FROM THE BRITISH NEWSPAPERS AND LEGAL MAGAZINES—CHANGES IN THE BRITISH LEGAL PROFESSION?

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I. INTRODUCTION

For over ten years, a group of English lawyers, who wish to remain anonymous, have sent me newspaper and magazine clippings concerning the British legal profession. I have utilized this generous service in my writings and I am very grateful. In the past year it would have been difficult to comment on the rather unusual situation in British legal circles without this unique help. With the new labor government and a new Lord chancellor, a great deal was expected to happen. And it has. My short effort here is to glimpse into what is going on there.

II. THE NEW LORD CHANCELLOR

The Labor Party has only been in power for a relatively short time and like the former conservative Lord Chancellor, the new Labor Lord Chancellor has become a lightning rod of criticism by barristers and solicitors alike. Lord Irvine of Lairg was described by the Sunday Times as “a lawyer who has made a fortune from private practice [as a barrister] but now castigates his ‘fat cat’ colleagues for inflated fees. With his aristocratic nasal accent he is regarded by many as a snob, but his roots are working class.”1 He is the son of “a waitress and a roof slater.”2

It seems that some barristers in legal aid criminal matters have charged rather large fees. The legal aid system pays both solicitor and barrister fees in all eligible cases. “Privately, barristers admit that the

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2. Id.
system has given them, if not a blank cheque, then an unjustifiably open one . . . It is public money and that is the bottom line." Both Bar and Law Society did not comment publicly. But, privately, lawyers are seething at Lord Irvine's successful hijacking of the fees debate by seizing a populist topic guaranteed to earn instant popularity. [His] onslaught . . . seemed a master stroke in terms of news management."

It must be remembered that the Lord Chancellor is appointed by the Prime Minister and is a political figure. He is a politician at the right hand of the top political leader, who wields great power in all phases of the government, but who also controls the courts and the legal profession. It is an amazing position in any western democracy and is an example of the "Alice in Wonderland" atmosphere of the English system.

It did not take long for the judges to become involved, being as they are under the Lord Chancellor's office. In October of 1998, it was reported that a committee of Law Lords (judges) decided that there should be a graduated fee scale for barrister's fees in legal aid matters. In sharp contrast, top commercial barristers can earn at least $1,000,000 a year. The Lord Chancellor was one of these practitioners before Labor won the election and no one has ever said that these fees should be restrained. Of course, such fees are paid by private sources and not public funds.

The solicitors branch was not omitted from the Lord Chancellor's attack on payments from the legal aid funds. The Lord Chancellor has said that the 1.6 billion pound legal aid scheme must be restrained. His first public comments stated that at least in personal injury and other money damage situations, lawyers could only charge the legal aid fund if the lawyer won the case—a so-called "no win, no fee" arrangement. In late 1998, however, it was said that any changes would not take place until at least Autumn of 1999. It seems that Labor MPs were up in arms over the impact on the poor of suggested changes in the system. A new scheme, it was said, would be thought out.

5. Id.
The Lord Chancellor... and his officials are still on course to scrap civil legal aid for all claims over money and damages and bring in "no win, no fee" arrangements. But the strength of criticism from Labour backbenchers over the impact on the poor has forced them also to look at creating a contingency legal aid fund to avoid a political debacle like that over Welfare to Work reforms.

Such a fund, favoured by the Bar, Law Society and Consumers' Association, would ensure that deserving but costly cases would still obtain public funds. The proposals will be contained in a consultation paper at the end of next month.

The paper is likely to canvass the idea of a self-financing contingency fund. It would pay the upfront investigative costs and insurance premiums of deserving cases such as medical and professional negligence cases and some personal injury claims. Lawyers would take the cases on a "no win, no fee" basis, but they would put a slice of their winning fees back into the fund to keep it afloat and pay for the losers.

The key to the scheme would be that, unlike legal aid, lawyers would be made to share the risk of bringing a case, and they only be paid if the claim were successful. This would ensure that only cases with a reasonable prospect of success would be brought.9

Solicitors are wary of more cuts to legal aid, a significant source of income for ordinary lawyers where fees are not exorbitant. In a Times of London article, Patrick Stevens explained why little of all of the furor over fees applies to most solicitors.10

The grim realities of legal aid work have recently been scrutinised by the Chancery Division judges. Their lordships are more used to big commercial disputes between rich litigants. Therein lies the problem: the judges suspect that some of the legally aided cases are largely spurious and have written to the Lord Chancellor about it.

