Trials of Strength: The Reconfiguration of Litigation as a Contested Terrain

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The past 15 years have seen a significant attempt by governments in the United Kingdom to restructure the market for legal services. As a part of this program, in 1992 the English bar finally lost its exclusive jurisdiction over advocacy. Although solicitors could qualify to appear as advocates in the higher courts, few have so done. We explore the perceptions of legal professionals, solicitors, and barristers through a qualitative study. By examining the legal profession as a set of connected but differentiated and competing fields of practice, we show how change resonates with the legal market. We find that institutional coherence and client service vie with the desire to become *complete lawyers* in the rationale for solicitor advocacy. The identification of institutional constraints on the pursuit of professional hegemony leads us to qualify the proposition that professionals are motivated purely by economic returns or market dominance.

In English legal culture, advocacy is inalienably associated with the barrister. The barristers' monopoly of higher court advocacy, and with it domination of the bench and profession, evolved over 700 years. Faced with the market orientation of the 1980s and 1990s, the bar's hegemony began to dissolve.[1] As a part of this process, the battle over rights of audience in the higher courts brought to a head the historic tension between the branches of the profession. It was, however, part of a wider pro-

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[1] For example, the two-counsel rule—queen's counsel (QC) accompanied by junior counsel—where the junior is paid a fee equivalent to two-thirds of the QC, irrespective of the amount of work. Greenwood and Hinings (1996:1029) argue that as a mature profession, the institutional pressures for conformity are high.

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cess and concluded a decade of deregulation of legal services—and reregulation of the legal profession—in which old assumptions, particularly regarding professional jurisdiction, were questioned.

Until 1992, civil litigation in the high court was allocated according to role and status within the legal profession. It was initiated by solicitors and continued by them through various intermediate stages until the dispute reached court, when it was transferred to a barrister, counsel, to present orally (Glasser 1993). Similarly, it was necessary for solicitors to instruct counsel to appear in criminal cases in the Crown Court, the only venue for significant numbers of jury trials. Appeals from these senior courts of first instance had also to be presented by barristers. Their centrality in the presentation of cases conferred a superior status on barristers; although solicitors controlled litigation, in cases of any importance, barristers were asked to prepare, inter alia, formal statements of claim and defense, and advise solicitors on any step leading to trial. Potentially all matters of discretion and skill from liability to evidence were covered. Exclusive access to higher courts conferred on barristers strategic control of litigation. Solicitors commanded lucrative areas of work of their own, but, in the context of litigation, they had a service role. Moreover, if either barristers or solicitors wanted to exchange roles in relation to litigation and advocacy, they also had to rearrange their status categories.

This article outlines the findings of research conducted in 1995 and 1996, some 2 years after solicitors were permitted to appear in the higher courts as advocates. It addresses the phenomenon that very few appeared willing to do so, thus challenging analyses that see market dominance as the driver of professional action. Before outlining the empirical work and some implications for theories of professional motivation, we set out the context of our research. This introduction is divided into two parts: first, a description of the wider economic and political backdrop to changes in jurisdiction over advocacy, and second, the organization and culture of the split profession that was its subject.

The Economic and Political Context

The jurisdictional settlement between solicitors and barristers persisted since solicitors emerged as the dominant contenders for the legal work rejected by the bar. In the early nineteenth century, the bar consolidated its role as a specialist consultancy and advocacy profession acting only on referral from solicitors. Solicitors accepted this inferior role but secured a lucrative and secure monopoly over conveyancing, the transfer of land. This settlement was upset by the New Right Agenda of the Conserva-

tive governments of Margaret Thatcher in the 1980s (Gamble 1998; Lawson 1992). Tackling the economic decline of the United Kingdom and responding to the pressures of economic globalization, Thatcher sought to reestablish classical liberalism. In subjecting the economy to a free market and reversing the social democratic consensus that had existed since World War II, her governments were marked by a determination to confront and vanquish those vested interests that resisted the new order (Gamble 1998; Gray 1998).

Attacks on professional jurisdiction pervaded the 1980s with professionals subject to internal markets where intraoccupational competition was not possible. In relation to lawyers, change seemed at once seismic and yet less successful than in other areas (Burrage 1996, 1997). The first step was taken in 1984, following concern about the cost of domestic property transactions. Through the policy of selling local authority houses, the Conservatives aimed to create a property-owning majority. A new occupational group, licensed conveyancers, was created, and solicitors' charges tumbled. This encouraged the government to turn its attention to a more entrenched problem: mounting concern at the cost of legal aid and the inaccessibility of the legal system consequent on the progressive raising of eligibility limits (Moorhead 1998). The loss of conveyancing and legal aid income was keenly felt by the solicitors. The Law Society, the solicitors' professional body, demanded rights of advocacy in the Crown Court, the criminal court of first instance for jury trials, and the preserve of the bar.

In 1986, barristers torpedoed an attempt to negotiate a new settlement on Crown Court advocacy rights (Marre Report 1988). The lord chancellor, the government minister charged with responsibility for the legal profession, then published a Green Paper (a government discussion paper) on the work of the legal profession in 1989 (Lawson 1992:621). The Courts and Legal Services Act was enacted in 1990 and contained the mechanism for changes in the rights of litigation and audience considered here. Lord Mackay of Clashfern, a former advocate and Scottish judge, was given power under the act to recognize the right of any group to offer litigation and advocacy services. The act also established a statutory body, the Lord Chancellor's Advisory Committee on Education and Conduct (ACLEC), to consider applications for rights to conduct litigation and advocacy and to advise on the adequacy of proposed qualification and regulatory regimes. He also vested in four senior judges the right to veto applications.

Following a successful application by the Law Society, solicitors were permitted to become advocates in the higher courts.[2] Under the Higher Courts Qualifications Regulations 1992, some solicitors, those with extensive experience—for example, barristers who had changed profession—were given automatic rights. The majority were subject to a qualification regime that required them to make a substantial number of appearances in lower courts, attend a course, and pass a written and practical test of competence. Even though these requirements were seen as onerous and in excess of the bar's own requirements, the removal of formal barriers might have led to a flood of solicitors seeking access to a lucrative field of practice.

Yet the numbers of solicitors granted higher rights remains low, well under 1,000, within the general population of practicing solicitors of 68,000. In May 1997, a Labor government was elected. During his first year of office, the Labor lord chancellor, Lord Irvine of Lairg, evinced his determination to continue to make legal services more accessible, including by creating a Community Legal Service. On February 24, 1998, he intervened in the committee stage of the Crime and Disorder Bill in response to a proposed amendment in the higher rights of audience for solicitors. Lord Irvine observed that his predecessor had been

> right to seek to open up the provision of legal services, especially rights of audience, so that the question of who could appear in the courts was based on something other than old-fashioned restrictive practices [but] the provisions . . . of the 1990 Act have singularly failed to achieve what was hoped for them. It is arguable that the only tangible achievement is that, seven years on, 596 solicitors in private practice [approximately 0.9%] have been awarded the right to appear in the higher courts. (Hansard 1998)

During his short term in office, Lord Irvine has made repeated attacks on the fees of barristers, many of whom were alleged to earn substantially more from legal aid than do senior hospital physicians (Boon & Levin 1999:226). Of real concern to the lord chancellor was that ACLEC had refused to sanction advocacy rights for various groups of employed lawyers. One of these, the Crown Prosecution Service, offered the prospect of cheaper advocacy in criminal cases. ACLEC's problem was the impartiality of public prosecutors. When Lord Irvine called for a "fresh modern approach to rights of audience," he signaled his determination to abolish ACLEC, to recognize the rights of employed lawyers to enjoy higher rights of audience, and to abolish the right of the judiciary's representatives to veto the recognition

[2] These courts include the High Court (Queen's Bench, Family, and Chancery Divisions), the Court of Appeal, and the House of Lords. Solicitors already had advocacy rights in the inferior courts (county and magistrates' courts).

of new groups of litigators and advocates (Lord Chancellor's Department 1998b).

The low numbers of solicitors seeking to qualify as higher court advocates undoubtedly undermined the prospect that intraprofessional competition would stimulate cost reductions. In this respect, we argue, it was not the failure of the "unacceptably labyrinthine and slow" procedures laid down in the act, but rather more deep-rooted factors that account for the phenomenon the lord chancellor described. These are much less susceptible to immediate change.[3] The article, therefore, explores an attempt to restructure a well-established market for legal services. We are less concerned here with whether the changes enacted by government are beneficial, although it will be seen that most solicitors were deeply concerned about their implications. Rather, we are concerned with the way that those within those structures perceive their circumstances and potential for agency. This forces us to consider the professional structures and cultures that underlie and resist change and requires an appreciation of the significance of advocacy to professional organization.

The Organizational and Cultural Context

Lawyers invariably engage in any number of activities, from politics to business, creating problems of definition and comparison (Abel & Lewis 1989; Ramsay 1993). Trial advocacy is traditionally at the very heart of the core of legal activity. The ideology and ethics of lawyers are steeped in advocacy.[4] The pursuit of justice, hence access to courts, characterizes lawyers and gives meaning to the idea of the legal profession (Abel-Smith & Stevens 1967; Abel 1986; Abbott 1988; Morison & Leith 1992). Although solicitors could appear in lower courts and tribunals, the bar's monopoly provided a foundation for lucrative drafting and counseling business in relation to higher court matters. Solicitors dealt with clients day to day; the bar seldom saw clients.

The advocacy monopoly also played a critical role in determining status and prestige in the hierarchy. The bar's monopoly, and the separation from clients, rendered advocacy a sanctified activity remote from the quotidian concerns of business (cf. Morison & Leith 1992). The advocate's disdain for choosing between desirable and undesirable clients is manifest in one of the most powerful symbols of the English legal profession, namely, the cab rank rule. Solicitors are not subject to an obligation of neutrality. Although much of this tradition is a recent invention (Hobs-

[3] Since our research report was published, the lord chancellor has taken on board the concept of cultural transition and change as problematic. See Lord Chancellor's Department (1998a).

[4] "Litigation is an important tool of regulation in society." Martin Day, medical negligence solicitor, *Today,* BBC Radio 4, 19 August 1998.

bawm & Ranger 1992; cf. DiMaggio & Powell 1991), it has shaped the character of the profession.

