints Commission (who then return it to him), and if the matter falls short of a conduct complaint, the Dean will resolve it as best as he is able. If the Dean considers it sufficiently serious, he will raise a complaint in his own name.

31. There is no equivalent role to the Dean for solicitor advocates and no process similar to the process above with regard to solicitor advocates.

32. Lady Smith has a role as liaison judge, appointed by the Lord President, to work with the judiciary and solicitor advocates to resolve any operational issues at the Supreme Courts, whether relating to solicitor advocates, or the judiciary. It appears that the main issue with which she has been involved related to resolving matters of court dress.

Queen's Counsel

33. Promotion to Queen's Counsel is intended to allow the Lord President to ensure that there are sufficient senior lawyers capable of leading in the most important, serious and complex cases.

34. The system to appoint QCs is overseen by an independent observer. Sir William Rae, in his report on the 2009 process, highlighted the fall in applications from solicitor advocates and suggested that this should be explored with the Society prior to the 2010 round of appointments.

35. There is a convention in the Faculty that once an individual attains the status of QC, he ceases writing and will not take on work ordinarily done by juniors. This is a convention not a rule and the Review team understand from the Faculty that it is designed to ensure the continuous development of junior advocates through the Faculty.

36. On and as a result of becoming a QC, there is no Society convention relating to the type of work that he will undertake – that is a commercial matter left to a solicitor advocate, his firm and market forces.

Legal Aid

37. The Legal Aid Board has provided some analysis of their expenditure since 1995/96. The expenditure with solicitor advocates and advocates, for each year since 2000/01 are below:

	Solicitor Advocate – civil	Solicitor Advocate – criminal	Advocate – civil	Advocate - criminal
2000/01	5,000	700,000	3,482,000	6,150,000
2001/02	8,000	1,222,000	3,099,000	7,188,000
2002/03	1,000	1,592,000	3,238,000	7,813,000
2003/04	2,000	2,400,000	4,157,000	10,714,000
2004/05	3,000	2,548,000	4,384,000	11,501,000
2005/06	0	2,201,000	4,605,000	10,391,000
2007/08	0	2,701,000	5,668,000	12,103,000
2008/09	32,000	2,554,000	5,067,000	9,997,000

38. The regulations, as they relate to criminal legal aid, require solicitors to request sanction for the appointment of senior counsel on a matter. If the senior counsel is an advocate, any QC can appear. If the senior counsel is a solicitor advocate, then he must be one of the 15 on a list of qualified solicitor advocates which has been agreed between the Society and the Legal Aid Board. It is not clear what process has been followed in order to establish that these individuals are suitably able to appear as leading counsel in a criminal trial. However, the Review team have been told that unless a solicitor advocate's name appears on that list, he will not be sanctioned by the Legal Aid Board as senior. This list was agreed in late 2009 and is believed to be in force as at the date of this report. Prior to the creation of the list, the lack of definition of "senior solicitor advocate" led to the practice of self certification as a senior for legal aid purposes without reference to experience or ability.

39. There is no legal aid rule that provides that once an individual attains the status of QC, he is unable to take on work only sanctioned for a junior (and therefore be reimbursed at the relevant junior rates).

Other facts

40. Following the introduction of extended rights of audience for solicitors, the Faculty introduced rules which prohibited members of Faculty from appearing in a team with solicitor advocates, known as the “mixed doubles” rule. This rule did not however apply to a criminal prosecution team, where advocates and solicitor advocates did appear together in the same team. A solicitor advocate instructed to conduct a case that required a junior to support or a senior to lead, was consequently unable to call upon a member of the Faculty to work alongside them – a team comprised fully of solicitor advocates or advocates would have to be assembled. This rule was recently abolished.

41. None of the 33 judges sitting in Court of Session and High Court of Justiciary are solicitor advocates. All were and remain members of the Faculty, although 3 originally trained and were admitted as solicitors. The Judiciary and Courts (Scotland) Act 2008, section 21, amended the Law Reform Act to extend eligibility for appointment as judges of the Court of Session to solicitor advocates who have continuously had rights of audience in either the Court of Session or the High Court of Justiciary. This relaxed the previous requirement that rights of audience were required in both the Court of Session and the High Court of Justiciary. Section 21 came into force on 1st June 2009.

42. The Constitutional Reform Act 2005 transferred, with effect from 1st October 2009, the jurisdiction of the House of Lords (and the Judicial Committee of the Privy Council) in respect of Scots law matters to the new Supreme Court. The rules of the Supreme Court do not appear to deal with rights of audience directly, although they clearly envisage parties only being represented by legal professionals. It is assumed that like its predecessor, the Supreme Court will decline to allow anyone other than party litigants, advocates and solicitor advocates to appear before it.

43. The introduction of rules to allow for sanction for the employment of solicitor advocates in the sheriff court is under active consideration. New regulations have been drafted which make provision to allow for recovery of fees for counsel or for solicitor advocates, where a case was sanctioned in the sheriff court as being appropriate for the employment of counsel. The draft regulations have been passed to the Sheriff Court Rules Council for comment. Subject to that, the new regulations should be included in the next appropriate Act of Sederunt.

CHAPTER 3 RIGHTS OF AUDIENCE (SOLICITORS)

Background to the solicitors' profession and its regulation

1. By the sixteenth century in Scotland, groups of men had begun to organise around and develop expertise in pleading before the courts. Over time they formed into associations and through those associations asserted a monopoly over rights of audience. In respect of the Court of Session that monopoly came to be enjoyed by the members of the Faculty. Analogous local associations developed around the various local courts.

2. The Procurators (Scotland) Act 1865 made provision for the local associations to become incorporated societies and for the establishment of formal requirements for entry into the profession. But where legislators may have perceived a singular profession of procurators, the local incorporated societies fiercely preserved their autonomy and special privileges. In recognition of that the Act itself provided for the monopoly on the rights of audience which the members of each local society enjoyed in respect of their local court to continue. Those local monopolies over the rights of audience ended eight years later[1], but the local societies' commitment to their continued independence did not.

3. It was not until the twentieth century that the concept of a unified solicitors' profession gained currency. The Solicitors (Scotland) Act 1933 paved the way towards a more recognisable landscape (it was the first time the word "solicitor" was used in statute to encompass all members of that branch of the profession in Scotland). The Act established a General Council of Solicitors in Scotland charged with, amongst other things, the regulation of solicitors' education and training and bringing discipline and correction cases against solicitors. It also established an Independent Discipline Committee. The efficacy of the General Council as a regulatory body seems to have been questionable. Structurally was essentially confederal with its membership drawn from the local societies. Moreover, it seems to have suffered from a chronic lack of resources. During the course of the 1933 Act's successor's passage through the House of Lords, a former Lord President (Lord Normand) referred to the problem of the General Council having to drop disciplinary cases because it had ran out of funds[2].

4. These deficiencies of the General Council (which were all the more evident following the establishment of a Law Society for England and Wales) formed the backdrop against which the Legal Aid and Solicitors (Scotland) Act 1949 was enacted. It was under the auspices of that Act that the Society was first established along with the Solicitors' Discipline Tribunal. It is notable from the parliamentary debate in relation to the Bill for the 1949 Act that, at least amongst parliamentarians, concern was principally about ensuring the profession's autonomy. There was an anxiety that any strong, centralised regulation of the profession by the State would diminish its independence and could thereby

[1] 1873 c. 63.
[2] Hansard HL Vol 163, 7 July 1949, col 986

threaten the proper separation of powers. To allay those concerns the Bill was assiduous in ensuring that the membership of the Society (that is the enrolled solicitors of Scotland) were to retain control over it. Accordingly the Bill made no attempt to stipulate such details as the constitution of the embryonic Society, but rather insisted that no constitution be adopted until it had been approved by the Society's membership.

5. These early debates reveal a conflict between two conceptual models of regulation which continue to figure prominently in current discourses about the legal profession's regulation. On one hand autonomous self-regulation is asserted to be essential, not least to ensuring that solicitors are able to perform their duties with proper independence from the State. On the other, it is contended that for regulation to be meaningful the regulator must be independent from those whom it regulates. The inherent tension is evident from the terms of the statutory provision which forms the Society's current legal basis. Section 1(2) of the Solicitors Act provides that the Society's objects include the promotion of "the solicitors' profession in Scotland" and "the interests of the public in relation to that profession." To ensure that the Society was properly discharging the latter function the Solicitors Act provided for independent supervision in the form of the lay observer. A decade later the Law Reform Act abolished that office and replaced it with the Scottish Legal Services Ombudsman.

6. During the first session of the Scottish Parliament, the Justice 1 Committee undertook a review into the regulation of the Scottish legal profession.[3] The Committee's principal concern was with the handling of complaints about legal professionals. Its report explores the tension the Committee perceived between those who argued in favour of retaining a high degree of self-regulation by the profession and those who sought to move toward a system of completely independent regulation. The Committee's preferred approach lay between those two extremes. One of the Committee's core proposals was that the contemporary complaints handling system be streamlined under the auspices of a new Complaints Commission. The Scottish Government took that proposal forward in the Legal Profession and Legal Aid Act (the current complaints handling processes are discussed in further detail in Chapter 4).

Admission of solicitors and standard setting

7. The Society is able to control who can practise as a solicitor in Scotland because, by virtue of sections 4 and 25 of the Solicitors Act, entitlement to do so flows from being-

   a.) admitted as a solicitor;
   b.) one's name appearing on the roll; and
   c.) (subject to one exception) holding a practising certificate.

   The Society plays a significant role in relation to all three of those requirements.

[3] Justice 1 Committee 11th report, 2002, Report on Regulation of the Legal Profession Inquiry (SPP 700).

Admission

8. In principle, it is the Court of Session which admits new solicitors to the profession. The mechanics of the admissions process are however left to the Society. To be admitted as a solicitor in Scotland, the applicant must satisfy the Council of the Society that he has complied with the training regulations (made under section 5 of the Solicitors Act) and that he is a fit and proper person to be a solicitor. The applicant must also pay the prescribed fee.[4] The Council of the Society can make regulations under section 5 only with the concurrence of the Lord President, and the amount of the fee must be agreed with the Lord President.

9. The Solicitors' Admission Regulations provide for more than one route to qualify. The vast majority of intrant solicitors obtain an LLB in Scots law,[5] complete the Diploma in legal practice and then undertake a two year traineeship. The alternative is to undertake a three year pre-Diploma training contract and then sit the Society's professional examinations. Having passed those examinations the prospective intrant can go on to complete the Diploma and the post-Diploma training contract in the same way as an intrant who had followed the LLB route. It should be noted that whilst the period of the post-Diploma traineeship under either of these routes is two years, an intrant may be admitted after his first year (her practising certificate will however be qualified until he has completed the full term of the traineeship).[6]

10. The training structures have been the subject of active consideration by the Society since November 2006, when it launched its consultation 'Shaping the Future of Legal Education'.[7] The Society's proposals, developed in light of that consultation, were then subjected to further comment in 'The Way Forward' published in 2008. At its 2009 Annual General Meeting, the Council of the Society endorsed the proposals set out in 'The Way Forward' and authorised that the project move to phase 2: implementation. Implementing the proposals will, the Society claims, produce a "monumental change to the way in which solicitors are educated, trained and maintain their [Continuing Professional Development] in Scotland."[8]

11. The consultation focussed solely on the training of solicitors. The training and testing of solicitor advocates did not fall within the remit of the Society's Training and Education Committee; although the consultation paper states the Committee's willingness to look at the arrangements for solicitor advocates in the future.

[4] Solicitors Act, section 6(1).
[5] The Society does not prescribe the content of LLB courses per se. However a prospective intrant who obtains a LLB which does not meet the Society's requirements will be required to sit the Society's professional examinations to the extent that thy have not completed the prescribed syllabus of professional subjects in the course of their LLB.
[6] Solicitors' Admission Regulations, regulation 36.
[7] Details of the consultation are available on the Society's website: <http://www.lawscot.org.uk/training/consult/detail.aspx> accessed January 2010.
[8] <http://www.lawscot.org.uk/training/consult/TheFuture.aspx> accessed January 2010.

12. Unsurprisingly different admission rules apply for those who are already legal professionals. A member of the Faculty seeking admission as a solicitor need not work under a pre-Diploma training contract, nor sit the Society's professional exams, nor complete the Diploma. They do however need to undertake what is ostensibly a 6 month traineeship.[9] An advocate who becomes a solicitor must cease to be an advocate.