If the judges had spent a little time in the county court, all this would not have come as such a shock, because a legally aided case is conducted entirely differently from a privately paying one.

Matrimonial work is the obvious example. A typical scenario is that of a husband and wife in their forties with grown-up children. She earns [pound]9,000 a year; he is self-employed and earns [pound]15,000. They were living in a council house but he has

9. *Id.*
moved out to live with another woman. The only assets are joint savings of [pound]12,000, which the man suggests be split equally.

The objective observer might consider this a sensible offer. But the objective observer would quickly go bankrupt as a legal aid lawyer. The first stage is to get legal aid for the wife. This is done by laying claim to all the savings. They are then said to be in dispute and not taken into account for assessment purposes. She is within the income limits and legal aid is granted, subject to her paying a contribution.

The fundamental difference between private and legal aid work now becomes apparent. The husband is having to pay privately and wants to get matters settled as quickly as possible. The legal aid solicitor is being paid a low hourly rate on matrimonial work and has to work as many hours as possible to stay in business. He is not a fat cat lawyer but a thin and very streetwise moggy.\footnote{ld.}

Like the barristers, solicitor fees have been taken out of context by the newspapers and given undue publicity. The high circulation Daily Mail gave examples of both barrister and solicitor high fees:

The high figures earned by individual barristers run alongside the fees paid to prominent firms of solicitors for legal aid work. Glasgow firm Ross Harper and Murphy won [pound]3.7 million worth of legal aid work last year.

London firm Harkavys received nearly [pound]3 million; Brendan Fleming in the West Midlands and Irwin Mitchell in Sheffield each made more than [pound]2.6 million; and Garstangs of Bolton, which has acted in fraud trials including Guinness, made more than [pound]3 million.\footnote{David Hughes, \textit{THE LEGAL AID MILLIONAIREs; Revealed: The massive payments to lawyers from public purse}, DAILY MAIL (London), Dec. 10, 1997, at 2. The Times of London reported:}

Lawyers in the top commercial law firms have had a record-breaking year, with the highest-paid partners now earning nearly [pound]900,000 a year, according to a survey published today.

Partners at the city of London firm Slaughter and May are the wealthiest, according to the annual survey by the monthly magazine \textit{Legal Business}. Their top rate is [pound] 875,000 a year. But close behind is Allen & Overy at [pound]800,000. New partners, generally solicitors in their early 30s, would receive [pound]437,000 at Slaughter and May and [pound]325,000 at Allen & Overy. Twenty commercial firms saw profits shoot up by more than 30 per cent, the survey also shows.
Often, these are exceptional situations involving cases where defendants claimed legal aid when they were accused of fraud etc. and although they were involved in business transactions they qualified for legal aid help.

On the subject of the no win, no fee rule suggested in the legal aid cases, for the first time the Bar Council and the Law Society have allowed barristers and solicitors to work on a contingency fee basis as allowed by

[T]he Court of Appeal in *Thai Trading v. Taylor* (see [1998] *Gazette*, 22 April, 1). The court ruled that a solicitor could work on a no win, no fee basis as long as he only charged his normal fees in the event of winning. The Bar also approved a recent ruling extending conditional fee agreements to arbitrations and abolished the prohibition against barristers acting for a fixed fee over a fixed period. Russell Wallman, the Law Society’s head of policy, welcomed the changes, saying they were a “helpful modernisation.”

Before he moved into the Lord Chancellor’s nine room apartment in the House of Lords, Lord Irvine decided that the place was “‘rather depressing’ and ‘not designed to be lived in by a human being.’” He therefore spent 590,000 pounds (at about $1.65 a pound, this was approximately $975,000) on his refurbished residence. Of course, the outcry was enormous and, when considered with the expected slashing of legal aid, the criticism will continue.

