

# Rights of Audience—A Scottish Perspective

*The Right Hon. Lord Rodger of Earlsferry\**

It is an honour for me to have been asked to give the Child & Co. lecture. When inviting me, Sir Nicholas Phillips suggested that any talk might relate to a difference between procedures in England and Scotland. It seemed to me that some discussion of rights of audience might be suitable, since the topic is not entirely free from controversy and a speaker from a Scottish background might be able at least to supplement your thinking on the subject.

First, a few words of introduction or elementary vocabulary for those contemplating the mysteries of Scots Law for the first time. In Scotland we have solicitors who correspond to solicitors in England and Wales. Advocates are the Scottish equivalent of barristers and they are all members of the Scottish Bar or Faculty of Advocates. Until the legislation on the Scottish legal profession in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 advocates had virtually exclusive rights of audience before the Scottish supreme courts – the Court of Session in civil matters (including appeals) and the High Court of Justiciary (hereafter the High Court) in criminal matters. Similarly advocates had virtually exclusive rights of audience along with barristers before the judicial committee of the House of Lords to which an appeal lies in civil matters.<sup>1</sup> Even though Part II of the 1990 Act contained no new term for solicitors who obtain rights of audience before the supreme courts, the Law Society's rules approved by the Lord President of the Court of Session<sup>2</sup> used the unlovely term "solicitor advocate" and, while some advocates have protested about this terminology, I suspect that it is here to stay and shall use it for the sake of convenience.

The second point to notice is perhaps somewhat ironical. While the controversy over Scottish advocates' exclusive rights of audience had continued for at least as long as that over barristers' rights,<sup>3</sup> there is no doubt that the timing of the introduction of the Scottish legislation in 1990 was determined by the introduction

\*Lord Advocate. The Child & Co. Lecture 1993, published by arrangement with the Right Hon. Lord Rodger and Child & Co.

1. For the detail see *Stair Memorial Encyclopaedia of Scots Law* Vol. 13 (Edinburgh 1993) para. 1325.

2. Eg. Code of Conduct (Scotland) Rules 1992, Rule 2(1). The Government's subordinate legislation used the term "rights of audience solicitor" which does not exactly trip off the tongue. See eg. Civil Legal Aid (Scotland) Amendment Regulations 1993 (1993 S.I. No. 535).

3. For some of the background see A. Rodger, 'The Future of the Legal Profession in Scotland: Marching to an Alien Tune?' (1991) J.R. 1, 6 *et seq.*

of equivalent legislation for England and Wales following the breakdown of the Marre Committee initiative. Once the legislation was passed the necessary steps were completed fairly quickly in Scotland and the first solicitor advocates were admitted in April and began to practise in May 1993.<sup>4</sup> Those admitted have indeed appeared before the Court of Session and High Court. All this happened at a time when the English scheme was not yet in operation and still awaited the approval of the Heads of Division. The result is that we in Scotland have some, though limited, experience of the new system in operation.

The proposals to allow solicitors to acquire rights of audience in the supreme courts of Scotland were not welcomed by the Faculty of Advocates. This is hardly surprising. None the less it is fair to say — and it was noticed during the period of consultation on the proposals and during their passage through Parliament — that the public approach of the Scottish Bar was markedly different from that of the English Bar. The English Bar, supported by some at the very highest levels of the judiciary, mounted a vociferous campaign against the Lord Chancellor's proposals.<sup>5</sup> The tone of the Scottish Bar's campaign against the Secretary of State for Scotland's proposals was rather different. In their response to the Government's consultation paper<sup>6</sup> they, of course, made clear their opposition to what was proposed, but in that response and in most of the public utterances of the Scottish judges the rather apocalyptic tone adopted south of the Border was missing.

There may have been many reasons for this, but one, I believe, was that certain rather sweeping arguments which were strongly pressed in England and Wales could simply not be put forward in Scotland because of the different way in which Scottish solicitors had practised over the years. To bring out the difference we need to look briefly at the historical position, even though any sketch must sacrifice a degree of accuracy for brevity.