Hobsbawm noted that "inventing traditions . . . is essentially a process of formalization and ritualization, characterized by reference to the past, if only by imposing repetition" (Hobsbawm & Ranger 1992:4). The ritualization of advocacy and litigation in the higher courts is a key example. Notions of priesthood have been invoked, as in Barnett Hollander's (1964) hagiography, *The English Bar: The Tribute of an American Lawyer,* where he celebrates the barrister's remoteness from clients:

> It should be remembered that if counsel fails to appear the opposing counsel will take his place and in the best of faith adduce the facts and state the law that he must meet and overcome. Here is "priesthood". Patience and thoroughness is the rule of the Bar and the Court; time is never more than a passing consideration and counsel are permitted to exhaust the argument . . . no warning light and cutting short as in the U.S. Supreme Court—"Justice is seen to be done". (p. 53)

Abbott further asserts, "The barrister stands above the solicitor because he works in a purely legal context with purely legal concepts; the solicitor links the law to immediate human concerns" (Abbott 1981:824). The barrister's activity is legitimated by access to the courts, which are both truly powerful and symbolically mighty. Advocacy, therefore, encapsulates within litigation a kind of "purity" that reinforces tradition and convention.

Mary Douglas (1966:162) highlighted the perils of claims to purity when she said: "Purity is the enemy of change, of ambiguity and compromise. Most of us would feel safer if our experience could be hard-set and fixed in form." Distinctions between barristers and solicitors have, until recently, secured the identity of each. For example, Aylett (1978:160) attributed the following apothegm to Quintin Hogg, a former lord chancellor: "The solicitor is a man of business, a barrister an artist and a scholar." This idea that barristers are socially and intellectually superior to solicitors (Glasser 1990) is reflected in the image of a pyramid with judges at the apex and barristers representing a higher, more rarefied, level than the solicitors.

Our study attempts to break with grand theoretical analysis of legal professionalism to examine the cultures of fields of practice. Cultural analysis sometimes creates a picture of integrated forms, various elements working, consciously or unconsciously, toward a common end. We prefer ideas of differentiation and ambiguity that "stress inconsistencies, delineate the absence of organizationwide consensus usually in the form of overlapping, nested subcultures" (Martin & Meyerson 1988:110). Ambiguity is important because it "directs our attention to the lack of clarity and the uncertainty, confusion and double meanings which organizational culture holds for organization's members" (Schultz

1994:12). The legal profession is therefore seen as a set of subcultures that are often in friction with each other; this type of competition is both interprofessional (e.g., solicitor versus barrister) and intraprofessional (e.g., solicitor versus solicitor).

Essentially, ambiguity highlights the complexity and confusion that inhere in organizations and institutions. Both barristers and solicitors appeal to the symbolic power of historical precedent and tradition, combined with the good of the public interest, for justification of their actions or, in some cases, of the role of market forces. These appeals mark out one group from another and attempt to claim territory for their own purposes. As relationships change over time, differences are recast and redrawn, creating more uncertainty over what was once settled turf. The division in the bar between commercial and noncommercial barristers is one instance of ambiguity and difference where the former serves privately funded clients and the latter is largely funded by the state. Similarly, recent turmoil over the Law Society's role as labor union versus professional association indicates differences in the culture of being a solicitor. Nevertheless, there is cooperation, as both sides of the profession require each other's skills and resources. And there is a social structure that supports the onset and distribution of social capital, which facilitates the creation of networks that provide the means for solicitors and barristers to do their work (Coleman 1988).

In understanding how competition succeeds or fails in overturning tradition, we must focus on how lawyers have structured the market through their organization as firms, for solicitors, and as chambers for barristers. Through partnerships, solicitors not only facilitate direct contact with clients, but they also share collective responsibility. The independent consultancy status of barristers is reinforced by prohibitions on partnership and prohibitions on holding client monies. Yet the institutional dimensions of these organizational forms have been largely ignored in sociolegal research (Nelson & Trubek 1992; Galanter & Palay 1991). Analysis of professional preoccupation with markets (Larson 1977; Abel 1988) has been supplemented by greater attention to the interplay between government policy and occupational strategy (Halliday 1987; Johnson 1993; Halliday & Karpik 1997) and the "benign, even altruistic" (Halliday 1987:3) dimensions of professional action. The focus of this article therefore is those institutionally generated factors, organization, and culture that policy makers have tended to ignore when unleashing competition in well-established professional markets. In making choices about whether or not to become higher court advocates, solicitors weigh becoming *complete lawyers*[5] against efficiency, cost, and service to clients.

[5] The concept here is drawn from Isaak Walton's *The Compleat Angler.*

Powell (1996:962) suggested that, compared with other disciplines, "research on the organization of law is too insular, missing an opportunity to assess how the broader social environment modifies conduct inside the law firm as well as to analyze how the organization of law firms influences how clients interact with the law." We avoid treating fields of practice as homogeneous and seek sensitivity to cultural distinction and difference (Nelson & Trubek 1992). We attempt to bring together macro-micro concerns by situating one aspect of lawyers' work, advocacy, in the context of the markets for litigation. Our approach enables us to scrutinize the conflicts arising out of the cultures of different fields of practice and their attempt to come to terms with large-scale change throughout the profession.

Methods and Data

We addressed these issues by examining solicitors engaged in four fields of practice—corporate, personal injury, criminal defense, immigration—and barristers active in each, as case studies. These fields were selected because although they are not a comprehensive representation of available fields, they provided a range of institutional forms and hence possibilities for interaction with the market for advocacy services.

The research was undertaken during 1995 and 1996 when solicitor advocates numbered some 400, of which a large minority had qualified under the "grandfathering" provisions. The London focus enabled us to explore a context in depth and to maximize our understanding of how the market for advocacy services operated in practice (cf. Heinz & Laumann 1982:27). In the context of England and Wales, London has the advantage of containing the greatest number and widest range of lawyers, including the greatest concentrations of specialists, and the most courts. The four fields represented established and developing areas of practice. They rely on diverse funding; employ a variety of arenas for dispute resolution, from tribunals through arbitration to all levels of courts; and are populated by different groups of practitioners. All are subject to external influences, such as developments in European law or *lex mercatoria* (Teubner 1997).

Within each field, we interviewed solicitors, barristers, and judges (or their equivalents). We followed three phases, based on semistructured extensive interviews, so as not to preclude anything that might be of interest and use. First, we selected three firms in each of the four fields and undertook intensive interviews with key individuals in each firm. These were the senior litigation partner and another partner, a departmental head where one existed, and an assistant or a trainee. A number of resources were used to assist in selecting firms and solicitors, such as the *Solicitors' Directory, The Legal 500, Chambers & Partners'*

Directory, and our own, and others', extensive networks. This was not intended to be a random sample. Indeed, we aimed to capture member firms from the leading group in each field, whether they be the biggest, the most active, or the most experienced. Bourdieu has emphasized the importance of capturing the salient members of a field, otherwise a researcher risks "mutilating the object you have set out to construct" (Bourdieu & Wacquant 1992:243).[6] Each interview was tape-recorded and fully transcribed.[7] Interviews lasted from 1 hour to over 2 hours. Second, in addition to solicitors, we interviewed a small sample of barristers working in the same fields—three from each field—whose names were suggested by the solicitors. The perception of increased competition for scarce resources would, we hypothesized, markedly affect the relationship of the two sectors of the legal profession. An initial speculation, for example, was that as solicitors move more toward advocacy, barristers would take on more "full-service" activities, such as negotiations and deal making, or that even fusion could occur. Third, we also took a small sample of tribunals across the four fields (e.g., immigration tribunals, county courts, magistrates' courts, high court) to interview judicial personnel and to explore their perceptions of this new market, especially as they would be dealing firsthand with barristers and solicitor advocates. We interviewed four judges or tribunal chairs. Finally, in May 1999, we interviewed Lord Mackay of Clashfern, the architect of the changes discussed here and, indirectly, the sponsor of our report. This was a total of 66 interviews. We also sent a questionnaire to a random sample of 200 lawyers in London to test the validity of the conclusions reached by our selective sampling method.

The Fields of Practice

In this section, we show how practitioners in the fields have responded to the changed market for advocacy. Corporate and personal injury represent the archetypes of legal practice, the former with the business as client, and the latter serving the individual. They demonstrate quite disparate responses to the opening up of the advocacy market. For heuristic purposes, as some of the issues that were raised span the fields, we devote more space to these two than the following, since they demonstrate the analytical core. Criminal defense, however, is often presented as the

[6] We conducted a small number of pilot interviews with solicitors known to us who assisted us in devising a semistructured interview schedule. Its purpose was not to be a formulaic set of questions to be asked slavishly, but rather a checklist of topics that supported extended conversations with the lawyers. It covered four broad areas: individuals' responses to the changing market, firms' attitudes, the profession's ideas, and the perceived societal response.

[7] The tapes and transcripts are on file with the authors. The quotations used in the text are as spoken by the interviewees. Extracts have been edited only for length.

ideal typification of what a lawyer does: the crusader against the system. But immigration is peculiar. It is the one field that is entirely unregulated in that anyone can practice in it, and many do, including charity workers and ex–civil servants acting as "consultants." These two fields have not readily embraced the ideal of change.

Corporate

Financial and corporate work provide a stable core for the large law firms in the City of London (Flood 1996). Litigation has grown in quantity and importance as City firms have committed substantial resources to dispute resolution (Vincent-Jones 1993). Corporate law firms have therefore become multifaceted and large. For example, Clifford Chance has around 1,500 lawyers and fee earners, spread globally and by specialization (*Legal Business 100* 1997:12). Clients, too, tend to be sophisticated repeat players who understand the markets for legal expertise. The international focus of the firms, and competition with American law firms where there is no de jure separation between litigators and others, led at least one large firm to create its own advocacy division. Corporate lawyers are at the forefront of the solicitor advocate movement and were vociferous opponents of the requirement that solicitor applicants for higher rights qualifications should have "flying hours" in inferior courts.[8] Although these firms' work would not ordinarily bring them before such tribunals, some firms offered discounts for small-value litigation work that would provide experience for their members.

The three firms interviewed in the corporate field are classified as follows. Alpha falls just outside the top 10 firms and has an established reputation as a provider of general and specialist corporate legal advice and services. Beta, a top 10 firm, also offers a wide range of corporate and commercial legal services and has a wide international clientele. Gamma, also in the top 10, is similarly renowned for its extensive and international range of services to the corporate sphere. As City firms, all three are in competition with one another. Being part of a rather select group, it meant that their outlook towards their work, their clients, the way the services are provided to their clients, and their opportunities for expansion and development are to a large extent shared. Their perceptions and views on the matter of solicitor advocates reflect this shared outlook.