Britain’s biggest commercial firm, Clifford Chance, celebrated a 38 per cent leap in average profits to [pound]478,000 for each of its 260 partners. Herbert Smith, whose clients include BAT, Stagecoach and Eurotunnel, saw average profits leap by 35 per cent to [pound]473,000, and Norton Rose, which played a leading role in last year’s Guinness-Grand Met merger, saw profits soar by 31 per cent to [pound]331,000.

The figures are in stark contrast to the earnings of most solicitors. Those in the smaller firms of fewer than five partners would be lucky to earn [pound]60,000 a year and are currently facing huge demands for their professional insurance premiums.


15. Id.
In addition to this relatively insignificant incident, the senior judiciary started what *The Times* called a “revolt,”\(^\text{16}\) over plans of the Lord Chancellor to take greater control of the legal profession.\(^\text{17}\) It seems that Lord Irvine “intends to sweep away the Bar’s near-monopoly of Crown Court work and to allow Crown Prosecution Service lawyers to take Crown court trials.”\(^\text{18}\) Their concern is the constitutional principle of separation of powers:

The first public attack on the proposals from the judiciary came on Tuesday when Lord Steyn, a law lord, said that the plans were unacceptable and threatened the independence of the judges.

The Court of Appeal judges say they do not find acceptable that the designated [four most senior] judges should be relegated to a purely constitutional role. They say it is quite untrue that the judges are concerned to preserve the monopoly of the Bar in the higher courts, because they themselves come from the Bar.

Their concern is one of principle, they say: “The separation of powers is still an important constitutional principle, and the position of the Lord Chancellor as head of the judiciary and a government minister is anomalous.”

It is insufficient, they add, for the Lord Chancellor to change rules on the profession after consulting the senior judges; “he ought not to change the rules without the concurrence of the majority of them.”

The response of the 98-strong High Court Bench is equally critical and they say that they view with dismay the plans that senior judges should have only a consultative role over such matters as advocacy rights.

Lord Steyn, in a blistering attack last night, said that Lord Irvine’s plans threatened the separation of powers between politicians and judges. He did not object to reforming the machinery for determining advocacy rights in the courts, nor to allowing qualified solicitors to take Crown Court cases. But he said: “To entrust to a Cabinet minister the power to control the legal profession would be an exorbitant inroad on the constitutional principle of the separation of powers.”\(^\text{19}\)


\(^{17}\) *Id.*

\(^{18}\) *Id.*

\(^{19}\) *Id.*
III. THE RIGHT OF AUDIENCE DEBATE

Just like his conservative predecessor the Lord Chancellor has become entwined in the right of audience battle. This is one of the issues which upset the judges. Because only 600 of Britain’s 83,000 solicitors have rights of audience in higher courts and employed lawyers, such as those in the Crown Prosecution Service and in business, have no right to appear in the higher courts, the Lord Chancellor has proposed that the gates be thrown open to all lawyers, both barristers and solicitors and employed lawyers who qualify under the rules. He said that forcing people to pay for both a barrister and solicitor “where one would do” is not justified and he proposed removing the monopoly solicitors enjoy in preparing cases for trial so that the work could be done by barristers and legal executives (clerks).

The Lord Chancellor said he “expected” there would be a Modernisation of Justice Bill to widen consumer choice and improve the justice system for the people who use the courts. “Change is long overdue,” he said. “The perception has grown that the legal system is dominated by the interests of lawyers, rather than by the need to provide justice for the people.”

The shake-up of legal services will include scrapping legal aid for personal injury claims and extending “no-win, no-fee” work (which may now be in the autumn); reforms to cap legal costs; for civil claims; a fast-track for disputes up to [pound]15,000; and opening up courts to all qualified lawyers.

I have one clear aim: the establishment of a modern and fair system which will promote quality and choice for those who need the help of an advocate while, at the same time, providing value for money,” the Lord Chancellor said.