As I understand it,<sup>7</sup> in England until the nineteenth century justice was mostly centralised in the King's courts and the judges would hear cases, civil and criminal, either at the centre in London or on circuit throughout the country. These courts were serviced by barristers who would go on circuit with the judges. The position was changed somewhat in 1846 when the County Courts Act for the first time established a widespread system of local courts. The traditional organisation of the Bar and its discipline based on the circuit system began to break down. At the same time solicitors were given a right of audience in the new courts.

In Scotland by contrast there was an ancient system of local courts under a sheriff

4. Cf. (1993) 38 *Journal of the Law Society of Scotland* 208.

5. The flavour emerges pretty clearly from the debate in the House of Lords on 7 April 1989: *Official Report Fifth Series, House of Lords*, Vol. 505 cols. 1307 *et seq.*

6. *The Legal Profession in Scotland: A Consultation Paper* (Scottish Home and Health Department, March 1989).

7. See e.g. A.H. Manchester, *A Modern Legal History of England and Wales 1750-1950* (London, 1950) Chapters 4-7. For the nineteenth century developments see especially R. Cocks, *Foundations of the Modern Bar* (London, 1983).

and his substitutes.<sup>8</sup> These courts existed throughout Scotland and dealt with certain categories of civil and criminal business. Although advocates had rights of audience in these sheriff courts, in practice in the earlier part of the nineteenth century advocates were not instructed very often since any additional cost of employing counsel could not generally be recovered from the other side.<sup>9</sup> The people who actually appeared in the sheriff courts were procurators or agents – solicitors to use the modern term – and originally only those agents attached to the particular sheriff court could practise there. After 1873<sup>10</sup> agents could practise in any sheriff court in the country – a reform which was considerably resented by the agents since it broke down their local monopolies, while leaving the monopoly of the Faculty of Advocates before the supreme courts untouched. It is also worth noticing that prosecutions in the sheriff courts were conducted by procurators fiscal who were usually local agents and who were appointed by the sheriff. Gradually the procurators fiscal came more and more under the control of the Lord Advocate until in 1927 all appointments were vested in him and they became full-time civil servants.<sup>11</sup>

Even this very brief outline of the two systems is enough to bring out two points. Whereas in England it was only in 1846 that local courts came to the fore, they had always been important in Scotland and they had always been manned by agents or solicitors. In civil matters this remained largely the case even after 1849 when clients were allowed to recover the cost of counsel's fees if the court certified that the case was appropriate for the employment of counsel.<sup>12</sup> What was found then is still found today. Solicitors do a great deal of the routine work in the sheriff courts, including the preparation of pleadings. On the other hand counsel are frequently asked to revise pleadings, or to conduct legal debates or sheriff court proofs (ie trials) – though it is still considered good manners for a solicitor to inform his opponent if counsel has been instructed. In criminal matters the role of agents or solicitors was even more marked. As we saw, the prosecutor, the procurator fiscal, would usually be a local agent and he would conduct the proceedings on behalf of the Crown in the sheriff court. Similarly, if the accused was represented, it would be by a local agent and this became a major part of the work of many Scottish solicitors after the introduction of criminal legal aid in 1964.<sup>13</sup> Indeed counsel could not be employed in criminal legal aid cases in the sheriff court without special sanction<sup>14</sup> and this was not too readily given. It follows that, even before the recent legislation, solicitors could and

8. See *An Introduction to Scottish Legal History* (Stair Society, Edinburgh, 1958), Chaps. 25 and 26.

9. J. M'Glashan, *Practical Notes on the Jurisdiction and Forms of Process in Civil Cases of the Sheriff Courts of Scotland* (2nd edition, Edinburgh, 1842), para. 397.

10. Law Agents (Scotland) Act 1873, s.2.

11. For an excellent account of the history see *Stair Memorial Encyclopaedia* Vol. 17 (Edinburgh, 1989), paras. 530 *et seq.*

12. M'Glashan, *Practical Notes* (4th ed. by H. Barclay, Edinburgh, 1868), para. 439.

13. Legal Aid Act 1964.

14. Legal Aid (Scotland) (Criminal Proceedings) Scheme 1975, Article 15(1)(b)(ii).

did appear in the role of prosecutor and defending lawyer in all kinds of case before the sheriff, whether it was before the sheriff alone or before the sheriff sitting with a jury. Some of the cases would indeed be serious: where the sheriff sat with a jury, he could impose a sentence of imprisonment of up to two years (raised to three years in 1987) and he could remit the case to the High Court if a more severe sentence was required.