13. Similarly barristers from other parts of the United Kingdom are exempt from the ordinary requirements for admission but, in addition to the six month traineeship (which may be extended in duration if the Council sees fit) they must also provide evidence to the Council that they are a fit and proper person to be admitted as a solicitor in Scotland, that they have practised at their home bar for at least five years and, more onerously, they must pass an intra-UK transfer test.[10] Solicitors from other UK jurisdictions are not, by contrast, required to do the 6 month traineeship but need only produce evidence that they are a fit and proper person to be admitted and pass the intra-UK transfer test.[11]

14. The Solicitors' Admission Regulations make specific regulations for Colonial solicitors (within the meaning of the Colonial Solicitors Act 1900), from elsewhere (other than EU Member States). In respect of EU lawyers, Council Directive 89/48/EEC requires that their professional qualifications be given due recognition in order to allow them to practise in Scotland more readily. This is provided for by the EC Qualified Lawyers Transfer (Scotland) Regulations 1994. The Society's recent review of the routes into the profession did not address the position of those who are already qualified lawyers in other jurisdictions. The Society's Training and Education Committee has however committed itself to further consideration of the issue to ensure consistency with its approach for non-lawyer intrants.[12]

The roll of solicitors

15. An order admitting a person as a solicitor also includes a direction to the Society's Council to enter that person's name on the roll of solicitors.[13] Once on the roll a solicitor's name remains on it unless he asks that it be removed[14] (for instance because he intends to become an advocate) or he is struck off.[15]

16. The ease with which one may be restored to the roll depends upon the circumstances in which one was removed from it. A person who asked to have his name removed from the roll can have it restored relatively easily on an application to the Society's Council (although the Council may conduct such inquiry as it sees fit).[16] For those struck off the roll, being restored to it is apt to be more difficult. Having been struck off a person can only be restored to the roll if,

[9] Solicitors' Admission Regulations, regulation 28.
[10] Solicitors' Admission Regulations, regulation 30.
[11] Solicitors' Admission Regulations, regulation 29.
[12] *The Way Forward* (n. 8), p. 14.
[13] Solicitors Act, sections 6(4) and 8(1).
[14] Solicitors Act, section 9.
[15] Solicitors Act, section 53(2)(a) and 55(1)(a).
[16] Solicitors Act, section 10(1A); inserted by 1988 c. 42, Schedule 2.

on application to the Solicitor's Discipline Tribunal, it “thinks proper”[17] or, if his name has been removed by order of the Court of Session, it can be restored to the roll only by a further order of that court.[18]

Practising certificates

17. It is generally a prerequisite to practising as a solicitor in Scotland to hold a practising certificate. To practise without one for gain is, even for a solicitor whose name appears on the roll, a criminal offence.[19]

18. Practising certificates expire each year on 31st October and must therefore be annually renewed by those intending to continue in practice. Generally a certificate will be granted on request to any solicitor provided his name appears on the roll and he pays the requisite fee (currently £565).[20] Only in certain prescribed circumstances can the Council of the Society exercise a discretion to refuse or qualify a certificate.[21] Broadly those circumstances are where the applicant has not held a practising certificate for at least a year or some form of disciplinary sanction has been imposed upon him or disciplinary proceedings are pending.

19. The strict requirement to have a valid practising certificate admits only one exception. It is not required by solicitors (their assistants and employees) who are authorised by law to act as solicitor to a public department without admission.[22]

Standard setting

20. In addition to setting the admission criteria for prospective solicitors, the Society also has the function of setting the standards and practice rules which qualified solicitors are expected to adhere to. The rules which regulate professional practice, conduct, discipline and probity in accounting are all prescribed by the Council of the Society. The Society’s standard setting powers are conferred by sections 34 and 35 of the Solicitors Act. Before making any rules under either section, the Council of the Society must send a draft of the proposed amendment to each member of the Society, submit the draft rules to a meeting of the Society and take account of any resolution passed at that meeting. Moreover no change to the rules will have effect unless and until the Lord President, having taken account of any objections he considers relevant, approves the changes.[23] The principal rules governing the conduct of solicitors are presently embodied in the Solicitors' Practice Rules.

[17] Solicitors Act, section 10.
[18] Solicitors Act, section 55(3).
[19] Solicitors Act, section 23(1). It may also be treated as professional misconduct if an enrolled solicitor practises without holding a current practising certificate [section 23(2)].
[20] Solicitors Act, section 14(1). The annual fee was reduced from £656 to £565 for year 2009-10 at a Special General Meeting of the Society on 24th September 2009.
[21] Solicitors Act, section 15.
[22] Solicitors Act, section 24.
[23] Solicitors Act, section 34(2) and (3).

CHAPTER 4 RIGHTS OF AUDIENCE (ADVOCATES)

1. It is believed that the Faculty may have had some existence pre-dating the foundation of the Court of Session in 1532.[1] With the establishment of the Court in that year, the Lords of Session admitted eight men as “generale procuratouris of the counsall” and granted them an exclusive license to plead before the Court.[2] By the late sixteenth or early seventeenth century the Faculty had emerged as a corporate body “to administer the corporate affairs of advocates and to regulate matters of professional discipline and conduct.”[3]

2. Naturally there has been significant change in the nature and operation of the Faculty in the supervening years. However unlike the solicitors’ branch of the profession, advocates have largely been left to their own devices in establishing admission requirements and regulating their own conduct. Parliaments have intruded on the Faculty's self-regulation on only two notable occasions. First, the Law Reform Act imposed a statutory duty on the Faculty equivalent to that which it imposed on the Society, to handle complaints about its members and gave the Scottish Legal Services Ombudsman the role of superintending the Faculty's handling of those complaints.[4] Second, the Legal Profession and Legal Aid Act adjusted the operation of the Law Reform Act's provisions in relation to advocates in much the same way as it adjusted them in relation to solicitors. That is, it replaced the Ombudsman with the Complaints Commission and transferred from the Faculty to the Complaints Commission responsibility for dealing with services (as opposed to conduct) complaints against its members (the current complaint handling structures are discussed in detail in Chapter 4).

Admission as an advocate

3. The first step for any prospective intrant seeking admission to the profession, technically, is to petition the Court of Session. Not later than 28 days before petitioning the Court the candidate must advise the Clerk of the Faculty of his intention to do so. The Clerk will then publish intimation of the candidate's intention to seek admission. This is intended to provide an opportunity for anyone who wishes to object to the candidate's admission on the basis that he is unfitted to hold the public office of advocate. It is open to anyone to make such an objection to the admission of an intrant at any point until 4pm on the day prior to the day he is due to be admitted.[5]

4. On the candidate's presentation of the petition to the Court, the Court will remit to the Faculty for matriculation of the candidate as an intrant. At this stage the candidate will need to produce a certificate disclosing any previous convictions, findings of misconduct and information about any bankruptcy proceedings taken

[1] This is a claim made on the Faculty’s website: <http://www.advocates.org.uk/profession/index.html> accessed January 2010.
[2] Stair Memorial Encyclopaedia Vol 13, para 1241.
[3] Hughes ‘Royal Commission on Legal Services in Scotland Report Volume 1’ (Cmnd 7846, 1980), p. 223.
[4] Law Reform Act, sections 33 and 34.
[5] Advocates’ Admission Regulations, regulation 1 and 6(4).

against him. In addition the candidate must adduce references testifying to his good character from two "persons of standing".

5. Whilst the process "technically" begins with the petition for admission, in practice the prospective intrant will ordinarily have commenced training a number of years earlier. Those prospective intrants who are not already legal professionals must hold a degree in Scots law. An ordinary LLB will suffice only if it is with distinction or the prospective intrant has an honours degree (not less than second class) from a UK University in another subject. Otherwise the prospective intrant must have a LLB with honours, not less than second class.[6] The Faculty has its own examinations in legal scholarship, but a prospective intrant need not sit those exams to the extent that he has passed equivalent examinations in the relevant subjects during the course of his LLB. The list of subjects a prospective intrant must have passes in differs somewhat from the list which applies for prospective solicitor intrants. In particular, in addition to having passes in the subjects required by the Society, advocate intrants must also have passes in the roman law of property and obligations and international private law. The prospective intrant must also have a Diploma in Legal Practice.[7] Having satisfied these requirements he must then pass the Faculty's examination in evidence practice and procedure.[8]

6. By way of professional training the prospective intrant must undertake a traineeship in a Scottish solicitor's office for not less than 21 months[9] (subject to that period being reduced to 12 months in certain circumstances).[10] Having satisfied all of those requirements the intrant can commence his pupillage. A pupil (or devil) begins his training with his devil master on the first Monday in October.[11] According to the Faculty the typical period of pupillage is around 9½ months.[12] During that period neither the devil, nor his master, can earn any money for the devil's work.[13] In addition to his duties for his devil master, a devil must complete the Faculty's skills training programme which is comprised largely of a series of practical workshops.[14] In order to be admitted to the Faculty, a devil must complete those workshops and secure a favourable report from his devil master.[15]

7. A devil may be admitted to the Faculty no earlier than the last day in July before the Court of Session rises for its summer recess the year after his pupillage

[6] Advocates' Admission Regulations, regulation 2(d).
[7] Advocates' Admission Regulations, regulation 3(1)(a) and (b).
[8] Advocates' Admission Regulations, regulation 3(1)(c).
[9] Advocates' Admission Regulations, regulation 4(a).
[10] Advocates' Admission Regulations, regulation 11(4). The period may be reduced, at the Dean's discretion, for applicants with an honours degree (including a LLB with honours) or another professional qualification.
[11] Advocates' Admission Regulations, regulation 5(1).
[12] The Faculty 'A Career at the Scottish Bar' (January 2008). Available from the Faculty's website: <http://www.advocates.org.uk/downloads/becoming_training/careersbrochure_2009.pdf> accessed October 2009.
[13] Advocates' Admission Regulations, regulation 5(6).
[14] Advocates' Admission Regulations, regulation 4(b). An overview of the skills training programme is set out on the Faculty's website <http://www.advocates.org.uk/training/skills.html> accessed October 2009.
[15] Advocates' Admission Regulations, regulation 5(8).

commenced.[16] Assuming no objection is made to his admission on the grounds that he is unfitted to hold the public office of advocate, the intrant will (on payment of his entry money or an instalment thereof) be admitted.

8. Qualified lawyers from the solicitors' branch of the profession and from other jurisdictions have an expedited route to admission as a member of the Faculty. But a Scottish solicitor (or indeed a solicitor enrolled anywhere in the UK) seeking to become an advocate must have his name removed from the roll of solicitors before being admitted.[17]

9. There is no automatic exemption for Scottish solicitors from the requirement to pass the Faculty's professional examinations. Most solicitors have a LLB and will therefore qualify for an exemption on that basis, although if their degree is more than seven years old any exemption will be at the discretion of the Dean.[18] Those solicitors who do not have a LLB but have sat the Society's professional examinations will also be given an exemption from the equivalent Faculty exams provided the Faculty's Board of examiners is satisfied as to the quality of their passes in those exams.[19] A solicitor is not required to have obtained a Diploma in legal practice provided they have been a practising solicitor in Scotland for at least three years[20] and no enrolled solicitor is required to complete the 21 month traineeship in a solicitor's office.[21] These differences apart, a solicitor seeking admission as an advocate must abide by the same requirements as any other intrant (save that they can request admission slightly less than 2 months earlier in their pupillage period than any other intrant if they have practised as a solicitor for 5 years or more[22]).

10. Members of the English Bar, the Bar of Northern Ireland and legal practitioners from other EU Member States are largely exempt for the ordinary requirements for admission.[23] Instead they are required to pass a special aptitude test.[24]

Standards and regulation

11. The Faculty has historically acted as the standards setting body for its members; although unlike the Society it has no express statutory authority to do so. Its Guide to the Professional Conduct of Advocates is currently in its fifth edition (last revised October 2008). It is a lengthy document, but is prefaced by a plea that it should be read as a whole and interpreted in accordance with its spirit rather than strictly by its letter. Its general introduction concludes-

    “It cannot be stressed too strongly that the ultimate test of an Advocate's conduct is whether it is such as to impair the trust and the confidence which others place in him and his profession.”[25]

[16] Advocates’ Admission Regulations, regulation 5(8).
[17] Advocates’ Admission Regulations, regulation 5(2).
[18] Advocates’ Admission Regulations, regulation 9(3).
[19] Advocates’ Admission Regulations, regulation 9(5)(b).
[20] Advocates’ Admission Regulations, regulation 10(1).
[21] Advocates’ Admission Regulations, regulation 11(2).
[22] Advocates’ Admission Regulations, regulation 5(3).
[23] Advocates’ Admission Regulations, regulation 2(1)(d)(iv) to (vi), 3(1) and 4.
[24] Advocates’ Admission Regulations, regulations 12 and 13.

12. There is a dearth of authority exemplifying when an advocate will be considered to have impaired that trust and confidence.

[25] Advocates' Guide, p. 4.

CHAPTER 5 RIGHTS OF AUDIENCE (SOLICITOR ADVOCATES)

Background to solicitor advocates

1. Proposals to remove some or all of the distinctions between the two branches of the legal profession in Scotland (and the UK more broadly) have been a topic of debate since at least the nineteenth century.[1] A decade before Parliament legislated to allow the creation of solicitor advocates, the Hughes Commission had considered some of the issues in its report on legal services in Scotland.[2] The preponderant weight of evidence received by the Commission favoured the retention of two distinct branches of the profession, but a "considerable weight of legal opinion was in favour of extending the rights of audience of solicitors to enable them to appear in the supreme courts."[3] The Commission considered, but ultimately rejected, both the possibility of fusing the two branches of the profession into a single profession and the option of extending the rights of audience of solicitors.