It seems that the Lord Chancellor has committed himself to giving solicitors real access to the higher courts by demolishing the judge-dominated bureaucracy which has so far stood in its way. Instead, the Lord Chancellor will make decisions on rights of audience himself—having consulted

21. Id.
22. Id.
the Master of the Rolls, Vice Chancellor and President of the Family Division.\textsuperscript{23}

In commenting on the Lord Chancellor’s suggestion that the judges veto of rules affording rights of audience should be abolished, Professor Michael Zander advised caution.\textsuperscript{24} First, the Lord Chancellor needs an advisory body “with a broad remit,” but the most far reaching change would be to abolish the judges’ veto. These changes would do away with the system of checks and balances which the present system utilizes. Although the procedure proved to be slow, “legitimacy of decisions is even more important than speed.”\textsuperscript{25}

The Consultation Paper, however, is not confined to rights of audience. It also proposes that the Lord Chancellor should be able to “call in” any of the rules of the Bar and the Law Society “for scrutiny either as a whole or in part” (para 3.7). The professional body would have, say, three months to justify the rule or to propose an acceptable alternative. If at the end of that time, the Lord Chancellor, having privately consulted the designated judges, was not satisfied that the original rule should be kept, he would be empowered either to replace the rule with an alternative proposed by the authorised body, or “to substitute a rule fashioned by him in consultation with the designated judges.”

The pretext for all these drastic proposals is to speed up the process. It is true that the question of rights of audience for solicitors in private practice and for employed lawyers took years. But they were complex and highly controversial. Most issues have been dealt with in a perfectly reasonable time-frame. Moreover, the problem of delay could easily be solved by giving the Lord Chancellor the power to set timetables for the different stages of the process as the Consultation Paper in fact proposes.

The real agenda is for the Lord Chancellor to take control. When Lord Mackay in his 1989 Green Papers proposed to transfer vast new powers over the profession to the Lord Chancellor, the resulting uproar forced him to back off. Lord Irvine is apparently bent on completing the job.\textsuperscript{26}

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25. \textit{id.}
26. \textit{id.}
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IV. OTHER PROBLEMS BROUGHT ON BY THE LABOR GOVERNMENT

There are other suggestions afloat which can affect professionals in Britain. One of the strangest is the claim by the government that professionals, barristers, solicitors, accountants etc. pay tax on work which has been completed, even that in progress. This would mean that a barrister or solicitor who has sent out a bill (and maybe where no bill was sent) would be liable for taxes whether the bill is paid or not. This sounds preposterous in the context of the present system. The chairperson of the Bar Council (the first woman to achieve that position) Heather Hallrett, QC, has said that these proposals could spell financial disaster for many barristers and solicitors.27 Barristers who are not allowed to sue for fees would especially be harmed. They cannot charge interest. Barristers without private means, especially young ones, would be driven from the Bar. Barristers or solicitors may never collect fees on which taxes have been paid.

Another development arose in early 1998. Jack Straw, the Home Secretary in the labor government decided that all judges, police and prison officers should register their membership in Freemasonry.28 He said:

"Membership of secret societies such as Freemasonry can raise suspicions of a lack of impartiality or objectivity. It is therefore important the public know the facts."29

Two hundred judges admitted to being Freemasons in response to a voluntary questionnaire from the Lord Chancellor who disagreed with the inquiry. Fifty refused to say one way or the other. It seems this resulted from an inquiry by the House of Commons' Home Affairs Committee which suggested a public register of people involved in the criminal justice system.30

All of this elicited adverse comment from the editors of The Times who said:

Mr. Straw's move, as the Lord Chancellor wisely recognised, is another unfortunate step in the politicisation of the judiciary. This is one battle Lord Irvine of Lairg deserved to win. The process by which judges are appointed should depend on their legal wisdom, not the examination of criteria quite apart from their professional competence. Supporters of the Home Secretary are already claiming this move is a step towards ending the "male, white, middle-class" composition of the judiciary. It is, sadly, a step towards the Balkanisation of the Bench.\(^{31}\)

V. PROFESSIONAL SELF REGULATION

Over the past year or so the old spectre of self regulation has crept into the newspapers and legal magazines. Because the legal aid bureaucracy has increasingly exercised control of lawyers, and other tribunals have exercised some power, the legal profession has become worried. In a statement to the House of Commons, Home Secretary Jack Straw said that he would introduce a scheme which would regulate immigration advisors, who would be both those who are, and those who are not legally qualified.\(^{32}\)

Immigration cases account for 26 million pounds of income to lawyers.\(^{33}\) The government, it seems, will give more authority to the Legal Aid Board.\(^{34}\)

There has also been the increasingly interventionist role of the Legal Aid Board. Backed by its financial strength, the board is acting for the consumer in imposing, often on a reluctant legal profession, higher standards of service in giving legal advice.