These City firms see themselves leading change and innovation in the profession. At the time of the interviews, Beta had about four people qualified as solicitor advocates and another

[8] Flying hours are the numbers of hours in inferior courts required by neophyte solicitor-advocates before they can qualify. Barristers are not required to acquire them as they undergo pupilage.

four or five in the pipeline, with six or seven solicitors in preparation. Beta's partners estimated that there would probably be about 10 in a year or two, which would be adequate and would maintain parity with the competition. Although Gamma was seen as competition by Beta, Gamma considered itself the market leader and was therefore more likely to identify other firms as trying to keep up with it, rather than accepting them as true competition.

The firms had chosen different paths to the provision of advocacy services and set their own pace for change. This can be largely explained. Despite sharing the structural and cultural parameters of their involvement and commitment to greater advocacy rights for solicitors, specific individuals acted as agents of change. They had ultimately shaped each firm's position. The commitment, charisma, and determination of a single, or a small cluster, of individuals has made all the difference (Weber 1978:1111). This creates an interesting paradox (cf. Nelson 1988; Cooper et al. 1996): the City law firm, as a rational, bureaucratic institution, required to reconcile professional ideals of service and justice with its own commercial reality of profit maximization and cost effectiveness, combined with the individual as an agent of fundamental change and rethinking, with his or her faithful followers devoted with considerable zeal to the mission of becoming *complete lawyers.*

The context for rational decisionmaking in the corporate firms was somewhat clouded by uncertainty regarding market signals. It was unclear what demand there was for a "one-stop shop" incorporating litigation and advocacy services. The senior partner in Alpha thought that international clients, particularly corporations in the United States, "expect their lawyers to provide a seamless service in which they take the client from the first meeting through to the end of his problem—just as the lawyers have historically obviously done in relation to a transaction." Nevertheless, he was confident that an overseas client, familiar with the bar, would feel "much more comfortable if he is being taken to someone at the bar whom he is assured by his lawyer, whom he trusts, is a leading expert in tax or a leading expert in planning, or what have you" (CaII).

The other rational consideration for large corporate firms was whether the bar added value to litigation services. The same partner noted that since the beginning of the 1990s, leading solicitors' firms had attracted high numbers of the best graduates. The size of litigation departments had grown and now handled the same volume of trial work as larger sets of corporate chambers. Corporate litigation solicitors had increasingly specialized. They were, the same partner felt, a match for the leading corporate sets of chambers. They had more experience than barristers

in many fields and resented that they were seen, and even saw themselves, as mere conduits of information from client to bar.

An assistant solicitor in Gamma summarized a growing sense of resentment through two anecdotes. In the first, he described a case where he had "taken his foot off the pedal" and handed a troublesome client over to counsel to advise. He concluded that "what that guy has given us is zilch, absolutely nothing. Nice bloke, and all of that, but you put a point in and, 'Oh yes that is a good point' . . . they just devolve all of their responsibility to the solicitor and then the solicitor says, 'Well, I have got counsel's comments therefore my position is secure,' but the poor old client sits there with some half-baked work" (CcIII). His second example concerned the distribution of fees:

> I did an extremely large appeal about two years ago. . . . The brief fees were sickening. They were half a million pounds for the services of a QC. One chap accepted two hundred and fifty thousand pounds for a part of the case, which ultimately was not argued, and it was a part of the case that I and my colleague had put together completely. It was very nice of him, he bought me a bottle of champagne afterwards to say thanks for the work, but it was interesting that this guy got a house from my work and I got a bottle of champagne. (CcIII)

Even though these were by no means isolated examples, the rational calculations of most of the corporate lawyers tended to favor instructing barristers. Three sets of reasons were paramount; the preeminence of the bar in advocacy, the difficulty of reconciling the solicitor's role with advocacy, and the difficulty of creating an organizational structure that would address these problems.

The basis of the first reason, that barristers are likely to be more competent advocates, is rooted in recognition that barristers, because of their continuous exposure to the discipline of the courts, could do the work more efficiently and to a higher standard than solicitors. The opportunity cost to the solicitors of doing this kind of work could make outsourcing a most attractive proposition.

> On a very big discovery application I had earlier this year, I took the view that *(a),* the amount of time that it would have taken me to prepare for the application would be wholly disproportionate to the amount of time that counsel needed to do it, because, with my current experience, it would be a strange thing for me to be doing and I would have to prepare very carefully for it, and *(b),* I suspect that the chances of me doing it half as well as counsel were remote. This factor was very important to my decision, thinking of the client's needs. (CaIII)

The second reason, that existing professional roles were qualitatively different and incompatible, was pervasive. It is reinforced by the perception that entrants to the profession choose

the branch, and thus the role, that suits their personalities. Two elements were striking. Corporate solicitors were concerned that an ability to attend to the client's needs and to keep the client informed was jeopardized by advocacy. The exception was Gamma's senior partner who argued, "It's all manageable, with the resources we have it should be manageable" (CcI). The more common view was, however, expressed by the head of the litigation department in Alpha:

> A partner in a City law firm is meant to be a "client getter" and a "client pleaser" and, much less important, but none the less important, available to his partners. . . . I don't think that any of that is something that an advocate can readily do consistently with the requirements of his role as an advocate. It may be that I have been putting it at a very practical level; I get my leg mercilessly pulled by clients and partners if I'm not available every hour of the day at the end of the telephone at my desk. . . . If . . . I had to say that I am going after a three week trial, to take two weeks off to prepare for the trial, people would be very upset. (CaI)

He also spoke of the difficulty of reconciling the roles of advocate and negotiator, the latter being usually associated with solicitors. He observed that "if you are an advocate you want to see things slightly black and white. Your case is white and his case black. To be a successful negotiator, settler, you have got to see the shades of gray in the situation. . . . If you spent a day trying to see the common ground between the two parties and see the strengths of the other chap's case it is obviously much more difficult to get up and argue in the black and white terms that one wants an advocate to argue; that the other chap's case is hopeless and your case is very strong" (CaI).

The third reason, the organizational problem, is linked to the second. The idea that the functions of the different branches of the legal profession cannot be accommodated in the same organization is a fundamental truth to English lawyers. The head of the litigation department in Alpha said, "I suspect that all of the requirements of an advocate are antithetic to the ethos of a partner in a City law firm, certainly as we are currently structured" (CaI). All the firms found it difficult to conceive of an organizational structure that would guarantee a standard of advocacy equal to that of their other work. The assistant solicitor in Alpha noted, "The barrister rarely has to worry about clients—big advantage . . . you know if you take clients down to see them for a meeting, then they do not have to worry about clients. . . . They can just do their specific job . . . and give it back to the solicitor and it is the solicitor's job to pass it out" (CaIII). The senior partner in Beta put it this way:

> I think that one thing is for sure and that is that we are all wrestling with the same problem . . . how do you get people with sufficient experience? How do you act as the advocate and run the case? Should you have a separate advocacy group? Is it inevitable that one will develop? How do you ever get as good as the leading barristers who are in court all day, every day? Do you just do your own case or hold yourself out as being available for being an advocate for your partner's cases, *etcetera*? (CbI)

One solution to the problem of standards is to recruit barristers, who would then have to requalify as solicitors, to serve the advocacy needs of the firm "in house." None of the firms thought this viable. The litigation head in Beta argued that "barristers are not very house trained. We have many years ago now taken a couple in and it was a disaster on their side. They sort of operated as if they were still sole practitioners taking up pretty much any client that they wanted, to do whatever they wanted and it just does not really work" (CbI). Because of this lack of "house training," barristers were perceived as not knowing how to handle clients, and if they did, it could be with deleterious results. Similarly, Alpha's head of litigation suggested:

> City law firms tend to do better with what are called team players. I think that there are probably people who work better in a team and there are people who work better on their own. So I suppose I would say that the loners, if they do come into the solicitors' profession as opposed to, as I think they probably do, go to the bar, should go into advocacy and one should try and have the loners as advocates and the team players in the classic solicitor role. (CaI)

In contrast with this reluctance to welcome barristers in their firms, solicitors valued their ability to instruct a barrister when, as a senior partner in Alpha explained, the client says, "I want the very best advocate for this case, I don't mind the cost, I want the very best" (CaI). An independent bar enabled a junior partner in Gamma to consider "the identity and status of counsel on the other side . . . together with the complexity and size of the case, in deciding which barrister to brief" (CcII). The bar realized that solicitors "really only go back to those people with whom you do have an easy working relationship"(CbI) and, as Beta's senior partner explained, had attended to their relationships with solicitors. Thus,

> We will often have barristers in the office working and going through documents on cases or coming along to a conference in the office, meeting with clients, talking through problems. So I think the bar has become a lot less stuffy and much more co-operative and, in truth, good barristers have taken on board the idea that it is all—you know, you just become another, albeit very important, member of the team. (CaII)

The senior members of the firms in our study were more interested in training their own advocates than luring barristers into the firms. Rational commercial reasons featured less strongly than the desire that litigation solicitors become *complete lawyers*, able to handle entire cases, from interview to advocacy. In both Beta and Gamma it was possible to identify a small number of individuals who, with a great degree of determination and enthusiasm, had managed to sway the firm, the partners, and other colleagues toward adopting a more proactive and fully committed attitude to developing their firms' advocacy services. Their missionary-like zeal and charisma were absent in Alpha, and this partly explains the differences in the firm cultures and policy. The head of litigation in Gamma said that it was a "belief it makes for better lawyering and quality service to the client that drives me to believe that I ought to be doing more advocacy and not less. . . . Young lawyers in my office . . . all remark how different it is to the normal way of operating when they are much more engaged in the process and much more attached to the outcome, and they get much more job satisfaction" (CcI). Another senior enthusiast, at Beta, said:

> There is an enormous ground swell of desire to do [advocacy] from youngsters. We will not get or keep the quality of candidate we want . . . unless we allow them to do this. . . . It is a question that is asked at interview and when they come they want to do it. It is a key point; it is a career point as well. I want to do it, if this firm does not do it, I will do it elsewhere. But it is also, if I do it there is more prospect that I will stay on here; I have a better chance of becoming a partner if I do it and do it well. If the philosophy is that you are not going to be a credible litigator without it in ten years time, then I better have it. (CbII)