2. The Commission was not persuaded by the argument of fusion's proponents that it would reduce the costs of litigation and allow for greater specialisation. The Commission's view was that the concentration of advocates around Parliament House meant their overheads were relatively low, but if they dispersed into local practices like solicitors those costs would rise. In any event, the Commission took the view that the cost of litigation (in the civil context at least) owed more to the inefficiencies of the court system than it did to the dual character of the legal profession. The Commission had already recommended a further review aimed at identifying improvements to the Court of Session's procedure and it was confident that that was the appropriate means by which to tackle the expense of court proceedings.

3. Having dispensed with the purported merits of fusion the Commission analysed the detractions which had persuaded it against recommending the proposal be taken forward. Principally the Commission seems to have been concerned that it would result in a diminution in the quality of advocacy before the Supreme Courts (and it adduced anecdotal evidence from other jurisdictions to support that conclusion).[4] The Commission also expressed concern that rather than promote consumer choice fusion might reduce it. The Commission's argument ran that better advocates would naturally gravitate to the larger firms where they would be best remunerated leaving smaller firms (and by implication their clients) with an inferior grade of court practitioner. That possibility was to be contrasted with what was and remains the position, that any firm of solicitors can engage on behalf of their clients the services of any member of the Faculty.[5] The Commission also suggested that having a small cohesive advocates' profession centred around Parliament House, aside from the benefit of reducing overheads, allowed for an informal but nevertheless essential flow of information and indeed a highly

[1] See R. Shiels 'Aspects of the Fusion Debate' (2003) 8 Scottish Law and Practice Quarterly 263.
[2] Hughes 'Royal Commission on Legal Services in Scotland Report Volume 1' (Cmnd 7846, 1980).
[3] Hughes, paragraph 15.44, p 229.
[4] Hughes, paragraph 15.47, p 230.
[5] Hughes, paragraph 15.48, p 231.

effective, informal mechanism of maintaining professional regulation and discipline.[6]

4. The Commission then turned to the related but logically separate question of whether solicitors should be given rights of audience in the Supreme Courts. Again, at the core of the Commission's rejection of the proposal was the same concern about lowering the standards of advocacy in the Supreme Courts.[7] Notably the Commission does not explicitly discuss the solution to that concern which has since been adopted: creating a special class of solicitor advocates. That solution may also have ameliorated one of the Commission's other concerns, which was that if solicitors used their new found rights of audience extensively the position of the Faculty would be gradually eroded and fusion would be achieved by the back door. It is not apparent whether the idea of creating a special class of solicitor advocate was canvassed before the Commission, or whether the Commission considered but rejected it. Undoubtedly it would not have been a full solution to all of the problems which the Commission anticipated. For instance, the Commission observed that if solicitors were not constrained to operate the same cab rank rule as advocates they could have an unfair competitive advantage. Whatever the formal view of the full Commission might have been on solicitor advocates, certainly Lord Hughes was not favourably impressed when the proposal was put to the House of Lords. His stated objection at that time was that allowing solicitors, even a limited class of solicitors, rights of audience would inexorably lead to the fusion of the two branches of the profession.[8]

5. Less than a decade later, the government revisited the issue of rights of audience. A similar extension of rights of audience for solicitors was being contemplated south of the border and it may, as some suggested at the time, have been the case that the Government had no more reason than that for proposing it in Scotland. Lord McCluskey described, or rather excoriated, the policy as a victory for "the competition theologists of the Department of Trade and Industry".[9] In any event, the Secretary of State for Scotland, Malcolm Rifkind, Q.C., M.P. (as he then was), launched a consultation paper in March 1989 entitled 'The Legal Profession in Scotland'. Some seven months later it was followed by a White Paper: 'The Scottish Legal Profession: the Way Forward'. When the Bill was introduced in the House of Lords, the then Lord Advocate (Lord Fraser of Carmyllie) explained the purpose of the provisions dealing with the legal profession to be twofold-

   "to widen the choice available to those using legal services and to allow the providers of those services to respond to the demands of clients with innovation and flair to the maximum extent consistent with the interests of justice and the necessary protection of clients' interests".[10]

[6] Hughes, paragraph 15.50, p 232.
[7] Hughes, paragraph 15.54, p 232.
[8] Hansard HL vol 515 col 195 (30 January 1990).
[9] Hansard HL vol 515 col 188 (30 January 1990).
[10] Hansard HL vol 515 col 169 (30 January 1990).

6. Thus the creation of solicitor advocates was presented as a means of offering choice to clients. The Lord Advocate acknowledged, but was sanguine about, the risks it would pose to members of the Faculty, asserting-

   "Advocates who are confident about the standard of service they provide need not be apprehensive at the prospect of solicitors appearing alongside them before the supreme courts."[11]

7. In corroboration of that proposition he noted that advocates continued to be employed in the sheriff courts and in tribunals and inquiries, where they competed for work directly with solicitors. Yet despite the rather Darwinian overtones of those remarks the Lord Advocate also asserted that it would not be appropriate to give rights of audience to all solicitors because "particularly high standards of advocacy and of conduct are required in the supreme courts."[12]

8. Lord Macaulay, for the opposition, suggested that the Bill had not gone far enough to ensure that sufficiently high standards of advocacy in the Supreme Courts would be maintained. The opposition's basic position was that the current system had not been shown to be deficient. Advocates were rigorously trained to a high standard and operated with an impartiality which solicitors, with their closer links to firm and client, may not be able to rival. Nor, it was noted, was there any perceived dearth of advocates and transfer between the two branches of the profession was relatively easy. Essentially, the opposition adopted a position similar to that of the Hughes's Commission a decade earlier.

9. The former judges in the House of Lords were no less antipathetic towards the proposal. Lords Emslie and McCluskey were particularly vociferous in opposing any extension of rights of audience to solicitors. Lord Emslie presented two principal arguments. The first was that the small, centralised nature of the Scottish Bar meant that the Faculty was able to quickly and efficiently regulate its members. Indeed the tightly knit community of lawyers ensured a high degree of informal, self-regulation as any advocate falling short of the required standards would rapidly lose favour with the Bench, the other members of the Bar and the solicitors likely to instruct him.[13] Second his Lordship expressed concern that solicitors may be less able pleaders than advocates. Courteously, his Lordship was careful to assert that he did not base his conclusion on a view that solicitors are inherently less able, but rather that the specialist skills of an advocate cannot be acquired by appearing before the courts on a part time basis.[14]

10. Interestingly it seems the Society was, at the time of the Bill's introduction, equivocal in its view about the attractions of extending solicitors' rights of audience.[15] It is unlikely that the lack of any clear official line reflected ambivalence on the part of the Society, but rather a sharp internal split of views.

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[11] Hansard HL vol 515 col 170 (30 January 1990).
[12] Hansard HL vol 515 col 170 (30 January 1990).
[13] Hansard HL vol 515 cols 183 to 185 (30 January 1990).
[14] Hansard HL vol 515 cols 183 to 185 (30 January 1990). His Lordship reiterated this view when moving a motion at committee stage to have the provision (clause 20) removed from the Bill, Hansard HL vol 517, cols 1067 to 1068 (29 March 1990).
[15] Hansard HL vol 515 cols 170 to 171 (30 January 1990).

Such had been the experience of the Hughes's Commission 10 years earlier. The Commission's report refers to the "unusual experience of the Law Society submitting a divided view in their evidence to us".[16]

11. Rights of audience in the Supreme Courts were extended in 1990 by the Law Reform Act.

12. Shortly after devolution, the Scottish Executive Central Research Unit commissioned research to investigate what the impact of solicitor advocates had been on the legal services market. The research used data gathered between 1994 and 1996; by the end of which period there were only 87 solicitor advocates. Broadly and unsurprisingly, the research found that the arrival of solicitor advocates on the Scottish legal landscape had not precipitated an overnight revolution.[17]

13. The subsequent Report by the Research Working Group on the Legal Services Market in Scotland in 2006[18] offers little detail on the impact of solicitor advocates. It simply notes that the level of competition between advocates and solicitor advocates varied in different parts of the market. In particular, it was found that relatively few solicitor advocates exercised their extended rights of audience in relation to civil matters with a greater number doing so in criminal cases.

14. There are currently around 265 solicitor advocates in Scotland practising civil law, criminal law or both (although fewer than that will actually be exercising their extended rights of audience). The Society estimates there are around 10,000 solicitors in Scotland (although again not all will be practising). By way of a crude estimate though, that means around 2.65% of Scottish solicitors have extended rights of audience. According to the Faculty, there are around 460 practising advocates.

The admission of solicitor advocates and standard setting

15. Solicitor advocates are, by definition, solicitors and must therefore have satisfied the admission requirements for the solicitors' branch of the profession discussed in chapter 3. To become a solicitor advocate though the solicitor must satisfy the further requirements of the 2002 Rules (Criminal), to enjoy rights of audience in the High Court and (in respect of criminal matters only) the Supreme Court, or the 2002 Rules (Civil) to enjoy rights of audience in the Court of Session and (in respect of civil matters only) the Supreme Court. Both sets of 2002 Rules are in similar terms. The rules are made by the Council of the Society by virtue of section 25A(4) of the Solicitors Act. Subsection (8) applies the requirements in section 34(2) and (3) to the rule making process (that is that any rules must be consulted on with members of the Society and can be made only if and when the Lord President has consented to them). Once the Lord President has approved

[16] Hughes, paragraph 15.44, p 229.
[17] A helpful outline of the research is set out in R. Shiels 'The Short History of the Solicitor Advocate' (2003) 8 Scottish Law and Practice Quarterly 1.
[18] The Report is available from the Scottish Government's website <http://www.scotalnd.gov.uk/Publications/2006/04/12093822/0> accessed December 2009.

the rules, subsection (9) further requires that they be sent to the Secretary of State (now the Scottish Ministers) who, in turn must consult the Director General of Fair Trading. The rules can only take effect once they have been approved by the Scottish Ministers.

16. Essentially, an applicant is required to undertake a course of study and at the end of it pass written examinations. The rules prescribe the methodologies to be used in the course and these include practical interactive and observational exercises. The two sets of 2002 Rules give effect to the Society's obligation in terms of the Law Reform Act to set candidates a course of training in evidence and pleading.[19] In addition, the Society is required to ensure the candidate properly understands the applicable rules of professional conduct (to which end a further examination is set) and that the candidate has sufficient court experience and is a fit and proper person. According to the Society's guidance notes for applicants, a solicitor who has not had at least five years experience of court work is unlikely to satisfy the requirement of having sufficient experience.[20]

Standards

17. As they are still solicitors, solicitor advocates remain bound by the same rules of professional conduct. In relation to the exercise of their extended rights of audience though, solicitor advocates are subject to additional professional obligations. These are set out in the Solicitor Advocate Rules, a more detailed commentary and comparison with the Advocate’s Guide is provided in chapter 4. The Solicitor Advocate Rules are, in a number of respects, not dissimilar to the Advocate's Guide; indeed on some points it is a verbatim copy. This is perhaps unsurprising given that a number of the core principles express basic propositions of fairness and integrity from which few would demur. Moreover both the Faculty and the Society subscribe to the principles espoused in the Code of Conduct of the Council of European Bar Associations. To the extent that there are meaningful differences these largely reflect the different working practices of solicitors and advocates.

[19] Law Reform Act, section 25A(2)(a).

[20] Society’s ‘Guidance Notes for [Solicitor Advocate] Applicants’ available from the Society’s website <http://www.lawscot.org.uk/Members_Information/rules_and_guidance/guides/Rules/SolAdvocates/ROFAGuide.aspx> accessed October 2009.

CHAPTER 6 RIGHTS OF AUDIENCE (COMPLAINTS HANDLING)

Complaints Commission

1. Before the Legal Profession and Legal Aid Act, complaints against solicitors, solicitor advocates and advocates were handled by the relevant professional body; albeit subject to independent oversight by the Scottish Legal Services Ombudsman. The Legal Profession and Legal Aid Act has transformed the situation however, making the Complaints Commission the first port of call for anyone who wishes to complain about a legal practitioner (from whatever branch of the profession).

2. The Complaints Commission is a new institution, established by virtue of section 1 of the Legal Profession and Legal Aid Act. Its constitution is closely defined by statute. The Complaints Commission has (and must have) nine members. Five of those members, including the chair, must be "non-lawyer" members. And while the Scottish Ministers may vary the global number of members by statutory instrument, they are prohibited by the terms of the Act from doing so in any way which would result in there being more lawyer than non-lawyer members.[1] Members are appointed by the Scottish Ministers (who must first consult the Lord President). Appointments are for a fixed term and members can only be removed from office during the currency of that term by the chair in certain prescribed circumstances and then only with the Lord President's consent.

