Advocacy as an important public service

by Bill Braithwaite QC

The author reviews past and present attitudes at the Bar and looks at what the future holds for barristers, both nationally and in the North West.

THE PAST

When I came to the Bar, it was still being run as a gentlemen's club. There were all sorts of unspoken rules of behaviour. For example, it was established practice that we did not shake hands with fellow members of the Bar, presumably because we were part of such a small group that we were all assumed to know each other sufficiently well not to adopt that formality. It was common to use surnames when talking to each other, and particularly about other barristers. Again presumably, that was based on the (minor) public school practice, which was also, I think, common in the services.

Well into the second half of the twentieth century, there was a rule that, when a barrister became a QC, he effectively had to move to London. I think that the rule actually was that he had to live within a certain distance of an "assize" town (ie a town or city in which the assizes were held), but the effect was to limit you to London. Another rule relating to QCs was that they must or should not appear in court without a "junior." This was (and still is) called the two counsel rule. The impact is obvious; people had to pay for two barristers in circumstances when one might have been enough. I think that there may have been an element of dignity involved. Certainly there was apparently a time when the QC would not consider it right to talk to a criminal defendant whom he was defending.

In those days, many barristers, and professionals generally, were conscious of the distinction between the professions and "trade", as business was called then. It was not only that we thought we were different; more importantly, we did not value business skills.

It must have been because of that background that so many restrictive practices were allowed to exist at the Bar. England and Wales were (and are) divided into the "circuit system", by which there was an artificial division geographically. That was the cause of significant restrictions. I remember well, even now 30 years later, a Welsh solicitor friend being told quietly that, if he tried to use Northern Circuit (ie not Welsh) barristers, they (unspecified) would make sure that he did not get any of that type of work. An even more annoying restriction was that the circuit division meant that Birkenhead was included in the Wales and Chester circuit. If Liverpool barristers (or any other English ones for that matter) went to Birkenhead to do a case, they had to pay the Welsh circuit £5 for the privilege.

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In addition to all those transparent restrictive practices, there was the unspoken area of career development. All those phrases spring to mind, such as "the right sort", "does his face fit" "is he one of us", and so on. The impact of that approach was of course that, for many (but not all) barristers, it was important not to upset the establishment. That included judges, and one had to expect that, particularly in the provinces, if a barrister was considered by judges to be a troublemaker, he (in those days it was very rarely she) would not be considered for promotion.

Turning to more recent times, I remember well my experiences when I set out to obtain the "kitemark" in the early 90s. At that time, manufactured products often had a

kitemark, so that there was a good deal of derision that I should pursue a standard which you might also see on a hoover or a kettle. The process of obtaining it was lengthy, difficult and expensive but, at the end of it, I (and my chambers) had a system of management which was a huge step forward. Probably the most extreme change was that my system imposed a requirement on me and my practice manager to review our work. We had to do it at regular intervals, and it involved, for example, checking documentation. As part of the system involved me documenting everything I did, it was easy for my practice manager to see whether my performance was up to standard. Not surprisingly, the Bar generally considered this to be inappropriate; how could one possibly reduce the art of advocacy to office systems? Naturally there is an element of truth in that, but only a small one. Much of what barristers do can be monitored, either by outside agencies or by the barristers themselves.

A direct result of that process was that my practice manager and I discovered that most or all of my failures were related to delays in dealing with requests for a written opinion. Again and again, we came across examples of slow service, so at one review we confronted the problem; what should we do? Fortunately, the answer was easy; stop doing written work! As a result, I have done no written opinions for years, and I have avoided years of worry about those delays, and years of aggravation for those waiting for the opinions to be returned. As it happened, that was an excellent decision because, in the field of claimants' catastrophic brain and spine injury in which I work, it is far less satisfactory to give opinions in writing.

I have never regretted getting the kitemark. It transformed the way I looked at my practice, and the way my chambers managed the administration. Of course, the Bar eventually decided that it needed standards, but did not go nearly as far down the route of self-analysis and systems checking.

Another example of old-fashioned ideas is that, only a few years ago, it was thought politically expedient for me to ask permission of the "Leader of the Circuit" to open an office in Manchester.

THE PRESENT

So, is all that tradition now well behind us? Of course not. There are still barristers who are reluctant to shake hands, who use surnames, and whose business practices are firmly rooted in the 19th century. Our governing body is rooted in the past, and I personally do not feel that it has anything to offer a modern advocacy business.

A headline in the *Times* said it all recently: "Accused barristers – the Bar Standards Board is to list the names of barristers facing disciplinary charges, but has opposed proposals to grade barristers according to competence and experience".