The threat to the corporate bar appeared to come not from changes in advocacy rights but in the propensity of corporate firms to use barristers less frequently for pretrial work than before. Although Beta and Gamma, in particular, noted this trend, they did not think that it would threaten the existence of the bar itself. They saw their own attempt to penetrate the market for advocacy services as their own crusade, a mission that was not shared, even by other elite firms. The senior partner in Gamma suggested that if one were to "go down . . . below the first ten, say, the firms are not at all interested in advocacy. They want to carry on their traditional way"(CcI). It was acknowledged that penetrating the market would require considerable investment and involve significant risk. The junior partner in Beta explained:

> Friends of mine who are barristers tell me that they do not care what . . . the top City firms do, because nine out of ten firms regularly send them work. Those firms are the firms with the

> most litigation in London and it is small work but it is interesting work, and it is trial work. When I say small work it is only small in comparison to the "catastrophe" work we get. Those firms will always brief [barristers] because they run litigation very differently. They do not run litigation . . . to think about cases really, they run litigation to deal with the client, to marshal the evidence and to hand it over. And that is why barristers are instructed and that is why they are such cozy partners really. [Barristers] are the legal brain on the case . . . that is why they will survive. Most of the bar doesn't have bread and butter work from us or from other similar firms. The bar's cheap if that's the way that you want to do it. If you are going to be a mail box, the bar is cheap. (CbII)

The main competitive impulse that concerned the firms in this study was "keeping up with the Jones" (cf. White 1981). The senior lawyer in Beta observed that "no one wants to get left behind. . . . It isn't coming from the client. It isn't coming from the attitude at the bar. It is coming from fierce competition between City firms to be able to say we can add something different. We are a 'one-stop shop', if clients buy that" (CbII). The assistant at Alpha said that the firms that did develop advocacy "will no doubt be going to tell the world, and to sell it to their clients" (CaIII).

The opportunity presented by this ambivalence among solicitors was not lost on barristers who cited their lack of overheads, detachment from clients and experience of court work, as reasons why solicitors would continue to instruct them. Competition from solicitors was forcing barristers to consider their competitiveness in terms of the quality of what they did. A leading corporate barrister made the point graphically:

> We've had a glorious unprecedented fifteen years . . . based . . . upon a boom in litigation and more and more people wanting to try litigation . . . and therefore the people involved in it make money. . . .Ultimately, we can only compete on quality, because assuming that we keep the price where it is has been, or going up in accordance with a sensible regime, if we aren't better than them then people will not instruct us. We have at the moment a most tremendous edge because we've got so much experience in relation to it, and we also have the edge that we don't restrict ourselves to one particular firm, as inherently, advocacy departments will do. (CB1)

In summary, corporate clients and corporate solicitors valued the presence of an independent bar in the market for legal services. The primary competitive consideration for these firms was not to lead the field but not to lag behind comparable firms. This was complemented by a more powerfully expressed desire to become *complete lawyers* and underlying resentment of the prestige, status, and business advantages enjoyed by barristers. This left City firms with ambivalent feelings regarding the increasing

marginalization of the bar. Alpha's litigation senior partner argued that

> We must be careful we don't change the system . . . for the short term commercial benefits of the big City law firm. People shouldn't underestimate the commercial interest that City law firms might have in this, nor their commercial clout. . . . I can see for the wrong reasons, and for reasons of ignorance largely, a head of steam building up to change the system, to merge the two professions, all at the altar of greater efficiency, lower cost, greater speed. . . . [Rather than lose the bar] we want to be able to say, "But on the other hand, we choose for your purposes." (CaI)

Most of the arguments about offering advocacy services had ethics and particularly the service offered to clients at their core. Most of the reasons had institutional concerns at their core. And on occasion they were conflated. Thus, a junior in Gamma, a supporter of solicitor advocacy, said, "If I could be convinced that it did not [benefit justice] and it was just a way of this firm making more fees, then I would be encouraged to look to do something else" (CcIII).

Personal Injury

Personal injury (PI) work is one of the staples of general legal practice,[9] combining "high-volume" areas such as road traffic and diverse areas of great complexity such as medical negligence. Less than 5% of cases involve advocacy, although the cost of advocacy is a significant component of the trial costs avoided by settlement (Cane 1993). Solicitors were handed an opportunity to undertake a significant volume of work in 1991 when the county court jurisdiction was extended to £50,000 in PI cases (O'Hare & Hill 1996:106). The field is increasingly dominated by specialists, including firms acting for labor unions under PI schemes, resulting in the creation of a personal injury panel to vet firms able to claim special expertise (Boon 1993).

All the selected firms acted for plaintiffs. Delta acted for legally aided clients, specializing in medical negligence. Epsilon worked mostly for labor unions and had offices in most of the major population centers in England and Wales. It treated each solicitor as a department whose expertise reflected the nature of regional clients. Zeta also worked for labor unions, but conducted more legal aid work than Epsilon. It had more balanced

[9] Personal injury work is one of four areas where there were relatively high numbers of solicitors specializing exclusively (Chambers & Harwood 1990). The smallest and largest firms and those located in London tended to derive fees from fewer categories of work than other firms, suggesting a greater level of specialization in those firms. Personal injury represented 7.9% of the cases generated by the profession in 1989 and 4.3% of the gross fees generated by the profession in the same period (Chambers & Harwood-Richardson 1991).

fields of work and a normal departmental structure. In addition to these three specialist PI firms, we included a small high street (i.e., small-town main street) firm, Ita. Half of the Ita partner's caseload was PI cases. He preferred to work on a conditional fee basis, which at the time of the research had recently been permitted. In agreement with a client, he was entitled to charge a markup on a bill, calculated on ordinary time charging principles, if he won the case. If he lost, the client would not be liable for this lawyer's costs.

Unlike the corporate sector, the senior staff in all the PI firms were wary of the creation of in-house advocacy departments, as the senior partner of Zeta indicated.

> We looked . . . at setting up our own advocacy department. We had it in mind to employ probably four or five counsel and then to sub-contract their advocacy services to other firms who needed it. . . . We looked very seriously at that sort of deal. Now, that was at the time when the bar was saying, "This is an end of history as we know it, we are all going to be out of jobs", and you were actually getting counsel phoning up and saying, "Look, any jobs going?" Since then the bar has realized that they are not doomed, quite the reverse. If they get their act together properly they can still deliver an economic, quality service that we would have difficulty doing. As far as we are concerned, we have put that, certainly as far as the PI department, very much on the back burner. (PcI)

Even the Ita partner, who admitted that becoming a higher court advocate was "attractive," thought that, provided there was a satisfactory supply of PI barristers, there would be no financial incentive to be an advocate. He said, "There are so many barristers desperate for work. . . . When we get the odd criminal matter, there are barristers who will go to court and sometimes be engaged in court all morning, on a fairly simple matter, for fifteen pounds" (PdI).

As with corporate solicitors, all the firms admitted that they were using barristers less for pretrial matters. With changes in court procedures, speed was increasingly important in the handling of personal injury work: "If you send papers to counsel, then anybody who is half decent, unfortunately, is going to have them for quite a long time" (PbI). Specialization had also enabled PI solicitors to take responsibility for a higher level of decision making and drafting of court documents. They were now likely to instruct a barrister to advise only to "protect your interests with regard to the client and the institutional clients" (PcII), the insurance facility, or for economic reasons; it is still "probably quicker to send it out and pay fifty to sixty pounds for a particulars of claim than it is to spend an hour or so doing it yourself" (PbII). Even the Ita partner had resolved to draft his own documents of claim, as it would mean "more money for me" and, as

he said, "To be honest, all counsel do is hit a button on the word processor, unless it is a particularly tricky matter, and there's no reason why I can't do that" (PdI).

Despite this trend towards greater solicitor independence, PI solicitors valued the two professions and the availability of expert counsel, although there was some ambivalence regarding the services offered by barristers. A middle-ranking lawyer at Zeta said, "Because the bar has become so tough for barristers to get into, I think the quality is improving. The people who make it are people who are generally good" (PcII). For the senior Epsilon partner, however, it was generally in advocacy that the bar excelled:

> What they have got is something I haven't and that is the lack of fear about standing on their feet. I feel that this is one of the reasons here that they are revered; it is because of that. . . .
>
> *Q. So you don't particularly respect their other skills, their research skills or negotiation skills or tactical skills?*
>
> Listen, this week we've had two barristers who have been found out, have given us wrong advice on two instances. I don't particularly hold them in any great regard. (PbI)

Just as there was little confidence that solicitor advocates could, in the short term, replace the quality of advocacy offered by the personal injury bar, none of the firms could see a way in which solicitors' PI practices could be easily reorganized to accommodate advocacy. The main problem is, as a PI barrister said, that "advocacy is something which you cannot just pick up and put down. I think that you have got to keep your hand in once you have got your skills" (PbII). Even with a high turnover of cases, the firms thought that they would be unable to provide enough trials for in-house counsel to stay at the cutting edge: "Most of the cases we deal with here settle, they don't get anywhere near a court and it is very difficult to compete in terms of training with the bar. Just by sitting in court the whole time, they get training by osmosis. You can't do that with solicitors" (PcI). And, "OK, we see one trial a month, two a month if we are lucky. Counsel know the judges" (PaI).

The partner in Delta, who frequently collaborated with American litigators, suggested that the bifurcated profession ensured that advocacy standards were higher among British barristers than U.S. attorneys:

> There is a tendency in the States to kind of get bogged down in a lot of minutiae whereas here . . . barristers seem to me at least to be in a position where they are above the minutiae, a bit more clear . . . barristers are good at that because that is their experience, they are looking at the case as a whole and haven't invested energy into the major points. . . . The Americans that I have seen I tend to feel that they have put so much into the

> case that they are going to run every point—they have invested time. (PaI)

One of the frequently mentioned elements of the partnership between solicitors and barristers in the PI field was the ability of the barrister to stand back from the case, almost in the role of judge. This allowed barristers to test plaintiffs' evidence by "cross-examining" them in conference. Solicitors felt that their need to keep a rapport with clients would inhibit them in this role. The split function ensured that "the client thinks you are his friend and the barrister is just doing his job" (PbIII). For this reason, barristers were trusted to carry bad news with more chance of acceptance by the client; as Zeta noted, "What continues to irritate me is that you can give a client advice in strong, considered and hopefully expert terms, which they rubbish. You then get the same advice two weeks later from a barrister and they accept it without demur. It is an irritation that we have to live with" (PcI). Beyond this, there was a feeling, articulated by a Delta partner, that separation maintained the integrity of the system by preventing solicitors, prone to overidentification with the plight of clients, from having too much control. Barristers, on the other hand, were more able to uphold a paramount duty to the court: "The barrister is moved away from the hurly-burly of everyday preparation of the case and they have a primary duty toward the court, but I am clearly torn, more toward my client and I think it far easier to get into shadier things—not revealing all you might and bending things round the truth" (PaI) (see Applbaum 1999:chap. 5).