3. The Complaints Commission commenced its work on 1st October 2008; on which date its predecessor, the Scottish Legal Services Ombudsman, was abolished. The serving Ombudsman at that time (Jane Irvine) is now the chair of the Complaints Commission. Like the Ombudsman, the Complaints Commission has a role in overseeing the handling of complaints by the Society and the Faculty.[2] Unlike the Ombudsman, the Complaints Commission also has a prominent role as the gateway for all complaints about legal practitioners.[3]

4. On receipt of a complaint, the Complaints Commission must first decide whether it has been made at an appropriate time.[4] A complaint may be treated as not having been made at an appropriate time in one of two circumstances. Either, it is made belatedly (which means more than one year after the date of the event complained of),[5] in which case the complaint will only proceed at the Complaints Commission's discretion. Or it has been made prematurely (which means the complainer has not given the practitioner concerned or, in the case of a solicitor, his firm a proper opportunity to address the complaint before approaching the Complaints Commission). In the case of a services complaint made prematurely the Complaints Commission may require the complainer to give the practitioner or, where applicable his firm or his employer, an opportunity to make amends.[6]

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[1] Legal Profession and Legal Aid Act, schedule 1 paragraph 2(8).
[2] Legal Profession and Legal Aid Act, sections 23 and 36.
[3] Legal Profession and Legal Aid Act, section 2. Section 33 obliges the professional bodies to forward any complaint they may receive directly about a member to the Commission.
[4] Legal Profession and Legal Aid Act, section 4.
[5] Rules of the Scottish Legal Complaints Commission 2008, rule 4(6).
[6] Legal Profession and Legal Aid Act, section 8.

Assuming the complaint has been made at an appropriate time (or the Complaints Commission is willing to hear it belatedly) the Commission performs a further filtering function: determining whether the complaint is frivolous, vexatious or totally without merit.[7] If the complaint has not been dismissed at either of these preliminary filter stages the Complaints Commission must then decide whether it is a conduct or a services complaint.[8]

5. Essentially a conduct complaint is one which impugns the honour or basic competence of the practitioner. Typical examples include allegations of: dishonesty (whether or not amounting to a criminal offence), other types of illegal or unbecoming conduct which suggest the practitioner is not a "fit and proper person", derelictions of duty and acts of gross incompetence. These latter examples begin to stray into the territory of services complaints and indeed it is entirely possible for a complaint to be reasonably considered to fall into both categories. In that eventuality, the Act enjoins the Complaints Commission to liaise with the relevant professional body as to how the complaint should be handled and contemplates the possibility that what may be presented as a single complaint should in fact be treated as a number of distinct complaints.

6. A services complaint is a less serious matter than a conduct complaint; at least in terms of the possible sanctions which may be imposed upon the practitioner. The Legal Profession and Legal Aid Act succinctly states it to be a complaint which suggests "that [the] professional services provided by a practitioner in connection with any matter in which the practitioner has been instructed by a client were inadequate".[9] The adequacy of services will be judged by measuring the standard of the service provided against that of a posited average practitioner.

7. The standards expected of practitioners in the ordinary course of events will be influenced by the rules and regulations made by the relevant professional body. However it is important to clarify that the standards to which a practitioner may be held by the regulatory system are not necessarily co-terminus with the standards prescribed by their professional body. It is, in principle, possible that a practitioner may be found to have acted in conformity with the standards expected of her, despite having breached one of his professional body's rules and regulations. Conversely he may be found to have failed to meet the standards expected notwithstanding that he has not breached any of his professional body's stipulated rules and regulations.

8. The subsequent handling and disposal of the complaint depends on its characterisation as a conduct or a services complaint. In acknowledgement of the potential for overlap between the two the Act expressly allows for reclassification of the complaint where the professional body, in the course of investigating a conduct complaint, decides that it is more properly a services complaint or where the Complaints Commission, in the course of handling a services complaint, decides it is really a conduct complaint.[10]

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[7] Legal Profession and Legal Aid Act, section 4(2).
[8] Legal Profession and Legal Aid Act, section 5.
[9] Legal Profession and Legal Aid Act, section 2(1)(b).
[10] Legal Profession and Legal Aid Act, section 15.

9. Locus to make a services complaint against a practitioner is restricted. Such a complaint can only be made by a person who considers him or herself a victim of inadequate professional services or one of a number of prescribed institutional actors (including the Lord Advocate, members of the judiciary and the Scottish Legal Aid Board).[11] Thus a complaint which has been determined to be a services complaint may go no further if it has not been made by a person entitled to make it.

10. One of the underlying premises of the Act is that a complaint should only be formally dealt with by the regulatory bodies if it cannot be resolved between the parties. Thus the next step in the Complaints Commission's handling of a services complaint is to decide whether the complaint is premature (as discussed above) and whether the practitioner, his firm or employer have made a sufficient attempt to offer the complainer redress. If the Complaints Commission takes the view that more might be done at an informal level by the complainer or the subject of the complaint then the Complaints Commission may request that they make further endeavours to settle the issue between themselves. If the parties are amenable, the Complaints Commission can interpose itself as a mediator in that process.[12]

11. If an informal settlement cannot be achieved at this stage the Complaints Commission must investigate the complaint giving the parties an opportunity to make representations. At the end of its investigations, if the complainer is an individual rather than one of the institutional actors, the Complaints Commission must make one final attempt to reach an informal settlement. The Complaints Commission proposes the terms of the settlement to the parties and if they accept it the Commission makes no formal determination of the complaint.[13] If the parties will not accept the settlement the Complaints Commission will make a formal determination on the complaint. Where the complaint is upheld the Complaints Commission has a discretion as to how to dispose of it. The disposals available are predominantly restitutionary, the exception being that where the Complaints Commission considers the practitioner to require further education or training it can report that to the relevant professional body.[14] If either party is disgruntled with the Complaints Commission's decision he, he or it may appeal to the Court of Session. Such an appeal to the court is largely constrained to dealing with judicial review grounds of complaint.[15]

12. Unlike a services complaint, anyone can make a conduct complaint against a practitioner.[16] Having determined that it is a conduct complaint the Complaints Commission must communicate that decision to the complainer and the practitioner concerned. The complaint is then remitted to the relevant professional body. Having done so the Complaints Commission is functus as far as the investigation of the complaint is concerned; although it has a general monitoring role in relation to the professional bodies' handling of complaints.

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[11] Legal Profession and Legal Aid Act, section 2(2)(b).
[12] Legal Profession and Legal Aid Act, section 8.
[13] Legal Profession and Legal Aid Act, section 9(4).
[14] Legal Profession and Legal Aid Act, section 10.
[15] Legal Profession and Legal Aid Act, section 21.
[16] Legal Profession and Legal Aid Act, section 2(2)(a).

Society

The Scottish Solicitors' Discipline Tribunal

13. Before discussing how the Society handles conduct complaints, it is necessary to first introduce another institutional actor: the Solicitors' Discipline Tribunal. The Tribunal was established by section 50 of the 1980 Act. Yet whilst emanating from the same legislative source as the Society, it is an autonomous body. The Solicitors Act stipulates that the Tribunal may have no more than 28 members (there are currently 26). It further requires there to be an even mixture of "solicitor" and "non-lawyer" members. The non-lawyer members can be neither solicitors nor advocates, conveyancing practitioners, executory practitioners nor entitled to exercise rights of audience by virtue of section 27 of the Law Reform Act. The Tribunal's autonomy from the Society is further safeguarded by the fact that, although the Society's Council can propose candidates (who cannot be members of the Society's Council), it is for the Lord President to ultimately appoint members. And, once appointed, members enjoy a five year term which can be terminated only by the Lord President. According to the Tribunal's website, in adjudicating cases before it the Tribunal usually sits with two solicitor members and two lay members.

14. The Tribunal's function is principally to hear complaints about the conduct of solicitors. Such complaints may be made to the Tribunal only by the Council of the Society. Until 1st October 2008, complaints about a solicitor could also be made to the Tribunal by the Lord Advocate, the Advocate General for Scotland, any judge, the Dean, the auditor of the Court of Session, the auditor of any sheriff court or the Scottish Legal Aid Board. However, the Legal Profession and Legal Aid Act removed the rights of those office-holders and institutions to make complaints about the conduct of individual solicitors directly to the Tribunal; although they may still complain about any default of an incorporated practice. Thus under the new complaints structure, conduct complaints can only be instigated at the level of the Tribunal by the Society. It should also be noted that since the introduction of the new complaints regime the Tribunal's first instance jurisdiction in relation to individual solicitors is limited to matters of professional misconduct and certain criminal convictions. If, at the end of its inquiries, the Tribunal concludes that there has been no misconduct and the solicitor is guilty only of the lesser offence of unsatisfactory professional conduct, it must remit the matter back to the Society.

The handling of conduct complaints against solicitors

15. Once seized of a conduct complaint the Society will appoint a complaints investigator to look into the allegations. The investigator will take evidence from both sides and then produce a report, which the parties will have an opportunity to comment on in draft. The report, which will set out the investigator's findings in fact, his opinion on the complaint and his recommendations, are then sent for consideration to one of the Society's Client Relations Committees. These committees are each comprised half solicitors and half non lawyers. If the Client Relations Committee determine that the complaint may suggest professional

misconduct, they will pass it to the Society's Professional Conduct Committee (which is also comprised half solicitors and half non lawyers). If that Committee determines that the complaint may suggest professional misconduct the complaint is remitted to the Tribunal. However if, on the facts, it is not clear that there has been professional misconduct, the Client Relations Committee and the Professional Conduct Committee each have the power to consider whether there has at least been "unsatisfactory professional conduct".

16. The concept of unsatisfactory professional conduct is, in statutory terms, an innovation of the Legal Profession and Legal Aid Act. Prior to that Act the Society, in practice, recognised a category of sub-standard professional conduct which it described as "unsatisfactory professional conduct". It was a label it applied in relation to conduct falling short of professional misconduct, or in circumstances where there was insufficient evidence to prove professional misconduct (misconduct must be established beyond reasonable doubt, whereas unsatisfactory professional conduct had only to be established on the balance of probabilities). But the concept of unsatisfactory professional conduct was not acknowledged in statute and was therefore dealt with only at an informal level.

17. Prior to the Legal Profession and Legal Aid Act, where the Society's Professional Conduct Committee found there had been unsatisfactory professional conduct the Council of the Society would issue a letter deploring it and note the finding on the solicitor's record. Such notes would remain on record for five years; conceivably if any solicitor accumulated a substantial number of them that might have been treated as amounting to professional misconduct.[17] The Legal Profession and Legal Aid Act has now given statutory force to the concept of unsatisfactory professional conduct and empowers the Society to apply sanctions where it upholds such a complaint.[18] The sanctions are a censure and, at the Society's discretion, any combination of a direction to the solicitor to undertake further education or training, a fine (up to £2,000) and a direction to compensate an aggrieved complainer (up to £5,000). Like the upholding of a services complaint, a finding of unsatisfactory professional conduct does not directly carry any sanction which can restrict the solicitor's right to practise.

18. A solicitor can appeal to the Tribunal against the Society's finding of unsatisfactory professional conduct or the terms of any sanction imposed. Equally if the Society does not uphold the complaint, the complainer can appeal to the Tribunal; although a complainer cannot appeal to the Tribunal in respect of the terms of any sanction imposed on the solicitor. If either party is still dissatisfied following the Tribunal's decision he may take a further appeal to the Court of Session.[19]

19. Returning to the stage at which the Society's Professional Conduct Committee considers the investigator's report, it may be that the Committee concludes that the allegations against the solicitor are sufficiently serious to suggest professional misconduct. In that event, the Society will remit the complaint to the Tribunal.

[17] Legal Profession and Legal Aid (Scotland) Bill: Complaints about the Legal Profession, SB 06/33, 20 April 2006, p 11.
[18] Solicitors Act, section 42ZA; inserted by section 52(2) of the Legal Profession and Legal Aid Act.
[19] Solicitors Act, section 54A; inserted by section 53(4) of the Legal Profession and Legal Aid Act.

20. The Tribunal will conduct its own hearing in respect of the complaint. Ordinarily the Society will appoint a solicitor to act as fiscal for the purpose of prosecuting the complaint.[20] The subject of the complaint may either represent herself before the Tribunal or be professionally represented. There are three outcomes following such an inquiry. The first is that the Tribunal finds that the complaint has not been established. The second is that the Tribunal concludes the facts do not support a finding of professional misconduct but considers the solicitor may be guilty of unsatisfactory professional conduct. In that event, the Tribunal will remit the complaint back to the Society.[21] The third is that the Tribunal upholds the charge of professional misconduct.

21. Where a finding of professional misconduct is made, the Tribunal has a range of disposal options available to it. As for a finding of unsatisfactory professional conduct, it may censure the solicitor, impose a fine or require him to pay compensation to the complainer. But the Tribunal can also order that the solicitor's practising certificate be restricted, suspend him from practice and, in the most serious cases, require the Society to strike him off the roll.

22. In those cases where it is established that the solicitor is guilty of professional misconduct or has a relevant conviction, there are a range of disposals available to the Tribunal. At the most potent end of the spectrum, the Tribunal can order that the solicitor be struck off the roll. Any person struck off in that circumstance can only be restored to the roll at the Tribunal's discretion. In practice this ultimate sanction is seldom used.