In my chambers, we started to pursue continuing education in a professional way in 1991. The Bar did not insist on continuing education for years after that.

I think that one of the main restrictions on the development of the Bar, apart from the attitude of barristers, is the limitation imposed by our governing body on our ability to create and develop a business. We are not allowed to practise as a limited company, but are all self-employed. That is often said to be a major strength of our profession, because it ensures independence. There is a very honourable history of barristers fighting difficult or unpopular causes, often against powerful bodies such as the government, and requiring complete independence to do so fearlessly. However, I doubt whether that need for independence carries the same importance as it did two or three hundred years ago.

An effect of the fact that we are not formed into ordinary corporations, governed by shareholders and management structures, is that we have no mechanism for businesses to grow by purchase and takeover. As a result, I think, barristers' chambers all over the country are either collapsing, merging (the same thing, but with a time delay built in?) or contracting. In a competitive market, I think that there would now be less blood-letting, and a more settled, competitive environment.

Coupled to this difficulty is the poor quality of some of the work which is done by barristers. Poor quality work in this context has two meanings; the nature of the work undertaken by some barristers, and the way in which they do the work presented to them.

I feel strongly that the time has come when barristers should only do work which genuinely requires the skill set which we possess, and which others do not. The theme of this talk is advocacy as an important public service, and I believe strongly (passionately, in fact) that there is a place for the advocacy which good barristers can and do provide. My own perception, which I concede is that of a narrow specialist, is that we are currently expecting that barristers should be used for work which does not justify their employment. Much of it is publicly funded, but not all.

I remember that, when I started at the Bar, barristers were used to present "pleas in mitigation" on behalf of a person who had pleaded guilty to a criminal charge. Of course, that could be important in some circumstances, but very often the barrister merely told the judge what was perfectly obvious, eg that the defendant had pleaded guilty, that his criminal record was not too bad, that he had a family to support, and that prison would be difficult for him, or whatever. For all I know, that is still going on. Surely it does not require a highly skilled advocate to undertake that task in many cases, particularly bearing in mind that the judge should be able to see most of the mitigating features for himself. There has been a change recently, which the Bar has not welcomed, in that non-barristers can now appear in the Crown Court.

There are very many areas of work currently undertaken by barristers which informed outsiders might consider to be insufficiently difficult or important to justify the use of such a high quality (theoretically) consultant. I have been fairly critical of my profession so far, but I must make it clear that there are many first-rate barristers who provide a consistently excellent service of top quality in areas where no other professional can equal them. Fortunately, many of those are in the North West. The Northern Circuit, which covers the North West, is generally considered to be well-served in that respect.

However, even here it is possible that standards are not as high as they should be. This goes back to the lack of self regulation of barristers by themselves, the lack of systems in chambers, the failure to specialise, historically over-generous public funding, and the overwhelming feeling that we have the right to earn a good living regardless of our abilities. Similarly, outside regulation probably would make us all realise that we cannot expect our performance to be judged by our own profession exclusively. In my opinion, the sooner we have outsiders managing our complaints system, and deciding on the complaints, the better it will be for the long-term health of the Bar. I am concerned also about the method of complaint management currently adopted, although it does seem clear that this will change in the near future.

Sadly, I think that another factor is that the public frequently has low expectations of barristers. Either that, or they are not prepared to complain about poor service. This may be related to the fact that much of the work barristers do is publicly funded. If that is so, it will surely reduce as a factor, because the government is currently reviewing, as it has been for some time, the level of fees paid to barristers.

THE FUTURE

Nationally

I think the future is bright, both nationally and locally. Nationally, I see fewer barristers, mostly of top quality, gradually creating a profession of the ultimate consultancy in advocacy. I imagine that it will be necessary for barristers to form larger groups, nationally and perhaps internationally. Certainly I can see great advantages in a national advocacy practice. There are many reasons for larger groups, although they do have to be focussed correctly, and well-managed. One obvious advantage is that it should make sense for one business to provide a wider service, both geographically and in practice areas.

Of course, in order to make that an effective model, one has to have a valuable product. The product will only have value if is genuinely needed by the public; in other words, barristers should only do work which really does require the highest level of advocacy skills.

If we limit ourselves to that type of work, and if we become truly specialist, we will then have to make sure that there is a public perception that our product truly has value. This will not be easy, because the public is not likely to know what advocates can do for them unless they have previous experience, which is uncommon, or unless we tell them. Shock horror! We might have to advertise our product. We might have to sell ourselves (in the nicest way, of course). We might have to make a sustained effort to manufacture and sell a worthwhile product. In other words, we might have to do what businesses do all over the world.