As in the corporate field, PI solicitors emphasized the choice offered by the bar. In PI selection of advocates involved more than the right level of expertise for the case. The junior lawyer in Delta commented:

> I assess my clients and instruct barristers with the client in mind. I can think of barristers who would really do for the client. Nice and pompous and tall and looks very effective. [The client thinks] "This is a proper barrister, I am going to take notice of what they say!" Other barristers I would choose because they were small and user friendly and the client is going to feel much, much better. (PaII)

The senior partner in Delta said, "The real value of the British system is that we, doing ninety per cent legal aid work, can bring in the leading counsel of the day into a poor person's case" (PaI). Last, the choice of advocate is not final. The existence of an independent bar provided almost infinite levels of support in the event that initial choices proved to be wrong.

> At the moment I choose from such a large variety of people the right person for the job. If I don't like them, I sack them. I fought a case to trial last year; five days in the high court and I had got rid of one QC already. She was not doing the job and

> hadn't got her heart in the case, so I got somebody else to do the trial. Now, if I was faced with only somebody in-house and they had a negative view on a particular case, I couldn't get rid of them. I mean we won and we won well because counsel who was part of the team put his back into it. I wouldn't like to lose them, you know. (PaII)

Despite the plaudits for the existing arrangements between solicitors and barristers, there were problems. The solicitors claimed that they had good relationships with a few chambers and barristers who provided good service, but there was concern that, outside this clique, there were poor standards of advocacy at the lower levels of the bar (cf. Drummond 1996). This problem was exacerbated by the inaccessibility of suitable expertise and the cost, particularly of queen's counsel. The Epsilon partner complained about barristers who were "very embarrassed about the amount of money that we charge, but it would be humiliating if we went into court with a lower brief fee than our opponent." He said, "Quite frankly, I wouldn't be humiliated on four thousand pounds for a day's work" (PbII). The partner in Zeta explained, "The people who are good get made up to QCs and we can rarely justify using a QC . . . the quality of the junior ones is not anything that is better than I can do and, therefore, I don't want to instruct them. The quality is there, it is a problem getting to it" (PcII).

Many of the PI solicitors believed that barristers' wigs and gowns potentially discriminated against solicitors and could perpetuate any prejudice which solicitor advocates might experience from clients, bar, bench, and public. That the barrister's wig and gown placed psychological distance between them and the client was seen as a mixed blessing. It augmented an attitude of superiority and pomposity in some barristers, which some of the solicitors found infuriating. This was most keenly felt by the trainees and newly qualified lawyers. Those at Zeta and Delta said, respectively:

> I get asked . . . by clients, "Are you going to be a barrister one day?" I think that people are still of the opinion that solicitors are baby barristers waiting to come out of their chrysalis and become a barrister. That really annoys me. (PcIII)

> . . . I have realized the bar have a perception that they are exclusive and perhaps better, superior in terms of their training, or whatever . . . but from outside the profession, especially when people ask what you do and you say, "Solicitor", they go, "Oh, right, you're like a paralegal", and you have to tell them about the division and their perception is that we are one rung below barristers because they are the people who do it in court, they must be higher than we are. (PaIII)

All the young lawyers were very interested in advocacy, a fact that surprised their seniors. They shared with some of the corpo-

rate lawyers a desire for *complete lawyering*. They were, however, fearful that once they became an advocate they would be under pressure to service colleagues' cases. To do so they would need to sacrifice client contact. Far from being *complete lawyers,* they feared becoming court hacks, undervalued by their firms. The reason was their belief that client contact, and hence income control, would always be valued more highly than advocacy within their firms.

Among the PI firms, there was great anxiety regarding an uncertain future. It was felt that solicitors and barristers would be in sharper competition for a decreasing pool of resources for PI litigation.

> If you have been given a pot of money, half a million on a couple of really complex cases . . . the division between you and counsel is really important, and getting the silk coming in after you have labored for two and a half years, and they come in for a month's trial and take half the fee, you may find that the pressures may start to accumulate. (PaI)

PI solicitors were apprehensive that high-quality junior barristers would be unable to attract sufficient work to establish themselves in areas such as personal injury that depend on a high volume of paperwork and limited trial work. These solicitors were anxious that there would be insufficient minor criminal work for young barristers to develop the skills they have traditionally transferred to areas like PI.

Although they shared this anxiety for the future of the junior bar, the senior barristers interviewed were confident that they would have work for the remainder of their own careers. The solicitors feared the decline of the pool of barristers in PI work. The senior partner in Epsilon had recently been concerned that chambers regularly instructed by Epsilon had decided not to continue in the PI field. He believed that they were either not confident about the future of the field or felt that they could build a practice in more profitable areas. A pervasive fear was that key players in the present system would break rank, that insurers or competitor firms would develop advocacy in house, depleting the ranks of top-quality advocates available in the open market. The infrastructure of the market for PI litigation was thought to be so fragile that even elite plaintiff firms might be unwilling to follow such a lead.

Criminal Defense

Although criminal work does not form the majority of law firms' work, many do find it a profitable field (Chambers & Harwood 1990:xi). It is a major field for the smaller firms, but only of minor interest to larger or City law firms. Apart from those who specialize in corporate fraud where clients are relatively sophisti-

cated, most criminal defense firms deal with one-shot clients. Criminal defense solicitors have long appeared as advocates in the lower courts, especially the magistrates' courts. The other key court for criminal work is the crown court where solicitors (unless qualified advocates) have only limited rights of audience.

To garner the range of criminal defense work, we selected six firms. The extended number enabled us to include white-collar crime and took account of the lack of hierarchy in these firms as compared with corporate and PI. The firms were market leaders in their field. Psi, a major firm dealing mostly with corporate crime, had 20 partners and over 90 staff.[10] Theta is a key legal aid firm that does much of its own advocacy and has eight partners and 60 staff. Iota, a small firm with two partners and nine staff, maintains a strong reputation in crime by being particularly linked to one of London's magistrates' courts. Kappa is an inner-city firm, long established with two partners. Lambda is a large firm in the City whose white-collar crime advocacy work has flowed from its institutional clients. Mu is a corporate firm that has a single partner who handles white-collar crime cases.

Only Theta had taken the step of organizing an advocacy department to take advantage of higher rights of audience, believing that a radical move was necessary to capture a market dependent on changing governmental attitudes to funding.

> We have now got three people in the firm who have got extended rights of audience. . . . Two people are attached to the firm. We amalgamated with another firm . . . and they don't have a caseload at all; they simply do advocacy. They are doing, I suppose, the same role as counsel really. We instruct them in the same way that we would instruct counsel; conferences take place in the offices and they get the brief at an early stage after committal so that they can have a lot of input to the fee earner whose case it is; at a much earlier stage, I think, than if we were using counsel. (DbII)

Individual solicitors had taken the necessary steps to become solicitor advocates. Psi described his satisfaction with being an advocate:

> I do appear in court, I feel comfortable in court and I am expected to appear in court and I am happy to do so. . . . I think there is nothing more satisfying than going and doing the hard fight in court in the best professional way. When you are on your feet and cross-examining, or you are putting forward a point of law, or when you are debating it with the tribunal that you are before and you feel that you have succeeded. (DaI)

Other firms were reluctant to travel the advocacy route, preferring to employ barristers when needed. The two arguments proffered were the putatively high cost of hiring in-house advo-

[10] Staff includes assistant lawyers, trainee solicitors, paralegals, and occasionally experienced secretaries.

cates and the inability of solicitor advocates to achieve the same level of expertise as barristers. Mu bluntly noted, "You can go off and have your six months advocacy training and think you are a whiz kid. These guys [barristers] have been at it for years honing their skills" (DfI). Lambda argued for a traditional solution to the desire to do advocacy: "There is an argument for saying that if solicitors do actually want to be advocates why do they not go to the bar? . . . There never has been a satisfactory answer to that" (DeI). All the criminal lawyers—solicitors and barristers—however, concluded that the future of the bar was uncertain. The expectation was that in the short to medium term, criminal advocates were as likely to be solicitor advocates as barristers, whichever group organized itself the more efficiently.

The issue of advocacy was to the criminal field a critical one. Most solicitors did not have the time to undertake their own advocacy. At the start of his career, Kappa's senior partner thought the division was "stupid, but now I run on my own a busy practice, I couldn't do without it" (DdI). Yet another aspect was the failure of most criminal solicitors to keep up with the law. Most of their practices were taken up with administrative and management tasks surrounding their cases. They therefore needed the bar to provide them with up-to-date expertise. Finally, the solicitors depended on the bar for its detachment and disinterestedness in advising them on the worth of a case, as Mu described: "They can advise the solicitor very independently, 'Don't think you've got much of a runner', or, 'Yes, brilliant case, let's go for it,' or, 'Have you thought of this angle as well'. Now, that is an independent mind which, if we had trial lawyers within the firm as they do in the States, you would not get because they would be identifying what they can't do" (DfI). And Iota reinforced the bar's value for small firms: "The great thing for small firms like us is what I have always said; we have on tap the best advocates without having to pay them a retainer or employ them and if we have the right case or the right fee, we can get the right person to do it" (DcI).

Although there was some interest in advocacy from among criminal solicitors, most rejected it. Unlike corporate, there were no charismatic individuals proselytizing for it, nor were clients demanding it from their solicitors. The division of labor was one that was satisfactory to both parts of the legal profession; for them completeness was not an object of desire. Criminal solicitors in many respects act as paralegals to the bar, processing the paperwork and managing the case.

Immigration

Immigration law straddles the two hemispheres of practice: the refugee and asylum cases thrown up by conflicts around the globe and the employee transfer cases as corporations move their personnel around the world. Rarely do law firms take on both types of cases. Much immigration case work is handled by charities, as it is the immigration rules rather than the statute itself that forms the linchpin of modern U.K. immigration control (Juss 1993). Most cases are heard before an immigration tribunal with a single legally trained adjudicator, with appeals going to an appeals tribunal that, besides containing lawyers, has a lay element (Pearl 1996). Important cases will sometimes be judicially reviewed in the High Court.