23. The Review team asked the Tribunal about the number of prosecutions it has dealt with concerning the conduct of solicitor advocates acting in that capacity. The Tribunal has confirmed that although it has not collected statistics specifically about such prosecutions it has no knowledge of there having been any.

Faculty

Complaints handling

24. Unlike the procedures by which the Society handles conduct complaints against its members, the Faculty's conduct complaint handling procedures are not prescribed in legislation. The Faculty has not historically looked to statute for its powers to sanction its members and the Legal Profession and Legal Aid Act allows it to continue to deal with such matters on an administrative non-statutory basis.

25. Despite there being no statutory prescription as to how the Faculty should handle conduct complaints against its members, the Faculty has, of its own volition, adopted an approach not dissimilar to that which has been imposed upon the Society. The Dean is nominally in charge of handling any complaint, but he will remit to a Complaints Committee in the first instance. A Complaints Committee is

[20] Solicitors Act, section 51(1).
[21] Solicitors Act, section 53ZA; inserted by section 53(3) of the Legal Profession and Legal Aid Act.

constituted by four persons, two are members of Faculty (one of whom will chair the Committee) the other two are lay members drawn from a list prepared by the Scottish Ministers.[22] As with complaints against solicitors a one year limitation period applies in respect of complaints against advocates, but that period can be extended at the Committee's discretion.[23]

26. Where there is no material dispute about the facts forming the basis of the complaint the Complaints Committee has fairly free reign to dispose of it as it sees fit. It can dismiss the complaint as vexatious or frivolous, or simply decide nothing further should be done. On the other hand it is empowered to determine the complaint and impose significant sanctions against the member (including suspension from practise) but stopping short of expulsion from membership of the Faculty. Alternatively the Complaints Committee can remit the complaint, either for sanction only or for determination and sanction to the Faculty's Disciplinary Tribunal.[24]

27. If the facts alleged in the complaint, or the advocate's defence to it, are in dispute the Committee has similar powers to handle the complaint directly but it also has the power to remit the matter to an Investigating Committee.[25] The Investigating Committee will look into the complaint and prepare a report, which the parties then have an opportunity to comment on to the Complaints Committee. At the end of the process the Complaints Committee has before it broadly the same options as to further action as it does where the facts are not disputed.[26]

28. Any party aggrieved by the Complaints Committee's handling of the complaint can, with that Committee's leave, appeal to the Disciplinary Tribunal.[27] Such an appeal will only be heard if the Committee reached a decision disconform to the Disciplinary Rules or on the basis of a factual premise not supported by the weight of evidence.[28] Complaints can come before the Disciplinary Tribunal therefore either on remit or appeal from the Complaints Committee. The Tribunal exercises weightier powers than the Committee as it can expel members from (or suspend their membership to) the Faculty.[29]

29. The Tribunal is a chaired by a retired judicial office holder with its other five members comprising two advocates (including one senior) and three lay persons.[30] Moreover where the complaint has come before the Tribunal having been remitted from the Committee and the advocate’s membership of the Faculty may therefore be in jeopardy its procedures are formal. The Dean will appoint a solicitor to press the case against the advocate and that solicitor will in turn appoint counsel to present the case to the Tribunal.[31] There is no express right of

[22] Advocates’ Disciplinary Rules, rule 17(1).
[23] Advocates’ Disciplinary Rules, rule 1(8).
[24] Advocates’ Disciplinary Rules, rule 4(1).
[25] Advocates’ Disciplinary Rules, rule 5(1)(c).
[26] Advocates’ Disciplinary Rules, rule 5(7).
[27] Advocates’ Disciplinary Rules, rule 8.
[28] Advocates’ Disciplinary Rules, rule 8(8).
[29] Advocates’ Disciplinary Rules, rule 12.
[30] Advocates’ Disciplinary Rules, rule 19(1).
[31] Advocates’ Disciplinary Rules, rules 10(1)(b) and 11(1).

appeal under the rules against a decision of the Tribunal; although its decisions are presumably amenable to judicial review.

CHAPTER 7 RIGHTS OF AUDIENCE (COMPARISON OF STANDARDS)

1. This Chapter compares the position of advocates and solicitor advocates. The first part of the Chapter discusses some of the central differences between the two professions. The second part of the Chapter then goes on to discuss in more detail the standards of conduct applicable to advocates and solicitor advocates. Under reference to the 1992 Rules, the Solicitor Advocate Rules and the Solicitor's Practice Rules solicitor advocates are, for all intents and purposes, bound by standards very similar to those laid down for advocates in terms of the Advocate's Guide. That is particularly true in respect of those matters most intimately related to work in court. Indeed in respect of a number of the standards discussed in this chapter, there are many points where there is scarcely any textual difference between the provisions applicable to solicitor advocates and those in the Advocate's Guide. And even where there are textual differences it is, in a number of cases, doubtful whether they are intended to import any difference in substance.

Key differences between advocates and solicitor advocates

Admission

2. The admission requirements for the professions of advocate and solicitor advocate have already been discussed in the preceding chapters. Contrasting the requirements reveals that the standard of education expected of a non-lawyer, advocate intrant is higher than the standard expected of a solicitor intrant. Whilst the non-gradute route of entry to the solicitors' profession may be seldom used, there is no possibility for a non-graduate (who is not already a lawyer of some description) becoming an advocate. Moreover, the quality of one's degree is unimportant when seeking to become a solicitor and an ordinary LLB will suffice. To become an advocate an ordinary LLB must be with distinction, or else supplemented by an honours degree in another subject. Moreover the Faculty insists that its intrants have passes in the roman law of property and obligations, international private law and its own advocacy examination; none of which are required of the solicitor intrant.

Progression

3. Once admitted to one of the professions there is a further difference in terms of attaining senior status. For advocates the rules about who should act as senior and who should act as junior counsel are well established. There are no such well established rules in respect of solicitor advocates. Even although solicitor advocates can and do obtain the rank and dignity of QC, that does not necessarily have any bearing on their status when ranked against one another, or against advocates.

4. In Woodside, Lord Gill expressed the view that there were important differences about the respective roles of junior and senior counsel. The absence of any systematised rules by which solicitor advocates can obtain seniority was therefore, in his Lordship's opinion, problematic. He also alluded to a somewhat

separate issue which concerns the fact that the current structure of legal aid regulations effectively allows solicitor advocates to designate themselves senior counsel and claim the higher fee which that attracts. Naturally, that has irritated some members of the Faculty.

Different regulations and regulators

5. The second part of this chapter discusses in more detail the differences in the codes of conduct applicable to advocates and solicitor advocates. As will be evident from that part, the differences in the terms of the respective codes are relatively limited. However the fact that they are applied by different regulators creates the possibility that even textually identical rules may be interpreted and applied differently. Of course with the establishment of the Scottish Legal Complaints Commission, advocates and solicitor advocates now have the same regulator when it comes to service complaints.

6. The similarity of some of the provisions makes it all the more notable that, unlike the Solicitor Advocate Rules (or the 1992 Rules or the Solicitor's Practice Rules for that matter), the Advocate's Guide does not purport to lay down binding rules. The Advocate's Guide's introduction eschews the notion that it should be treated as a rigid code of conduct, urging advocates to follow its spirit not its letter. Paragraph 3 of the Solicitor Advocate Rules by contrast, states that a solicitor advocate “shall” comply with the standards prescribed therein. And paragraph 5 goes on to make clear that it is for the Council of the Society, not the individual solicitor advocate, to determine whether any derogation from the letter of the Rules is to be tolerated. That said, paragraph 6 states that breach of the Solicitor Advocate Rules only “may be treated as professional misconduct” suggesting that in practice a solicitor advocate who has breached the letter of the Rules but not their spirit may avoid disciplinary sanction.

Business structures

7. Solicitors, including solicitor advocates, can and do operate in partnerships with one another. At present they are prevented from providing their services jointly with other (non-solicitor) professionals, however the Legal Services (Scotland) Bill presently before the Parliament seems set to change that. By contrast, not only are advocates prohibited from practising their profession with other professionals, they are prohibited from doing so in partnership with one another too. The restriction on advocates forming partnerships has been criticised by the Office of Fair Trading on more than one occasion, most recently in 2007. However the Faculty has, to date, taken the line that it does not intend to allow its members to enter into alternative business structures under the Legal Services Bill.

The cab rank rule

8. Advocates are bound by the cab rank rule. Essentially it requires that they undertake any case they are instructed in, provided they are available to do so and offered an adequate fee. There are of course a number of other sensible exceptions, including situations where the advocate would have a conflict of

interest or would be required to breach his duty to the court, for instance by presenting a case he considers unstateable. Underlying the cab rank rule is the notion of an independent referral Bar equally accessible to all.

9. Solicitor advocates are not bound by the cab rank rule. This was a source of some concern during the passage of the Bill for the Law Reform Act. It was feared that solicitor advocates, not being bound by such a rule, would have a competitive advantage. In other words solicitor advocates would be able to cherry pick the better (more lucrative) cases.

10. The Review team have been unable to find any study into whether the cab rank rule works as purported. It was considered by the 2006 research working group, but they too were unable to find any research into its efficacy. They also noted the apparent absence of any mechanism for policing the rule and the Scottish Consumer Council expressed the view that its operation is not sufficiently transparent. The founders of Oracle Chambers have publicly described the rule as "a polite fiction".

11. The cab rank rule is inextricably bound up with the rules which prevent advocates from entering into practise with others. If there were no cab rank rule advocates could readily enter into de facto business arrangements with, for instance, a particular firm of solicitors by declining work instructed by anyone else. Equally, if the rule against advocates entering into partnerships or other alternative business structures were lifted it would be difficult for the integrity of the cab rank rule to be maintained. Thus its protection is one of the reasons the Faculty has given for refusing to allow its members to enter alternative business structures.

Taking instructions

12. Whereas solicitor advocates may take their instructions directly from their clients, there are restrictions on who may instruct an advocate. The position has been liberalised recently by the Direct Access Rules 2006, which allow persons other than solicitors to instruct advocates in certain circumstances. Nevertheless the 2006 Rules are a relatively modest change which only allow large institutional players (such as professional bodies and local authorities) to instruct directly. For lay clients it remains the case that they are generally unable to directly instruct advocates. The prohibition on instructing advocates directly was the subject of criticism by the OFT in 2007.

13. The position of advocates in Scotland differs from that of barristers south of the border. In 2004 the Bar Council liberalised its direct access rules significantly. Lay clients in England and Wales can now instruct members of the Bar directly in respect of a number of matters (criminal, family and immigration work being significant, but not absolute, exceptions). Moreover barristers can be instructed by lay clients not only to undertake advocacy work but also chamber work (such as giving opinions); although the Bar Council are careful to emphasise that the new rules do not allow barristers to undertake work which they would otherwise not be entitled to do.

14. The restrictive direct access arrangements in Scotland mean that solicitors are ostensibly the gateway to the services of advocates. That creates a risk that a solicitor advocate (or a solicitor in a firm which retains a solicitor advocate) might be tempted not to canvass with his client the possibility of engaging the services of an advocate. That was another of Lord Gill's stated concerns in Woodside. In an attempt to combat that risk rule 3 of the Solicitors (Scotland) Supreme Court Practice Rules 2003 expressly provides that solicitors are required to explain to their clients the pros and cons of using an advocate. The Society of Solicitor Advocates has since persuaded the Law Society's 2008 Annual General Meeting to dispense with that rule; although it has not yet been revoked. In theory though its revocation should not fundamentally alter the solicitor's duty to advise their client about the different options for professional representation. The basis of the argument for the rule's abolition was that it added nothing to the general duty on all solicitors in terms of the Solicitor's Practice Rules to always instruct the most suitable Pleader.

Precognosing witnesses and clients

15. Advocates generally will not meet with clients unless the instructing solicitor is present. Nor will they precognose witnesses. Solicitor advocates are usually not permitted to meet with witnesses while they are giving evidence. But that situation aside, solicitor advocates are not precluded from doing anything which an instructing solicitor would in the course of preparing for a case; subject to the recommendation in the Solicitor Advocate Rules that they may want to think carefully before doing so.

Mandate and agency

16. There is, at least theoretically, a further distinction between the relationship which an advocate has with his client and the relationship a solicitor advocate has with his client. An advocate, it has long been maintained, acts for his client under a mandate rather a contractual relationship. An advocate's mandate requires that he act in his client's best interests (subject always to his duty to the court). Thus theoretically an advocate can take action in respect of his client's expressed wishes. A solicitor by contrast acts under contract as an agent of his client and has no such broad power of unilateral action.

Appearing without an(other) agent

17. A corollary of the idea that an advocate is not his client's agent is that an advocate cannot appear in court without either his client or his client's agent (that is the client's solicitor) in attendance. In the civil context at least this rule, quite apart from the rule that lay persons cannot instruct advocates directly, means that in most cases a client will need to have both a solicitor and an advocate in court (unless the client is willing to spend a potentially significant amount of time in court).