There is a product of value, because there are so many areas of life where advocacy can make a difference. Advocacy is not just standing up in court and spouting forth. Advocacy is the art of preparation and presentation of a claim or defence (not just in litigation) so that it has the best possible chance of success. The most obvious examples occur in litigation, for example commercial, family, injury disputes, but there are ever-increasing areas where litigation may not be contemplated, or where it is a method of enforcing rights. In my world of catastrophic brain and spine injury, advocacy is important for those who have no compensation claim, because they are at the mercy of the state, and they probably will have to fight for their rights. Advocates would help them do that.

The North West

Turning to the more local landscape, the national vision would also work well in the North West. Looking at my own chambers as a model, I would hope that, however far we expand, we will remain rooted in the North West. That could work well, provided that we can persuade people to take us seriously without having our head office in London. By way of example, we have just been awarded the Chambers & Partners award for Regional Chambers of the Year, but that is a long way from being national Chambers of the Year.

It is possible, even probable, that the Administrative Court will open a branch in Manchester. That would be a terrific boost for lawyers in the North West, because an area of increasing interest is public and administrative law. If this does happen, it will be a marvellous boost for the regional economy.

The North West is blessed with two major court centres, Manchester and Liverpool. In addition, we have several other courts of significant size. It is probably fair to say that no other circuit or area has two such strong centres. Although there are clear signs that barristers in both major centres, and in the other towns as well, are struggling to cope with the current demands, those two centres have the ability to continue to form a nucleus of good quality legal services.

MY VISION

I should like to see my chambers as a national company, based in the North West, and run from there, servicing

advocacy needs nationally, and educating the public to the increasing importance of advocacy in the modern world. We would be shareholder driven, and managed as a corporation, with a board of directors. The company would have to provide value, and that would mean that the directors would have to make sure that we were manufacturing and selling a product of real value. Individual barristers would be monitored and regulated. We would acquire and develop core and non core businesses, so that our strength was widely based, and not susceptible to the winds of change.

In order to achieve that, we, and all other barristers' chambers, need solicitors, businesses, academics and individuals in the North West to help us. We need to be acknowledged as being able to provide a service (in our areas of excellence) which cannot be bettered anywhere in the country, including particularly London. That is achievable. We currently have individual barristers who could justifiably make that claim. In order to achieve more, though, it is essential that we have the support of the North West.

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Legal services: opportunities and challenges

by James Faulconbridge and Daniel Muzio

Some of the recent trends in corporate legal services in the North West can be perceived as creating either opportunities or threats.

INTRODUCTION

A predominant interest in globalisation often obscures the regional diversity and local flavours of professionalism that characterise our legal world. Our recent research into legal services in the North West partly rectifies this gap in our knowledge, revealing the experiences of solicitors in this region and highlighting a set of local responses to what are often more general issues affecting the profession as a whole. This is, perhaps, most aptly summed up as a story of new opportunities but also new challenges, as lawyers in the North West seem to benefit from stereotypical portraits of their work – to put it crudely, corporate legal services are cheaper in the "regions" that in London – but also challenge taken for granted assumptions about the quality and innovativeness of services. Indeed, as *The Lawyer* recently reported, the North West has both one of most attractive marketplaces for corporate legal services in the UK – Manchester – but also one of the least attractive, Blackburn ("London: not as sexy as Bradford, apparently," *The Lawyer*, September 25, 2007).

In this brief report we want to explore some of the recent trends in corporate legal services in the North West and argue that they can actually be perceived as creating either opportunities or threats. We begin by highlighting the key logics and dimensions which support a regional division of labour in the legal profession in England and Wales. We then analyse some of the organizational responses pioneered by North-Western firms to transcend the limits of their geography and bridge the gap between local and global. We conclude by highlighting an area, work-life balance, where regional firms may have a competitive advantage. This is important in an era where work-life pressure are exacting a toll in terms of job satisfaction and staff attrition rates.

NEW MODELS FOR NEW TIMES

Clearly one of most pressing issues for law firms today is the challenge or opportunity posed by the Legal Services Act and the proposed reforms to the ownership of law firms. We do not focus specifically on this issue here; our research was conducted before the bill was given royal assent and any discussion would be sheer speculation. Similarly, our research was also conducted before the onset of the "credit crunch" and the financial turmoil of 2008. What we can do, however, is analyse the way firms have been adapting to maintain and develop competitive positions in the North West but also, more broadly, in national legal markets in the 21st century.

The North West today is populated by a diverse range of corporate law firms. These include:

- Commodity firms, which focus on the bulk production of low value added services (both commercial and personal).