Pi is expert in the corporate immigration area having 23 partners. Rho is the best known firm for personal immigration work, especially in family matters. It has about 12 partners and 15 staff. Sigma handles many asylum and domestic servant cases. It has one immigration partner and three staff. Chi is a new firm with one partner and five staff. It handles personal and corporate immigration cases. Omega has a legal aid franchise, which gives it access to a plentiful supply of immigration work.

The crucial issue for immigration practitioners in the provision of advocacy services is the question of cost effectiveness. This remained true even for the corporate immigration specialists, Pi. The partner was gloomy: "My prognostication for a firm like ours as to the future, arising out of the availability of advocacy rights for solicitors, is essentially one of pessimism and worry. I don't see any of us having the time to become solicitor advocates; I don't see any of us having the inclination to do so" (IaI). The reasoning behind this pessimism relates to the principal factors of cost, size, and availability of other expertise.[11] The bar is cheaper than the charge-out rates of partners or even senior assistant solicitors in a central London law firm. These lawyers, as exemplified by Pi, could not envisage how they would absent themselves from the office for days at a time without neglecting the rest of their work.

> Cost is the biggest [issue] from the client's point of view. You see, if I want a ten year call barrister . . . I can get someone from . . . a very competent set of chambers for something like one thousand five hundred, to one thousand seven hundred and fifty pounds, including preparation. If I went and did it, I charge two hundred pounds per hour and if I am out of the

[11] An immigration barrister depicted the field as highly specialized: "Immigration is a much more smaller market rather than something like crime. It is a narrow area of law and I am fortunate enough to be in a chambers which is renowned to be very good at it, largely because of the reputation that has been created by senior members . . . to some extent what I do is insulated because it is a very specialized area of law and these are specialized chambers" (IbIII).

> office, travelling to the tribunal, being there, coming back and plus the time spent agonizing over practicing and researching and getting all my authorities right, a charge of one thousand seven hundred and fifty pounds, would mean a massive loss for my firm set against the time spent. (IaI)

The firms known for personal immigration work believed that the critical issue for the provision of advocacy services was essentially a question of desire, that is, whether or not the firm did, or wanted to do, advocacy. Asylum issues form the bulk of the work of firms specializing in the personal immigration field. The Asylum and Immigration Appeals Act 1993 gives the seeker, if he or she is refused asylum, the right to appeal. There is, however, no funding for appeal hearings.[12] So, although an applicant might be eligible for legally aided *advice and assistance,* there is no money available to fund a solicitor to do the advocacy. Applicants invariably have to borrow from relatives and friends. This unfortunately opens many applicants to exploitation by the "cowboy" immigration consultants (unqualified former bureaucrats) who promise results but abandon their clients as soon as their money runs out. Applicants are then forced to rely on charities for support and counsel.

Although firms may have the expertise to perform the advocacy, they were unanimous in saying this was never going to be cost effective. Only Chi expressed small hope that one of its lawyers might be able to do some advocacy sometime in the future. Sigma, which has a tradition of doing very little of its own advocacy, represented the dominant mode of thinking about advocacy. Occasionally, it is involved in preliminary hearings before the immigration tribunal and does an occasional emergency interlocutory application. Its partner said that the firm's attitude was unlikely to change unless or until legal aid became available for representation at the appeals' tribunal. The importance of this requirement was made clear by Sigma.

> I think that the effect of the Asylum and Immigration Appeals Act has actually meant that there are more appeals and more clients around with very little money and so we have already had to be more creative in how we have been able to find advocates for those people. I don't think that it is really feasible for a firm like this to do a lot of *pro bono* advocacy. We would just go under. Our income is mainly legal aid funds anyway. (IcI)

Although the immigration firms were reluctant to engage in advocacy without appropriate funding, they were sufficiently flexible in their approach to consider applying for government funded "franchises" that would give them a block grant to do the work. If this were instituted, the idea of employing an advocate,

[12] The original thinking behind the functioning of administrative tribunals was that their procedures would be so simple that ordinary people could represent themselves and therefore no legal aid would be necessary.

solicitor or barrister, becomes feasible. The senior partner of Rho was keen on this move, but he also recognized that without block funding, immigration solicitors would remain dependent on the bar for advocacy. He characterized the range of choice at the bar thus:

> I will not instruct the same counsel to do an asylum appeal as I would instruct to do a student appeal or a family reunion appeal; I will choose different people for different applications. I have an appeal coming up. . .which I think is tremendously important, it raises issues of . . . risk of persecution on the basis of gender and competence of a fifteen year old woman in the UK. . . . I will not instruct on that matter . . . one of three or four people I would instruct normally, on asylum appeals. I am going to choose . . . a barrister, who has a particular interest in gender persecution. They may not be someone I otherwise would instruct. (IbI)

Omega, a high street practitioner, said its firm was moving towards establishing closer links with freelance specialist advocates rather than setting up an advocacy department. These freelancers could then be given enhanced status within the firm by becoming consultants: "Although we are a reasonably . . . big legal aid firm, the demand for advocacy is not such that it would probably be economic to have someone based in the office full time doing advocacy. What is more sensible is that you develop links with someone who is effectively self-employed but who gives you greater preference" (IeI).

The immigration field is an example of a complete lack of interest in developing advocacy expertise. No rewards, economic or otherwise, accrue to performing it. And to clinch the matter, there were no champions for the advocacy cause. Clients neither appreciate it nor desire it. Immigration is a low-status field where the main object is either to process cases quickly as possible or, if there is a point of law that is reviewable in the High Court, hire a good judicial review queen's counsel who can be funded by legal aid.

The picture represented here in these four fields of practice shows 68,000 solicitors providing work for 6,000 barristers so they can concentrate on advocacy.

Enterprise, Markets, and Embedded Relations

In considering the market for advocacy services, our main concern is not the ways in which professions control their markets and exclude others (see Larson 1977; Harrington 1994). We have focused instead on how lawyers assess and exercise choices and particularly those factors that influence the decision whether or not to compete in "new" markets. Goriely (1996:215–16) illus-

trates the tendency for the English legal profession to be less than expansive when new turf opens before it.

> The organised [legal] profession has never taken the initiative in developing new markets among the poor. Instead, others—social workers, voluntary groups and pressure groups—have lead the way in pointing out problems and offering solutions. . . . "[T]he profession's strategy was one of co-option". They only devised new legal aid schemes when it became clear that if they did nothing others would do it for them. Their overriding concern was to keep control.

Traditionally, the legal profession has sought to protect what it had already rather than lay siege elsewhere.[13] In our survey of lawyers in London in 1996, we found only nine solicitor advocates in a sample of 117 solicitors. Table 1 shows the distribution of advocates between partners in firms and solo practitioners, which goes some way to support Goriely's point.

Table 1. Advocacy Status by Practice Status

Status	Partner	Solo Practitioner
Advocate	8 (9%)	1 (6%)
Nonadvocate	82 (91%)	16 (94%)

NOTE: There are 10 missing cases.

The legal profession, however, has not always had a free choice over whether it can avoid playing in a market. The advocacy market is one that has been opened up by government fiat. One way or another, the profession is compelled to adopt a stance towards the market. It may actively participate in, or reject it, or attempt to find a middle ground. Having shifted the *legal* jurisdictional boundaries (Abbott 1988), state and profession need to craft a modus operandi that helps the market flourish. In some respects, there is a similarity with Carruthers and Halliday's (1998:421–55) treatment of the development of insolvency practice in England. Solicitors were loathe to press for access to the rescue market, preferring instead to work in harmony (i.e., *workplace* jurisdiction) with the accountants rather than compete head to head. The crucial difference, however, between our case and that of the insolvency market is that the jurisdictional eruptions concerned *intragroup* and *intergroup* conflict over a core value—that is, advocacy—whereas in insolvency the struggles were *intergroup* conflicts between two professions, where one group, solicitors, had been only marginally involved in the field, which was dominated by accountants. In advocacy, we see solicitors, within and across fields, attempting to come to terms with their redefined selves as well as solicitors and barristers confronting each other. Abbott (1988) envisaged turf wars being

[13] Abbott (1988:chap. 9) shows how the U.S. and U.K. legal professions differed in reaching for new markets.

waged at the peripheries between professions, not at the core within professions.[14] This is precisely what has happened in the restructuring of advocacy.

Whereas rational choice theorists might argue that actors choose behaviors and lines of action because they maximize their welfare or utility (Elster 1986), in fact the opposite is often true (cf. Carruthers 1995). Actors will select action because of irrational reasons, for example, because they perceive others might be following a particular course of action and therefore they must be publicly seen to do alike (Han 1994; White 1981). If we accept that legal activity naturally combines both technical and ideological elements (cf. Gieryn 1983; Jamous & Peloille 1970), their interplay will sometimes lead to irrational justifications of action (Suchman & Edelman 1996:938). These can occur even if the consequences are deleterious to the actor; for instance, in the rush to open overseas offices, law firms did not always analyze the need for one, and so many were closed after a short but expensive sojourn (Flood 1996). Suchman and Edelman (1996:919) put it this way:

> Institutional factors often lead organizations to conform to societal norms even when formal enforcement mechanisms are highly flawed. Frequently cited institutional influences include historical legacies, cultural mores, cognitive scripts and structural linkages to the professions and to the state. Each, in its own way, displaces single-minded profit maximization with a heightened sensitivity to the organizational embeddedness within a larger social environment. . . . [That is,] organizations adopt many practices and structures, not for efficiency reasons, but because the cultural environment constructs adoption as the proper, legitimate, or natural thing to do.

As this suggests, the normative structures of professions render them occasionally resistant to concerns of economy or efficiency. It is the interplay between the technical and ideological within specific cultural settings that brings to life these aspects of professional life, which we call "culture in action," where culture provides "the characteristic repertoire from which [actors] build lines of action" (Swidler 1986:284) or the tension between jurisdiction and culture (see Burrage 1996; Sugarman 1996).

The legal profession's approach to advocacy as a new open market is deeply imbued with this philosophy. Its primary concerns are formed by the "cultural environment" of its fields of practice. Each is distinct and has its own character. The outlook of corporate lawyers is vastly different to that of criminal lawyers; the former being essentially entrepreneurial with desire to be the supreme lawyer and the latter being generally risk averse and not

[14] Note Bourdieu (1987:817) argued, "The juridical field is the site of a competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing a technical competence which is inevitably social."

totally imbued with the idea of being the best lawyer. Each, however, is attempting to construct its ideal of the *complete lawyer.* Embodied in the ideal are the elements that define the appropriate role and attributes of a lawyer. These vary enormously across time and space. For instance, Corfield (1995:86) demonstrates that

> by the later eighteenth century, it was unusual for criminal cases to be tried without specialist advocacy; and civil suits began to see the same pattern. The "lawyerisation" of trials in turn helped to clarify the laws of evidence and to crystallise the etiquette of professional intervention.