18. A solicitor advocate by contrast has a discretion to decide whether he requires another solicitor from his own firm or another to act as instructing agent. It therefore seems legitimate, in principle, for a solicitor advocate to appear on his

client's behalf without his client (or a separte agent of his client) being present. Whether or not it is practicable for a solicitor advocate to appear alone without the assistance of an instructing agent is unknown.

Comparison of the Advocate's Guide and the Rules

19. This part of the chapter considers the differences between the Faculty's Advocate's Guide to conduct for advocates and the Rules of conduct which apply to solicitor advocates. To set out the text of both sets of provisions side by side would make this chapter unnecessarily unwieldy. For the sake of brevity and to highlight those differences which do exist, this chapter contains a short synopsis of each standard and where the cognate provisions for advocates and solicitor advocates can be located. If there is no material difference in either the content or the framing of the provisions, that is simply noted. Where there is a difference we have attempted to state what the difference is.

Independence

20. The general principles of conduct set out in the Advocate's Guide, begin (at paragraph 2.1) with a statement about the importance of an advocate's independence; exhorting that he should not compromise his professional standards to please his client, the Court or third parties.

21. There is no direct equivalent in the Solicitor Advocate Rules for solicitor advocates, although the importance of independence is apparent from the content of more specific rules. The importance of independence to all solicitors, including solicitor advocates, is set out in paragraph 2 of the Schedule to the Solicitor's Practice Rules. That provision is framed quite differently from the corresponding provision in the Advocate's Guide but it is doubtful whether there is any real difference in substance.

Trust and personal integrity

22. Paragraph 2.2 of the Advocate's Guide and paragraph 1 of the Schedule to the Solicitor's Practice Rules appear under the heading “Trust and personal integrity”. They are expressed in different terms but it is hard to say what, if any difference, there is in substance.

    The Advocate's Guide provides-

    > “Relationships of trust can only exist if an Advocate’s personal honour, honesty and integrity are beyond doubt. For the Advocate, these traditional virtues are professional obligations.”

    Whereas the Solicitor's Practice Rules assert-

    > “Solicitors must be trustworthy and act honestly at all times so that their personal integrity is beyond question. In particular, they must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful.”

Confidentiality

23. Paragraph 2.3 of the Advocate's Guide expresses the advocate's obligation of confidentiality in general terms. Paragraph 4(1) of the Solicitor Advocate Rules also imposes a duty of confidentiality in respect of information communicated to a solicitor advocate in his professional capacity. Solicitor advocates are further bound by requirements of confidentiality in terms of paragraph 5 of the Schedule to the Solicitor's Practice Rules. The standards of confidentiality expected of solicitor advocates are expressed differently from those in the Advocate's Guide, but it is not apparent that there is any material difference in substance.

Duties in relation to professional association and other counsel

24. Paragraph 3.1 of the Advocate's Guide states that an advocate owes "a duty of loyalty" to the Faculty, his fellow Members and in particular to the Dean. Furthermore, paragraph 3.2 states that an advocate has a duty "not to bring the Faculty into disrepute".

25. Paragraph 2(1) of the Solicitor Advocate Rules simply states that a solicitor advocate "has a duty of loyalty to professional colleagues". Similarly, paragraph 14(1) of the Schedule to the Solicitor's Practice Rules states "Solicitors must act with other solicitors in a manner consistent with persons having mutual trust and confidence in each other." Notably it is not suggested that solicitor advocates owe any duty to the Society or to its President.

26. Paragraph 3.3 of the Advocate's Guide goes on to provide that it is essential that counsel can discuss, negotiate and resolve cases on the basis that confidences will be kept and agreements and undertakings honoured. The same wording appears in paragraph 2(2) of the Schedule to the Solicitor Advocate Rules; although it is prefaced by an explanation of why mutual trust is important. That is in addition to paragraph 14(1) of the Schedule to the Solicitor's Practice Rules which asserts that solicitors “must not knowingly mislead other solicitors or, where they have given their word, go back on it.”

27. Notably the Solicitor's Practice Rules only purport to govern inter-solicitor relationships. The Solicitor Advocate Rules by contrast refer to it being “essential that counsel and solicitor advocates” should be able to discuss cases in confidence. The framing of the latter provision is odd to the extent that it suggests solicitor advocates are not counsel. If that is correct and “counsel” means advocate, that leaves open the question what should happen when solicitor advocates appear on both sides. In that case it is unclear whether confidence and the honouring of agreements is to be protected by the Solicitor's Practice Rules instead.

28. The Advocate's Guide is equally ambiguous as to whom the professional duty it describes extends. It states it to be “essential that Counsel” should be able to discuss cases in confidence. Throughout the Advocate's Guide the drafter has switched back and forth between referring to an “Advocate” and “Counsel”. A note at the start states that “Advocate” and “Counsel” is used to refer to a

practising member of the Faculty unless the context otherwise requires. It is debatable what interpretation of the word the context of paragraph 3.3 requires.

Duties in relation to agents

29. The provisions on this point are all but identical. Both require counsel to respect the fact that the agent's relationship with the client is different and likely to be more enduring than counsel's. The provisions therefore insist that counsel should do nothing to upset that relationship or destroy trust between agent and counsel (the Advocate's Guide at paragraph 4.2 and the Solicitor Advocate Rules at paragraph 3(1) of the Schedule).

30. Both deal with (and in the same terms) the situation in which counsel feels the agent has been guilty of professional misconduct (the Advocate's Guide at paragraph 4.3 and the Solicitor Advocate Rules at paragraph 3(2) of the Schedule).

31. Both deal with (and in the same terms) the situation in which counsel feels compelled to criticise the conduct of the agent where it falls short of professional misconduct (the Advocate's Guide at paragraph 4.4 and the Solicitor Advocate Rules at paragraph 3(3) of the Schedule).

32. Both state that counsel should consider carefully whether to attend a consultation without the instructing agent being present (the Advocate's Guide at paragraph 4.5 and the Solicitor Advocate Rules at paragraph 3(4) of the Schedule).

33. Both address what should happen where counsel has to speak to the client and the instructing agent is not present. On this point there is a minor divergence in terms. The Solicitor Advocate Rules adopt a somewhat longer formulation which emphasises that in the ordinary course of events counsel should not speak to the client on his own. Paragraph 3(5) of the Solicitor Advocate Rules provides-

    > "In exceptional circumstances, it may be unavoidable that a solicitor advocate instructed by a solicitor has to speak to the client without the solicitor being present. Such an occasion will however be rare, and when it arises the solicitor should be told as soon as possible what transpired."

    Whereas paragraph 4.6 of the Advocate's Guide more pithily states-

    > "If Counsel has to speak to the client without the solicitor being present, the solicitor should be told as soon as possible what transpired."

34. It is doubtful that this difference in drafting produces any substantively different effect in practice.

35. The only material differences between the provisions on this point of standards is that the Advocate's Guide, in paragraph 4.1, provides a general statement that an advocate must respect the agent's independence. The paragraph further states that an advocate should, if asked by an agent to recommend the name of another

advocate to act either as junior, senior or in his stead should suggest multiple names. There is no express obligation on a solicitor advocate to do the same.

36. Further the Advocate's Guide discusses, in paragraph 4.7, that whilst there is no rule to preclude an advocate going to an agent's offices or accepting social invitations from an agent, the advocate should bear in mind the Advocate's Guide's other provisions about relations between counsel and agent. Again, there is no equivalent provision applicable to solicitor advocates. This is perhaps unsurprising given that solicitor advocates may well work in the same firm as the instructing agent.

The client's interest

37. Paragraph 5.1.2 of the Advocate's Guide urges that subject to all rules of law and professional conduct advocates must put their clients' interests first. The Solicitor Advocate Rules do not address the issue directly. Paragraph 3(1) of the Schedule to the Solicitor's Practice Rules however is in more or less the same terms as the Advocate's Guide. There may be a slight nuance in that the Advocate's Guide requires an advocate to act in what he, the advocate, “perceives in his professional judgement to be the best interests of his client”. The Solicitor's Practice Rules are less subjective referring simply to the client's “best interests” as though that phrase has an objectively ascertainable meaning. This difference in drafting may reflect the difference in principle between advocate's relationship with the client and the solicitor's. Solicitors are their clients' agents; advocates, strictly speaking, are not. Thus there is some lore around the concept that an advocate, acting as he does under a mandate, can depart from his client's instructions to pursue what he regards as his client's best interests in a way which a solicitor, as his client's agent, cannot.

Conflict between client and agent

38. Paragraph 5.1.2.1 of the Advocate's Guide goes on to discuss how an advocate should react where a conflict between the interests of client and agent arises (e.g. where the client may have a claim for professional negligence). Paragraph 4(3) of the Schedule to the Solicitor Advocate Rules is in more or less identical terms.

Withdrawing from acting

39. Paragraph 5.1.3 of the Advocate's Guide deals with withdrawing from acting. It begins by noting that in criminal cases advocates should generally be reticent to withdraw from acting. No similar observation appears in the Solicitor Advocate Rules, although paragraph 12 of the Solicitor's Practice Rules states "Solicitors must not cease to act... in a manner which would prejudice the course of justice."

40. The Advocate's Guide goes on to discuss that the advocate should intimate his decision to withdraw as soon as possible and seek an adjournment to allow his client an opportunity to seek alternative representation. This part of the Advocate's Guide is mirrored in respect of solicitor advocates by paragraph 4(4) of the Schedule to the Solicitor Advocate Rules.

Professional indemnity insurance

41. Paragraph 5.1.4 of the Advocate's Guide states that an advocate must maintain a reasonable level of PII cover. No equivalent appears in either the Solicitor Advocate Rules or the Solicitor's Practice Rules; solicitors are of course covered by the Society's master policy.

Special duties in criminal cases

42. Section 5.2 of the Advocate's Guide deals with various special duties in respect of criminal cases, specifically pleas, confessions and acting for a co-accused. Paragraph 5 of the Schedule to the Solicitor Advocate Rules is all but identical.

43. Paragraph 5.2.2 of the Advocate's Guide and paragraph 5(1) of the Schedule to the Solicitor Advocate Rules provide that pleas should only be tendered with the consent of the accused. The two provisions are virtually identical. The only discrepancy is that the Advocate's Guide stipulates clearly that counsel's instructions about the tendering of a plea are to come via the instructing agent whereas the Solicitor Advocate Rules make no such stipulation.

44. Paragraph 5.2.3 of the Advocate's Guide and paragraph 5(2) of the Schedule to the Solicitor Advocate Rules discuss advising on the possible consequences of guilty pleas. They are identical save that the Solicitor Advocate Rules simply state that a solicitor advocate should do no more than indicate the normally anticipated range of sentences. The Advocate's Guide goes on to state that an advocate may also discuss "any current case law indicating that a discount sentence may be expected when a plea of guilty is tendered at an appropriate stage." Words to that effect do not appear in relation to solicitor advocates.

45. Paragraph 5.2.4 of the Advocate's Guide and paragraph 5(3) of the Schedule to the Solicitor Advocate Rules stipulate that where the accused makes an admission of guilt to counsel, counsel must explain to the accused that the conduct of their defence is limited by that admission. The two provisions are virtually identical.

46. Paragraph 5.2.5 of the Advocate's Guide and paragraph 5(4) of the Schedule to the Solicitor Advocate Rules insist that counsel must act on instruction when the accused maintains his innocence and should advise on the implications before accepting instructions to tender a plea of guilty. The two provisions are in the same terms.

47. Paragraph 5.2.6 of the Advocate's Guide and paragraph 5(5) of the Schedule to the Solicitor Advocate Rules state, in the same terms, that only in the most exceptional circumstances should counsel accept instructions to act for more than one accused or appellant.

Duties in relation to matters of law

48. Paragraph 6.1.1 of the Advocate's Guide and paragraph 6(1) of the Schedule to the Solicitor Advocate Rules require counsel to draw to the court's attention any previous, binding decisions on relevant points of law whether or not the authority supports counsel's case.

49. Paragraph 6.1.2 of the Advocate's Guide and paragraph 6(2) of the Schedule to the Solicitor Advocate Rules state a similar rule in cases where there is no contradictor.

50. Paragraph 6(3) of the Schedule to the Solicitor Advocate Rules states that in proceedings before the House of Lords a solicitor advocate should have in mind Lord Chancellor Birkenhead's observations in Glebe Sugar Refining Co v Greenock Harbour Trustees. In that case, the Lord Chancellor emphasised the importance of ensuring that all authorities bearing upon a case are cited to the House, whether or not they assist counsel. Given the foregoing sub-paragraphs of the Schedule it is not clear what amplification paragraph 6(3) actually adds, nor why its application is stated to be restricted to cases in the House of Lords. It is perhaps for those reasons that the Faculty has not included a similar provision in the Advocate's Guide.

Duties in relation to matters of fact

51. Paragraph 6.2 of the Advocate's Guide and paragraph 7(1) of the Schedule to the Solicitor Advocate Rules are similar but subtly different. Paragraph 6.2 of the Advocate's Guide states-

   "In relation to matters of fact, an Advocate should have two principles in mind-
   (a) it is for the Court, not for Counsel, to assess the credibility and reliability of witnesses; and
   (b) Counsel must not seek to persuade a Court to proceed on a factual basis which he with reasonable certainty knows to be untrue."