Gordon Brown, the Chancellor of the Exchequer, has cast further doubt on the future of the Law Society in its role as a regulated professional body in the context of solicitors providing financial services. Surely the Financial Services Authority could, as its American equivalent does, regulate solicitors in matters involving financial services and advice. Common sense dictates that it should be the


\(^{33}\) Id.

responsibility of the authority, but the decision could go either way.\textsuperscript{35}

In 1986, after dealing with these issues in an article in England,\textsuperscript{36} this subject was discussed in my article in this Journal called \textit{The Necessity for Lawyers and the Law Society in England—A Lesson For The American Legal Profession.}\textsuperscript{37} Sociologists have shown us that there are three types of professional organization—the “prestige” association, the “qualifying” association and the “protective” or “occupational” association.\textsuperscript{38} Membership is not automatic in the “prestige” group, it is selective and exclusive. The “qualifying” association has as its basic aim to examine and qualify for the practice of the profession, even though this type may engage in the entire range of activities. The “protective” association, although difficult to categorize, works basically as a trade group, dealing with improving working conditions and remuneration.

The problem that the Law Society, Bar Council and others like the American state bar associations have is balancing all of the functions within these categories. It is inevitable that sooner or later outsiders will invade the group’s territory and criticism of the professional association policing of the profession will come. In Britain, the solicitors are now being supervised by something called the “Office for the Supervision of Solicitors,”\textsuperscript{39} but there is sharp criticism already:

THE LEGAL Services Ombudsman Ann Abraham has given the legal profession until the end of the year to get its complaints handling right.

Launching her 1997 annual report, Abraham warned the Office for the Supervision of Solicitors (OSS) and the Bar Council’s new complaints system still had a “long way to go” before they could satisfy her that self-regulation could survive into the next century.

In her report, she praised both the Law Society and the Bar Council for their efforts to improve complaints handling.

But Abraham delivered a warning to both that her patience was running out. She said the OSS was still too lenient towards solicitors and there were too many delays.

\textsuperscript{35} Id.

\textsuperscript{36} The BLA 1964-74: Some American Comparisons and Observations, SOLIC. J., May 17, 1974, at 322.

\textsuperscript{37} 11 J. LEGAL PROF. 37 (1986).

\textsuperscript{38} \textit{Id.} at 59.

"By the end of 1998 it should be possible to see whether the OSS is fighting a winning or a losing battle," she said.

And she delivered a similar warning to the Bar Council, which revamped its complaints handling system last year by appointing Michael Scott to the newly-created position of lay complaints commissioner with powers to order barristers to pay clients up to [pounds] 2,000 compensation for inadequate professional services.

Noting that by the end of 1997 no barrister had been fined under the rules, Abraham said: "The Bar Council will have to demonstrate by the end of 1998 that it has introduced a new complaints procedure in practice as well as on paper."  

There seems to be great doubt that a group which regulates and disciplines professionals can effectively sing their praises to the outside world. Acting as a lobbyist for the profession and at the same time acting as a disciplinarian seems to be relatively incompatible.

VI. SOME FINAL OBSERVATIONS

A Sunday Times editorial of February 8, 1998, suggested that the Prime Minister should abolish the political power of the Lord Chancellor and exclude him from the cabinet. "As we prepare for the new century, the lord chancellorship should be packed in mothballs and hidden in the vaults of the British Museum."  

"His sense of what is right and proper has turned out to be a mixture of the absurd and the offensive."

This may be true, but the direction a few of the new attitudes are taking is good for the British legal profession. It is about time that all qualified advocates have a chance to appear before all of the courts. It is time for the use of the contingent fee. All of the trappings around the Bar and the lower status of solicitors should be relegated to history. The position of the Lord Chancellor with his absurd costume is silly and his dual function in the government and the legal profession is not relevant to the present day. The British legal profession deserves better than this.

40. Id.
42. Id.