Each field has an ideology of lawyering that balances the permissible with the possible. Reasons for this arise because markets for expert knowledge tend to be small and sustained through relatively stable memberships or networks of ties (cf. Uzzi 1996). These memberships are socially structured and depend on developing trust and order (Granovetter 1985; Baker 1990). Reputation plays a significant role, as Leifer (1985:443) indicates: "A small and identifiable group of producers, attached to brands, develop stable and distinct reputations among consumers and hold onto stable market (volume) shares. The reputations are not arbitrarily distributed across producers, but are often tied to market share." A further element is imbricated in these professional markets, the effect of status as perceived by producers and consumers. Since reputations are unevenly distributed, perceived differences in quality frequently result in high-status producers receiving more customers than low-status producers. Moreover, the business flows to them with minimal or no costs of advertising (Podolny 1993). Such a market is difficult to enter and price will not be the crucial determinant in selecting a professional.[15] The connections between status and quality are at best fuzzy; they depend on incomplete signals about status from producers, buyers, and interested third parties.[16] There are also time lags in the signaling process (White 1981). The embeddedness of social relations within markets helps to facilitate the distribution of signals, but consumers are usually risk averse and will require proof of quality standards (Podolny 1993:838). In the case of advocacy, this is most important. Advocacy has significance because its outcome is dependent on the solicitor's correct selection of counsel, barrister or solicitor. The solicitor's view of reputation, based on the performance of counsel, reflects a body of knowledge beyond that of the client.

[15] For example, the market for auditing services among large corporations is dominated by the Big Five accounting firms, which possess the numbers of auditors and cost structure that enable them to undertake, say, the auditing of Ford. See Han (1994).

[16] In advocacy, one traditional signaling device has been the barrister's clerk, who vouches for the quality of a given advocate and so can bring on new barristers into the advocacy market (Flood 1983).

The corporate and personal injury fields strongly demonstrate these tendencies. In corporate law firms, the relationships formed with segments of the bar are deep and enduring, but they are not fixed in form. Both the bar and solicitors adapt to change rapidly with an appreciation of the consequences if they fail so to do. The top law firms and chambers have established almost invulnerable brands that create barriers to entry by others seeking to compete. It is generally recognized that the top five City solicitors' firms and the top four corporate chambers at the bar represent the market elite that constitutes a dense network of ties (Swallow 1999:28–29). Nevertheless, they both understand that although they dominate the domestic market, because of their high quality and durability, in the international market for professional services they are not insulated from external attack; the network effect is not so powerful. Thus, what may be largely acceptable to domestic consumers may well be repugnant to international clients. At this level, the quest for the best is even less constrained by price. City solicitors at least have the backing of considerable organizational resources to assist them; corporate barristers are remarkably undercapitalized by comparison. For example, under the 1999 government reforms to civil procedure, settlement has been affirmed as a primary goal of litigation, and the role of advocacy should diminish. Because the market for corporate legal services uses such imprecise, yet powerful, measures as status and reputation, it remains small and potentially responsive to change.[17] It can absorb the desire of some solicitors to become advocates, just as it can admit of some barristers moving into law firms and others remaining in chambers. Neither necessarily feels deprived of being a *complete lawyer.*

In the personal injury field, the response to change is perhaps slower, although also unevenly distributed across the field. The resistance here celebrates the complementarity of solicitors and barristers in the field. Only the younger solicitors are eager to establish new modes of advocacy; the senior members are content to maintain the status quo. The PI market is basically a domestic one, so there is no real external pressure to reform the arrangements between solicitors and barristers. Again, reputation and status are crucial determinants in saying who can participate in the field, but economic factors are irredeemably present. Corporate lawyering depends on private funds and is therefore able to experiment institutionally. In the PI field, the state is the main purse holder, with labor unions contributing

[17] Of course, these fields of practice need to reproduce themselves. Bourdieu and Passeron (1977) speak of cultural reproduction where social institutions perpetuate social and economic inequalities across the generations through influencing values and attitudes via the hidden curriculum in schools (e.g., private schools and certain influential universities). When we examine the cycle of change that the legal profession is now undergoing, all these forces are visibly at play: problems of reproduction, boundary disputes, fields of knowledge, and the exercise of power.

significantly as well. The mediating role of the state via funding injects an element of risk that serves to persuade the players to act safely and stay within stable networks. The disturbance of established relationships by rearranging the division of labor over advocacy would engender a set of struggles where neither side would necessarily benefit. At present, both sides receive economic rewards for being risk averse. Solicitors are not compelled to increase costs by setting up advocacy departments, which would potentially restrict their range of choice of counsel. Barristers retain the freedom to concentrate on "pure law" and leave the managerial aspects of the case to solicitors.

In both corporate and PI law, the nature of the client is different. Corporate clients are sophisticated consumers and repeat players; their lawyers have to "please" them. Clients are not hindered by lack of choice. Within the PI field, the appropriate analogy is that of client as "supermarket shopper," where in fact the range of choice is limited and often determined by an external paymaster. Although clients in general are absolutely essential, the significance of the individual client is small—clients are classic one-shot players and so receive negligible amounts of "pleasing" from their lawyers—instead, the context is that of the supermarket.

In conceiving of a "market for legal services," therefore, we employ White's (1981) interpretation. He asks questions not normally broached by economists. The crucial one is, "Why, when even the largest of firms wants to offer a product new to it to the public, does it usually do so by acquiring the persona of a firm belonging to an existing market?" (pp. 517–18). The burgeoning market for advocacy services provided by solicitors illustrates this. In some respects, solicitor advocates want to be like barristers, whereas in others, they claim a difference that says, in effect, besides being advocates we are also solicitors. White's sociological view of markets sees them as "self-reproducing social structures among specific cliques of firms . . . who evolve roles from observations of each other's behavior. . . . I insist that what a firm does in a market is to watch the competition in terms of observables" (p. 518). Advocacy lends itself to "observables" inasmuch as the product is often delivered within the public domain. Producers have to anticipate what will be the optimum volume of services in the market. This is extremely hard to fathom; all such market information is imperfect because feedback systems are inherently deficient. Producers must search diligently for information. And, "no firm can reliably assess relative qualities of other firms, and every firm knows that its position could be affected by choices made by any one or more of its competitors" (p. 519). The market for advocacy services, especially as envisaged by government, is therefore incapable of opening up in a smooth, ordered manner because the actors have so little information to base their

decisionmaking on. It would necessarily emerge in an ad hoc, stuttering way as actors begin to receive feedback from clients, fundholders, other lawyers, and the judiciary. Hence, actors in the advocacy market cling to networks built on social, cultural, reputational, and economic ties. Although these ties make choice simpler for solicitors selecting barristers, they compound the difficulties for those setting up as solicitor advocates. These do not yet possess the social capital necessary to make them active players bound into the networks.[18]

From the data we present, the picture that emerges is cloudy and sometimes confusing. Resentment cohabits with desire, economy can go awry under influence of ideology, and tradition is re-created to match contemporary states of affairs. Advocacy has been the practice and exercise of the rites of "pure" law by the few rather than the mundane commerce with the "impurity" of office practice—client management, rainmaking, and so on—by the many (Abbott 1981; cf. Douglas 1966). A criminal court judge captured the feelings against extending rights of audience.

INTERVIEWER. What are your views on the extension of the rights of audience?

JUDGE. I am against it.

I. When you say you are against it, are there any specific reasons for that?

J. Because I do not believe it is in the interests of the public.

I. In what way is it not in the interests of the public?

J. Well, I do not believe it is in the interests of the public because, although I only have limited experience of this, for obvious reasons, that experience leads me to think that the services provided by solicitor advocates are significantly below the level of those provided by the bar.

I. So what do you think was the case for extending the rights of audience?

J. None.

I. There were none?

J. Possibly financial, and in relation to the Crown Prosecution Service no doubt financial, but otherwise I happen to believe the division between does in fact work; in the interests of justice and for the benefit of the public. (DjI)

The expansion of advocacy has led to a critique. As new providers of advocacy services have entered the market, they have had to come to terms with the nature of advocacy. To achieve that, advocacy has had to be deconstructed, not always in a scientific manner. We see an example of this with the U.S. National Institute of Trial Advocates (NITA) becoming a key supplier of advocacy training as a means of overcoming the dearth of available educational sources in the United Kingdom (Lyons 1995). The result is that advocacy is seen less as an arcane art and more of an acquirable skill (Boon 1993). Advocacy is demonopolized and so spread among a greater population of lawyers. In doing this, the wider distribution of advocacy in society creates conditions of

[18] Uzzi (1996: 683) notes that "market structures . . . gravitate toward dense networks of ties, rather than idealized atomization."

ambiguity, since choice is expanded and uncertainty increased. Advocacy is given a new openness that admits of a greater public gaze. Purchasers of advocacy services are unable to rely on the old certainties of the *ancien regime.* To adopt the metaphor inhering in Beck's analysis of science, as advocacy develops, it creates a pluralization of knowledge sources (1992:172). "This complexity . . . puts opportunities in the hands of customers for selection within *and between* expert groups" (p. 173).

Risk also implies insurance in that a division of labor, as found between solicitors and barristers, enables claims to be made about attributions of responsibility. If there is only a single lawyer involved, then attribution is relatively straightforward. Duplication allows multiple attributions of responsibility to be made and at least sanctions the role of insurer of last risk. Barristers have de facto adopted this role in the past because of the protection given to them in the conduct of litigation in such cases as *Rondel v. Worsley.*[19] These defenses are steadily being whittled away by commercial reality and the courts. It is common practice for barristers' chambers to carry comprehensive insurance, and barristers are increasingly being sued for malpractice. Moreover, the courts themselves are becoming more responsive to client needs and more "case management" minded in their approach, thereby modifying these traditional modes of "insurance." One instance is found in the Commercial Court working party's recommendation that witnesses of fact should not normally be called to give evidence in court. Instead, the working party called for solicitors to endorse the accuracy of facts (Malpas 1996:1).