   By contrast, paragraph 7(1) of the Schedule to the Solicitor Advocate Rules provides-

   "In relation to matters of fact, a solicitor advocate should have two principles in mind:
   (a) it is for the court, not for a solicitor advocate, to assess the credibility of witnesses; and
   (b) a solicitor advocate must not, directly or indirectly, deceive or mislead the court."

52. As will be noted, there are differences in both the paragraphs (a) and (b) which counsel of each type must bear in mind. In respect of the (a) principle, advocates are told it is not for them to assess the "credibility and reliability" of witnesses, yet solicitor advocates are told they are only to avoid assessing the "credibility" of witnesses. This appears to suggest that a solicitor advocate can assess the "reliability" of a witness, if he can successfully disentangle that from the witness’s credibility.

53. The (b) principles differ more greatly in their language. Amongst other things, for an advocate his personal state of knowledge seems to be relevant. But for a solicitor advocate there is seemingly no defence that he, with reasonable certainty, believed the inaccurate factual premise he was putting forward to be true.

In court

54. Paragraph 6.3.1 of the Advocate's Guide and paragraph 7(2) of the Schedule to the Solicitor Advocate Rules are ostensibly the same, requiring counsel to base his questions upon his instructions, precognitions, productions and the evidence heard. There is a slight divergence in language, the Advocate's Guide refers to "...any evidence which has already been led" whereas the Solicitor Advocate Rules adopt a more long-winded formulation stating a solicitor advocate must "...after evidence has been led, [base his questions] upon the evidence."

55. Paragraph 6.3.2 of the Advocate's Guide and paragraph 7(3) of the Schedule to the Solicitor Advocate Rules assert that counsel should not state his personal opinion on matters of fact. There are trifling differences in the formulations. The Advocate's Guide states an advocate "must not attempt to supplement the evidence by making observations on matters of fact" not based on the evidence adduced. The Solicitor Advocate Rules simply state that a solicitor advocate "must not make observations on matters of fact" not based on the evidence. Further, the Advocate's Guide states that in a criminal trial an advocate should not express a personal belief "in the innocence or guilt of an accused or any of the accused." The Solicitor Advocate Rules simply state a solicitor advocate should not voice a personal belief "in the innocence of the accused."

56. Paragraph 6.3.3 of the Advocate's Guide and paragraph 7(4) of the Schedule to the Solicitor Advocate Rules state that counsel cannot be party to evidence being led before the court which he knows to be unfounded in fact. The only difference in the framing of the provisions is that according to the Advocate's Guide the advocate must know the case being put forward to be unfounded because the "client or his solicitor has informed him". The Solicitor Advocate Rules state that a solicitor advocate is only prevented from being party to advancing a misleading case if the client has informed him the case is unfounded.

57. Paragraph 6.3.4 of the Advocate's Guide and paragraph 7(5) of the Schedule to the Solicitor Advocate Rules states counsel must not put to a witness a question suggesting the witness to be guilty of a crime or other improper conduct unless counsel is personally satisfied that there is evidence to support the suggestion.

Confessions to counsel

58. Paragraph 6.3.5 of the Advocate's Guide and paragraph 7(6) of the Schedule to the Solicitor Advocate Rules state that counsel must not conduct a defence inconsistent with an admission of guilt where the accused has made an admission. The provisions are in identical terms.

59. Paragraph 6.3.6 of the Advocate's Guide and paragraph 7(13) of the Schedule to the Solicitor Advocate Rules positively explain what counsel may do in terms of defending an accused person who has admitted guilt. There is no material difference in the terms of the provisions.

Ex parte statements of fact at the Bar and in pleadings

60. Paragraph 6.3.7 of the Advocate's Guide and paragraph 7(14) of the Schedule to the Solicitor Advocate Rules deal with ex parte statements of fact made by counsel. The provisions require counsel to be scrupulous in making such statements and honest when they cannot answer a question on such a statement. The provisions are in identical terms.

61. Paragraph 6.3.8 of the Advocate's Guide and paragraph 7(15) of the Schedule to the Solicitor Advocate Rules requires that counsel have a proper factual basis for any statement of fact in the pleadings. The provisions are expressed differently. The Advocate's Guide states that "An Advocate must have a proper basis for stating a fact in any pleadings." The Solicitor Advocate Rules are more prescriptive about where that basis in fact must be derived, stating: "A solicitor advocate must have a proper basis on precognition or in the light of consultation with the client for stating a fact in any pleadings."

Interviewing witnesses

62. Paragraph 6.3.9.1 of the Advocate's Guide and paragraph 7(6) of the Schedule to the Solicitor Advocate Rules state that counsel may interview potential witnesses but equally that counsel can, at the stage of accepting instructions, insist that he will not do so. The provisions are in identical terms.

63. Paragraph 6.3.9.2 of the Advocate's Guide and paragraph 7(8) of the Schedule to the Solicitor Advocate Rules state that once a proof or trial has begun counsel cannot interview a witness about anything said in court in that witnesses absence. The provisions are expressed in the same terms.

64. Paragraph 6.3.9.3 of the Advocate's Guide and paragraph 7(7) of the Schedule to the Solicitor Advocate Rules state that counsel should not coach witnesses. The substance of the rule is expressed in the same terms in each case. But the Advocate's Guide begins "Under no circumstances should counsel do or say anything which suggests to a witness that he should give evidence other than in accordance with the honest recollection or opinion of the witness." The Solicitor Advocate Rules omit that general injunction.

65. Rule 6.3.9.4 of the Advocate's Guide and paragraph 7(9) of the Schedule to the Solicitor Advocate Rules admit that sometimes rigid adherence to the provisions around interviewing potential witnesses cannot be complied with and explains how various scenarios should be handled. The provisions are in identical terms.

66. Rule 6.3.9.5 of the Advocate's Guide and paragraph 7(10) of the Schedule to the Solicitor Advocate Rules state that counsel can only communicate with a witness

who has started to give evidence with the opposition's consent. The provisions are in identical terms.

Duty of courtesy

67. Paragraph 6.4.1 of the Advocate's Guide and paragraph 8(1) of the Schedule to the Solicitor Advocate Rules urge counsel not to be discourteous in court. The provisions are the same except that the Advocate's Guide says discourtesy is "equally" detrimental to the reputation of counsel with the bench, the interests of the client and to public confidence in the administration of justice. The Solicitor Advocate Rules, whilst noting discourtesy to be damaging in all the same ways, makes no statement as to the equivalence of the damage caused.

68. Paragraph 6.4.2 of the Advocate's Guide and paragraph 8(2) of the Schedule to the Solicitor Advocate Rules makes a more explicit statement about the importance of counsel not bullying or insulting witnesses. The provisions are in the same terms.

69. Paragraph 6.4.3 of the Advocate's Guide and paragraph 8(3) of the Schedule to the Solicitor Advocate Rules notes the importance of courtesy to the Bench. The provisions are expressed differently insofar as the Advocate's Guide notes "the long-standing tradition of mutual trust and Courtesy between the bench and Bar" whereas the Solicitor Advocate Rules simply refer to "a relationship of mutual trust and courtesy with the bench."

70. Paragraph 6.4.4 of the Advocate's Guide and paragraph 8(4) of the Schedule to the Solicitor Advocate Rules states that counsel should always apologise if arriving late in court. Both state that the apology should be given to the Bench in open court, but only the Solicitor Advocate Rules further clarify "It is not sufficient to offer an apology through the Macer or Clerk of Court." That aside, the provisions are identical.

Duty to attend court

71. Paragraph 6.5.1 of the Advocate's Guide and paragraph 9(1) of the Schedule to the Solicitor Advocate Rules state, in identical terms, that counsel should arrange his affairs to avoid foreseeable clashes of commitments.

72. Paragraph 6.5.2 of the Advocate's Guide and paragraph 9(2) of the Schedule to the Solicitor Advocate Rules discuss the requirement for counsel to be in court for cases in which they have accepted instructions. The provisions are in largely the same terms. There is a slight variation in language, where the Advocate's Guide states that an advocate must be present from the start of the hearing "...during the period of time for which he has been properly instructed until the trial or hearing is concluded." Whereas, the Solicitor Advocate Rules state a solicitor advocate must be in court from the beginning of the hearing "...and thereafter until the trial or hearing is concluded."

73. Perhaps a more significant difference between the two provisions is that the Solicitor Advocate Rules state that in the event of a solicitor advocate being

unable to attend he must arrange for some else to appear in his stead and, if necessary move for an adjournment. But, that is only if "...he is unable to contact the Secretary [of the Society]," which suggests that in the first instance it is for the Secretary to find a stand in. By contrast the Advocate's Guide states that an advocate is personally and solely responsible for finding someone to appear in his stead (although it may be in practice advocates may fulfil that responsibility by approaching the Dean in the first instance).

74. Paragraph 6.5.3 of the Advocate's Guide and paragraph 9(3) of the Schedule to the Solicitor Advocate Rules deal with clashes of commitments between cases in the Inner House and the High Court and those in the lower courts; essentially by requiring counsel to put their commitments in the superior courts first. These rules are materially the same. There are slight differences, in that the Solicitor Advocate Rules begin with a general declaration about instructions in the superior courts taking precedence. And, as with the preceding rule, the Solicitor Advocate Rules suggest that in the first instance a solicitor advocate contact the Secretary of the Society in the first instance where a stand in is required whereas the Advocate's Guide makes it solely the individual advocate's duty to find someone to cover his case in the event of a conflict.

Responsibility for pleadings in civil actions

75. Paragraph 6.6 of the Advocate's Guide states that an advocate has a professional responsibility for any pleadings he drafts. Where the pleadings are drafted by another, it stipulates that the advocate can only agree to the pleadings if they can be supported by the available information.

76. Paragraph 10 of the Schedule to the Solicitor Advocate Rules appears under the heading “Responsibility for pleadings and presentation in civil actions”. But its content is somewhat different from paragraph 6.6 of the Advocate's Guide. Sub-paragraph (1) provides that a solicitor advocate has personal responsibility for any pleadings he signs or (whether or not he signs them) those pleadings which he drafts. That differs somewhat from the provision in the Advocate's Guide which states that an advocate has a professional responsibility for those pleadings he drafts, but merely a professional duty to consider the sustainability of pleadings he has not drafted but only signs or otherwise agrees to speak to.

77. Paragraph 10(1) of the Schedule to the Solicitor Advocate Rules further departs from the Advocate's Guide in providing an express exception to the solicitor advocate's responsibility for pleadings he has drafted (although curiously the exception does not cover pleadings he has only signed) where his draft has been altered without his knowledge. In that event, paragraph 10(1) states that the solicitor advocate, presumably on discovery of the alteration, has a professional duty to consider whether he can support the case in light of the changes. That part of the provision echoes the language of paragraph 6.6 of the Advocate's Guide, but in a different context. The Advocate's Guide states that an advocate has a professional duty to consider the sustainability of any pleadings he has not personally drafted. But the Solicitor Advocate Rules refer to that professional duty only where the pleadings have been altered after the solicitor advocate signing them. It is not clear what difference this makes in practice, since if the pleadings

78. The Solicitor Advocate Rules differ from the Advocate's Guide still further in this regard, paragraph 10(2) goes on to state that a solicitor advocate should only sign pleadings drafted by someone else "in exceptional circumstances" and proceeds to discuss those circumstances. There is nothing in the Advocate's Guide to suggest that advocates should only exceptionally sign pleadings or documents they have not drafted.

79. Further, paragraph 10(3) of the Schedule to the Solicitor Advocate Rules asserts that a solicitor advocate has sole professional responsibility for the presentation of a case in court. There is no elaboration of what this rule means in those cases in which junior and senior counsel are involved. No equivalent statement appears in the Advocate's Guide.

Criminal appeals

80. Paragraph 6.7.1 of the Advocate's Guide and paragraph 12(1) of the Schedule to the Solicitor Advocate Rules state that in advising on a criminal appeal, counsel has a duty to consider whether the case is stateable and, if he considers it is not, to refuse to act in the case. The provisions are in identical terms, save that the Solicitor Advocate Rules go on to make express reference to Scott v HMA 1946 SC 68.

81. Paragraph 6.7.2 of the Advocate's Guide however goes on to state that an advocate should exercise particular care before deciding an appeal is not stateable if it has passed a judicial sift. No such statement is made in the Solicitor Advocate Rules. Similarly, paragraph 12(2) of the Schedule to the Solicitor Advocate Rules continues that where a solicitor advocate initially advises an appeal is stateable and subsequently changes his mind he must promptly inform his client he can no longer act in the case. No direct equivalent to that provision appears in the Advocate's Guide (although as discussed at paragraph Error: Reference source not found below, there is a general provision which produces the same effect).