Expertise has been conceptualized in a number of ways: as skills and knowledge, as experience, or as problem solving heuristics (Blasi 1995). Blasi distinguishes between a capacity for doctrinal analysis and those lawyers "seen as having sound judgement, able to offer wise counseling in solving complex problems" (ibid., p. 315). In advising, experience plays a critical part. All the theories of high-level expertise considered by Blasi are based on experience, which builds complex approaches to solving complex problems in the professional domain. Experts appeared "not to engage in a guided search; rather they seemed to be able simply to 'recognize' in the problem a pattern of a certain kind and to 'retrieve' a solution from a stored repertoire of similar problems" (ibid., p. 335). There is nothing intrinsic to the barrister's background or training that confers superiority in advocacy.[20] Many of the barristers interviewed identified the second

[19] The central point of the case is that a barrister does not owe a duty of care to a client in connection with any representation in court or anything connected to the preparation of the case.

[20] Indeed, there is a strong suspicion that the standards of qualification for advocacy are higher for solicitors than for barristers, for example, a Scottish member of the Faculty of Advocates retrained as a solicitor and failed the qualification tests (Legal Business 1995: 50).

six months of pupilage as the critical foundation of their forensic skill. This was the period when they could take their own cases, and, because of the volume of work available, could appear in court several times a day. This opportunity, in decline for a number of years, is now increasingly denied to the junior bar (Morison & Leith 1992:31).

The role of the bar in advice giving is primarily based not on doctrinal analysis but on the prediction of the outcome of adjudication. This expertise is more like judgment than problem solving. Solicitors generally acknowledged that experience of advocacy played a crucial role in various aspects of case preparation and planning. The practice of preparing a theory of the case, running arguments in court, handling different kinds of witnesses, and experiencing success and failure all informed case handling and the collection of evidence. For these reasons, particularly in relation to nonroutine PI litigation, experienced barristers still had a central advisory role in nonroutine and complex cases. The value of the advisory dimension, however, will probably decline as solicitors gain greater confidence and begin to seek experience of advocacy.

Competition takes many forms and has done so between existing providers of advocacy services and between those wishing to offer such services.[21] Competition in the most obvious sense—competition for clients requiring advocacy services between solicitor advocates and barristers—has not yet truly emerged. Relatively few solicitors have gained a higher rights qualification. The apparent lack of contest, however, may be deceptive, as the domain of advocacy services could potentially become, in fact, a field of intense competition. The trade press has carried a number of articles heralding the intentions of corporate firms to compete in the market for advocacy services by offering a "one-stop service" (Humphries 1995). According to *Legal Business:*

> There is a new breed of solicitor advocate, spearheaded by Clifford Chance and Herbert Smith, who are trying to change the conduct of trials in this country. With "client interest" as their battle-cry, they are marching straight into Bar's territory. And they are spending serious money to do it. In addition to the £1,900 per lawyer simply to go through the qualification process, most of the litigation firms—including Allen and Overy, Clifford Chance, Freshfields, Herbert Smith, Linklaters and Paines, and Lovell White Durrant—have spent money on putting their litigators through both internal and external courses. (Edwards 1995:46)

Our interviews show that the rhetoric is not matched by a widespread movement, as demonstrated above. Many corporate

[21] The Criminal Law Solicitors' Association complained that the Law Society had endorsed an application by the Institute of Legal Executives (paralegals) for rights of audience in lower courts in relation to nonimprisonable offenses (Bindman 1996).

law firms are still grappling with the complications that impinge on their ability to deliver advocacy services. It is clear, however, that some firms harbor expansionist intentions that, in some cases, countenance independence from the bar over a period of time. The publicity given to the intentions of a few firms, and a few solicitor advocates, in relation to higher rights conceals more fundamental developments in relation to the allocation of work between the branches of the profession. Solicitors, in all the areas of work we studied, appear to be performing advocacy and other tasks that they might previously have fed to the junior bar. According to S. J. Berwin, the firm has in the last four years retained 25% of the work it would have previously sent to the bar (ibid.). This is having, some assert, a significant effect on the junior bar in the corporate field (p. 46), but is also being seen to impact other areas. The barristers most threatened are the "generalist juniors" who tended to do the work that is increasingly going in house (p. 47).

The impact of the changes could reach into the upper echelons of the bar over the longer term, even though there seems to be agreement from some of the more combative solicitor advocates in large firms that "there will always be a major role for the top of the commercial bar" (ibid., p. 46; cf. Humphries 1995). Indeed, one of our interviewees thought that it was reasonable for solicitor advocates to take over the junior's role and ultimately, with experience, they would grow into the new senior bar, a kind of reverse takeover. Corporate work is not the only locus of competition. As a result of the increase in the numbers of barristers and the large sums of public money available—and possibly a decline in conveyancing income for solicitors—there has been sharper competition with solicitors for lower court advocacy work (Blacksell & Fussell 1994).[22] The continuing decline of legal aid may well project even more solicitors into advocacy as a means of maintaining income.

Conclusion

On the basis of our interviews and our reading of other public sources of data, we argue that barristers and their chambers, and to an extent solicitors in some of the practice areas, are more conscious of the market in general and are observing existing competitors and anticipating what they, and others, may do (cf. White 1981). This dual focus, looking both inwards to the unit of

[22] "In 1970 there were 2518 practicing barristers; by 1980 their number had almost doubled to 4519 and by 1994 had trebled to 7986. This is proportionately, four times greater than the equivalent growth in the number of solicitors . . . in 1989–90 it was estimated that 48% of all barristers' income was derived from public funds, £113 million through the Legal Aid Scheme and £48 million through the Crown Prosecution Service" (Blacksell & Fussell 1994:484).

delivery and outwards to the wider environment, is also apparent in the activities of professional associations. In Scotland, for example, the dean of the Faculty of Advocates said of competition with solicitor advocates:

> What it will do, and what it has done, is to lead us to address not simply the maintenance of our standards of excellence but the way in which the benefits we offer in terms of quality and cost are appreciated by those who need to use the services of the Faculty. For the first time, marketing is now high on the agenda, and if you are looking for a single change, then that is it. (Legal Business 1995:50)

Glasser (1990) argues that the power of the "lower branch" has grown to the point where solicitors are now more economically secure than barristers (cf. Swallow 1999). Growth in economic power for solicitors has coincided with growth in numbers at the bar, but the bar has gradually been losing its privileges. With the decline in orality in courts, the barrister's role in litigation has altered. Solicitors now play a more proactive role in structuring litigation, using barristers for particular kinds of expertise. This is especially so in the corporate sector: In the "personal plight" sector, where 50% of barristers' gross income is derived from public funds (Abel 1988; Glasser 1993), barristers provide a cheap source of labor for solicitors with court work. The most recent variation on this theme is the large law firm that has become a bulk discount buyer of barristers' services by concentrating its litigation business on two sets of chambers (Egan 1996; Pritchard 1996). Now that solicitors have secured rights of audience in the higher courts, change is potentially omnipresent. The bar has failed to mobilize the resources necessary to rebuff the solicitors' challenges, although it has slowed their pace.

The market for advocacy services is not a single, homogeneous market. There is no industrywide model. It is complex, differentiated, and culturally impregnated (for example, compare the differences between the corporate and immigration fields). That is, there are a series of markets, each with its own features and culture, some conformist and others nonconformist (Miller & Chen 1996). What is being encountered now by solicitors, barristers, and others in the fields of practice we have analyzed is a series of struggles either to legitimate tradition or to be iconoclastic and construct a "new" tradition. Each group is mustering a portfolio of resources, their symbolic capital, to engage in these jurisdictional battles. Their successes depend both on the technical and the ideological elements in their portfolios. The fields are distinct and the practitioners in them are aware of their differences to each other. This will create difficulties for the professional associations—general, local, and specialty—to cope with the strains induced by the changes, as they will be pulled simulta-

neously in more than one direction, with little hope of reaching consensus.

The activities of lawyers, including advocacy, are increasingly determined by factors outside conscious attempts to restructure the market.[23] Advocacy, especially, represents a lifestyle choice, a moral decision about career trajectories that places the individual in a most exposed position. It induces stress, as success is measured in one's wins and losses in court. Office lawyers are rarely so exposed, as Delta explains:

> I would be absolutely horrified to have to stand up in court. I just come up in a sweat thinking about it. I can deal with any number of clients in my office and any number of counsel outside the court, nobody settles anything without me doing what I want them to do—ever. But I think standing up in court would freeze me off and that is the truth of it, you know . . . imagine standing up and presenting a trial. (PaII)

The pressures of advocacy are felt across all the areas of practice we selected. Although in certain cases moves are being made to reduce the "game" element of advocacy by introducing more paper-based kinds of evidence, as in the commercial court (Woolf 1996), it is no surprise that these moves are being strongly resisted by the bar. What we have is a type of segmentation—the differentiation between public and private domains—where

> lifestyles are characteristically attached to, and expressive of, specific milieux of action. Lifestyle options are thus often decisions to become immersed in those milieux, at the expense of the possible alternatives. Since individuals typically move between different milieux or locales in the course of their everyday life, they may feel uncomfortable in those settings that in some way place their own lifestyle in question. (Giddens 1991:83)

The emotional responses of solicitors to advocacy—ambivalence, fear, joy—suggest that normality for them is some way in the future. They, as yet, do not have their set of charismatic icons to which the bar appeals—for example, Edward Marshall Hall and Norman Birkett—to buttress its arguments for the distinctiveness of advocacy.[24] Until they do, they will practice in the long shadow of the bar.

Finally, we can qualify the assumption that professions are obsessed by market domination. In the case of litigation, the bar and solicitors have reached a settlement that, to a large extent, feels right to both. Their organizations, cultures, and expecta-

[23] The economy—especially the boom and recessionary periods of the 1980s and the 1990s—has forced lawyers to seek new markets (Stanley 1991; Arthurs & Kreklewich 1996).

[24] Marcel Berlins, the legal correspondent of BBC Radio 4, however, has claimed, "What about tomorrow's advocates? I've seen them in action and they are gray and boring." *Brief Encounter,* Radio 4, 8 June 1999.

tions are built on it. Solicitors cannot imagine, and fear, a future where the security of the presence of the bar is removed. Yet the development of the solicitor's branch, now in some ways institutionally more powerful than the bar, is taking the ground from beneath the bar. Rather than fusion of the profession, as many have predicted, we foresee a restructuring of the market for advocacy services whereby the independent bar forgoes its specialist education and training function and becomes the home of experienced advocates, howsoever qualified. Yet we do expect a withering of the bar at the roots, as young lawyers choose the solicitors' profession in preference. The ultimate effects are unknown.

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