Opposing a party litigant

82. Paragraph 6.8 of the Advocate's Guide and paragraph 13 of the Schedule to the Solicitor Advocate Rules specify the standards expected of counsel when opposing a party litigant. The Advocate's Guide simply states that an advocate must co-operate with the court, insofar as consistent with his duty to his client, to enable the party litigant's case to be fairly stated and justice to be done. The Solicitor Advocate Rules are drafted in broadly the same terms but with two additions. First, the provision is prefaced with a statement that a solicitor advocate must not take unfair advantage of the party litigant. Second, the provision concludes with a reiteration of the point that whilst co-operating with the court, the solicitor advocate "must not sacrifice the interests of the client".

Duty to seek advice

83. Paragraph 7 of the Advocate's Guide and paragraph 4 of the Solicitor Advocate Rules, state that where counsel is in doubt about the proper course to adopt he should consult the relevant office-holder of the appropriate professional body. For advocates that means the Dean or Vice-Dean of Faculty. For solicitor advocates that means the Secretary of the Society. The Advocate's Guide is more verbose on this point and paragraph 7.3 states that an advocate must follow the advice offered by the Dean or Vice-Dean as the case may be, whereas no equivalent provision appears in the Solicitor Advocate Rules.

Accepting instructions and the basis of doing so

84. The provisions of the Advocate's Guide and the Solicitor Advocate Rules relating to the acceptance of instructions differ quite widely. To some extent, that reflects core differences between the two branches of the profession. But other provisions dealing with the circumstances in which counsel can and cannot accept instructions derive from general concepts of probity or have a clear correlation with the concept of counsel being officers of the court. To the extent that standards about the acceptance of instructions are germane to those more universal themes a comparison of the provisions is set out in the following paragraphs.

85. Paragraph 8.3.11 of the Advocate's Guide and paragraph 1(4) of the Schedule to the Solicitor Advocate Rules state, in identical terms, that counsel must not allow his personal interests to affect the performance of his professional duty (for instance where he has a pecuniary interest in the outcome of the case). However paragraph 8.3.11 of the Advocate's Guide goes on to warn advocates of the risks of involvement in a case where a spouse, partner or other person with whom that advocate has a close personal relationship is a party on either side. No such warning is set out explicitly in the Solicitor Advocate Rules.

86. Paragraph 8.3.12 of the Advocate's Guide and paragraph 1(6) of the Schedule to the Solicitor Advocate Rules, state that counsel must not accept instructions in respect of a case which he considers to be unstateable in law, or to be stateable only by distorting the facts. The provisions are in broadly the same terms. Notably these provisions require that counsel should ordinarily stop acting in a case where, having initially accepted instructions, it subsequently emerges that the case is unstateable. As noted above, the Solicitor Advocate Rules contain a specific provision to that effect in respect of criminal appeal cases whereas the Advocate's Guide does not. It may be Faculty took the view that such specific provision was not required standing the general provision in paragraph 8.3.12.

87. Paragraphs 8.3.13 and 8.3.14 of the Advocate's Guide state that an advocate must not advise, represent or act on behalf of two or more clients where is a potential conflict of interest. Solicitors are also subject to strictures in how they handle conflicts of interest, or potential conflicts of interest in terms of paragraph 6 of the Schedule to the Solicitor's Practice Rules. The provisions in the Advocate's Guide and the Solicitor's Practice Rules are textually different, but there appears no material difference in substance.

Priority of instructions

88. Section 8.5 of the Advocate's Guide discusses the priority an advocate is to give to instructions. The general rule (in terms of paragraph 8.5.1) is that instructions are prioritised according to the order in which they were accepted. However that is subject to paragraph 8.5.3 which sets out relevant considerations which may modify the operation of that rule, including such factors as the forum in which the case is heard and the extent of the advocate's prior involvement with the case.

89. The rules relating to the precedence of solicitor advocates instructions are set out in the 1992 Rules. Unlike the Advocate's Guide, the 1992 Rules put the issue of forum ahead of the date of acceptance of instructions as the key factor in determining priority (rule 3). It is also notable that the 1992 Rules differ from the Advocate's Guide in not mentioning the Court of Justice of European Communities or the European Court of Human Rights. That is curious since the structure of the 1992 Rules would seem to mean that instructions in respect of cases before those courts should be treated as of the lowest priority as a result. That is in stark contrast with the Advocate's Guide's approach, which makes cases before those courts the highest priority. Representation before these European Courts can be provided by any lawyer qualified to practise before the courts of his home state.

Cancellation of instructions

90. Section 8.6 of the Advocate's Guide and paragraph 5 of the 1992 Rules deal with the issue of cancellation or, as the Advocate's Guide puts it, return of instructions. The provisions are similar in effect and at points identically drafted. Essentially they insist that counsel should only cancel instructions once accepted with good cause.

91. The noteworthy points of difference are that the Advocate's Guide discusses the return of instructions in cases where that is required in terms of the Proceeds of Crime Act 2002 (at paragraph 8.6.8). The 1992 Rules do not have similar provision.

92. Further paragraph 8.6.9 of the Advocate's Guide states that the paramount consideration is the interests of the client. The 1992 Rules do not contain an equivalent statement; although of course solicitor advocates are enjoined to treat the client's best interests as a paramount consideration by paragraph 3(1) of the Schedule to the Solicitor's Practice Rules.

Passing on instructions to other counsel

93. Paragraph 8.7 of the Advocate's Guide states that an advocate is not entitled to pass instructions on to another advocate without the consent of the instructing solicitor. Presumably although the Advocate's Guide discusses passing instructions on to another advocate, it would be equally impermissible to pass instructions on to a solicitor advocate.

94. The 1992 Rules deal with the issue differently. Paragraph 6 states that where a solicitor advocate is unable to secure representation “for a person wishing to be represented by a solicitor-advocate” they must notify the Secretary of the Society. The Secretary must then either nominate and appoint another solicitor advocate and consult the Dean of the Faculty of Advocates. The approach of the 1992 Rules differs therefore from that of the Advocate's Guide since it suggests that in the first instance it is the responsibility of the solicitor advocate to secure alternative representation, which failing the responsibility devolves upon the Secretary. No exception to that is stated even in cases where the solicitor advocate is not the client's agent.

Appendix 1

Definitions

"1992 Rules"	the Solicitors (Scotland) Order of Precedence, Instructions and Representation Rules 1992;
"2002 Rules (Civil)"	the Solicitors (Scotland) (Rights of Audience in the Court of Session, the House of Lords and the Judicial Committee of the Privy Council) Rules 2002;
"2002 Rules (Criminal)"	the Solicitors (Scotland) (Rights of Audience in the High Court of Justiciary and Judicial Committee of the Privy Council) Rules 2002;
"the Advocate's Admission Regulations"	the Faculty's Regulation as to Intrants;
"the Advocate's Guide"	the Faculty's Guide to the Professional Conduct of Advocates (2008);
"the Advocate's Disciplinary Rules"	the Faculty's Disciplinary Rules 2008;
"the Complaints Commission"	the Scottish Legal Complaints Commission;
"the Dean"	the Dean of the Faculty of Advocates;
"the Faculty"	the Faculty of Advocates;
"the Judiciary and Courts Act"	Judiciary and Courts (Scotland) Act 2008
"the Law Reform Act"	the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990;
"the Legal Aid Board"	the Scottish Legal Aid Board
"the Legal Profession and Legal Aid Act"	the Legal Profession and Legal Aid (Scotland) Act 2007;
"the Lord President"	the Lord President of the Court of Session;

"a Pleader"	term used to refer to anyone with rights of audience in the Supreme Courts;
"the Review	the Thomson Review
"rights of audience"	rights of audience in the Supreme Courts;
“Rule 3”	Rule 3 of the Solicitors (Scotland) Supreme Court Practice Rules 2003
"the Society"	the Law Society of Scotland;
“the Solicitors Act”	the Solicitors (Scotland) Act 1980;
“the Solicitor's Admission Regulations	the Admission as a Solicitor (Scotland) Regulations 2001;
"the Solicitor Advocate Rules"	the Solicitors (Scotland) Rules of Conduct for Solicitor Advocates 2002;
"Solicitors' Discipline Tribunal"	the Scottish Solicitors' Discipline Tribunal;
"the Solicitor's Practice Rules"	the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008
"the Supreme Courts"	the Court of Session and the High Court of Justiciary;
"QC"	Queen's Counsel;
"Woodside"	Alexander Woodside v HMA 1996 J.C. 29; 1996 S.L.T. 155.

Appendix 2

Press Release

September 28, 2009

REVIEW TO BE CARRIED OUT OF RIGHTS OF AUDIENCE IN HIGHER COURTS

Senior Scottish investment banker Ben Thomson is to carry out a short independent review of the workings of the system of rights of audience in the supreme courts.

The review follows concerns expressed by the Lord Justice Clerk Lord Gill in an Appeal Court ruling, and a call for a review by the Law Society of Scotland .

The review is expected to report by March 2010.

Announcing the review, Justice Secretary Kenny MacAskill said:

"I am determined to see a justice system in Scotland that is fit for the 21st century. The Lord Justice Clerk and his fellow judges in the *Woodside* case raised significant concerns about the regulation of solicitor advocates. That, and the debate which has followed, have persuaded me that it is time for an independent review of the system of rights of audience which has been in place since 1990.

"I am delighted that Ben Thomson has agreed to carry out this review. Mr Thomson is a person of stature who will look at this with an independent mind.

"As the remit makes clear, the paramount issue underlining the review must be the proper administration of justice."

Ben Thomson said:

"There seem to be some general views in the legal sector that the different systems of training, qualification and regulation for solicitor advocates and advocates in representing cases to the courts may not deliver the best service for customers nor provide a level playing field. The aim of this review is to find out whether there is real substance to these views and, if so, to recommend ways in which the system might be improved."
NOTES FOR NEWS EDITORS

1. Ben Thomson is the Chairman of Edinburgh-based investment bank Noble Group which he joined in 1990, being Chief Executive from 1997 to 2007. He is also Chairman of the Board of Trustees of the National Galleries of Scotland, children's publisher Barrington Stoke and Reform Scotland, the non party aligned Scottish think tank.

2. Mr Thomson has been a member of the Financial Services Advisory Board (FiSAB) since 2005. He is also a non executive director of the Edinburgh International Science Festival. He is a former Scottish international athlete and graduate in physics from Edinburgh University.

3. The remit of the review is:
"In the light of the decision of the Appeal Court in the case of *Woodside v HMA*, to

- review the operation of rights of audience in the Court of Session and High Court of Justiciary, having particular regard to
  - The desirability of common principles applying in relation to the exercising of rights of audience by all practitioners appearing before the Court of Session and the High Court of Justiciary, and fair competition between solicitors advocates and advocates
  - The paramount importance of the proper administration of justice
- recommend any improvements which might be made to the regulation of such rights of audience, and
- make any related observations or findings."

4. Both advocates and solicitor advocates have rights of audience in the Court of Session and High Court. Advocates are regulated by the Faculty of Advocates, and solicitor advocates by the Law Society. In the case of *Woodside v HMA* (18th February 2009), the High Court criticised the behaviour of solicitors representing a person facing a murder charge, and Lord Gill said that 'This appeal has highlighted problems of rights of audience that seem not to be unique to this case. I think it would be opportune if there were to be a review of the working of the system overall.' The review will look at the overall system, covering both advocates and solicitor advocates.

5. Ben will be supported in his work on the Review by Sarah Booth. Sarah is a Scottish qualified Solicitor who has had a career in industry as general counsel in a number of international commercial organisations, including Christian Salvesen and more recently Sodexo.

Contact: Stephen Orr: 0131-244-2656
News Release: «News Release No»

Appendix 3

List of Meetings

Date	Meeting
24th September 2009	Kenny MacAskill MSP
14th October 2009	Faculty of Advocates
	The Law Society of Scotland
29th October 2009	Scottish Solicitors Disciplinary Tribunal
	Professor Alan Paterson
4th November 2009	The WS Society
	The Office of Fair Trading
	Lord Justice Clerk, Lord Gill
5th November 2009	Lord President, Lord Hamilton
	Society of Solicitor Advocates
	Glasgow Bar Association
16th November 2009	Scottish Legal Complaints Commission
	Consumer Focus Scotland
	The Law Society of Scotland
17th November 2009	Faculty of Advocates
25th November 2009	Scottish Legal Aid Board
	The Law Society of Scotland
14th December 2009	Lord Malcolm
	Lord President, Lord Hamilton
	Lord Mackay of Drumadoon
	Oracle Chambers
	Lady Smith
	Lord Advocate and Solicitor General

Appendix 4

Thomson Review Team

The Review team who conducted all the meetings were Ben Thomson and Sarah Booth.

Colin McKay of the Constitution, Law and Courts Directorate of the Scottish Government organised the Review team support. Technical research was provided by Fraser Gough of Scottish Government Legal Directorate, Civil and Constitutional Law Division. Administrative and other support was provided by Steven Day, Susan Anderson and Jill Clark.

Ben Thomson was paid ● for the Report.

Sarah Booth was paid ● for the Report.

Out of pocket travel and other expenses were met by the Scottish Government.