When the matter of reform of rights of audience came to be discussed in Scotland in 1989-1990, the background was therefore rather different from the background in England and Wales, where, as I understand the position, the vast bulk of defended criminal work was done by barristers. Scottish solicitors had long possessed, and more importantly had exercised, very substantial rights of audience in both civil and criminal cases. Unless, therefore, the Faculty of Advocates had been prepared to assert that at least two centuries of Scottish legal history had been based on some fundamental mistake, it was simply not possible for them to adopt the stance that solicitors could not conduct cases properly and that only members of the Bar should prosecute or defend significant cases. In the event the Faculty chose to argue in effect that the work of the supreme courts was best conducted by a group of specialist pleaders who devoted their whole time and attention to preparing and presenting cases in court and who could therefore provide a better service to the Court. The supreme courts, it was said, relied on that quality of service to operate at the level required of a supreme court and moreover, it was argued, the use of specialist pleaders made for the more efficient disposal of business. While this was effectively the same as the core argument of the English Bar, the Faculty presented it in a different tone because of the different background. It is doubtful whether the rather more black-and-white approach of the English Bar was really any more effective in the end in persuading the Government, the press or indeed the public.

You would not expect me to stray into the area of the discussion about rights of audience for members of the Crown Prosecution Service in England and Wales. I think that I am, however, entitled to mention the position of procurators fiscal in Scotland. As I have explained, they prosecute day and daily in courts throughout the country and in cases attracting significant terms of imprisonment. No-one would suggest that every procurator fiscal is perfect, but it is self-evident that for the most part they do the work well and I have no reason to believe that it would be done better or more economically if counsel were employed.

It is sometimes argued that people employed full-time in a prosecution service would not be able to bring the same standard of independence and objectivity to the conduct of cases in court as do barristers, who appear one day for the prosecution and the next for the defence. The position would inevitably be exacerbated, it is said, if the person who prosecuted had taken any part in the investigation of the offence. The Scottish experience does not bear this out. It is a matter of the ethos of the prosecuting authority. With us every procurator fiscal is fiercely proud of his independent role: it requires him to take decisions which he believes are right even though they may not please the police or the judge before whom he appears. For instance every working

day procurators fiscal and their deputies exercise their discretion in deciding whether to institute proceedings or to abandon a case. So far from his superiors criticising him or holding him back from promotion for taking a decision, say, to abandon proceedings in an appropriate case, a procurator fiscal or his deputy would be criticised if he failed to do so.

While this approach pervades all levels of the Crown Office and the procurator fiscal service, we have a particular – perhaps unique – mechanism to ensure that it continues to prevail. At the very top of the system are thirteen Crown Counsel or Advocate Deputies who are appointed personally by the Lord Advocate. They appear for the Crown in the High Court and prosecute the most serious cases such as murder, rape or armed robbery. Hitherto they have all been members of the Bar who usually act as Advocate Deputies for about three years and then return to private practice. Perhaps their position could be summarised in this way. Whereas in England and Wales prosecuting counsel are instructed by the Crown Prosecution Service, in Scotland Crown Counsel are commissioned by the Lord Advocate and give instructions to the Procurator Fiscal Service. Because they are in post for only a short time, they are not likely to become unduly prosecution-oriented. The crucial point is that these Crown Counsel take all the decisions on whether to indict the more serious cases and they also give instructions to procurators fiscal on hundreds of other points throughout the year. These instructions must be followed by the procurators fiscal.

This ultimate element of independence is important, I believe, in preserving the ethos of the Service and in maintaining public confidence in its independence. The mere fact that certain procurators fiscal may now have rights of audience in the High Court does not in any way undermine the argument in favour of having this team of Crown Counsel drawn from outside as an ultimate safeguard of the independence of the system. So, while I have announced <sup>15</sup> that, as a result of the changes in rights of audience, in future I may appoint one of the Advocate Deputies from among the solicitor advocate members of the Procurator Fiscal Service, I have stressed the need for any such Advocate Deputy to act in all respects in the same way as the Advocate Deputies drawn from outside. Moreover, to ensure that Crown Counsel continue to operate as they have done up until now, to begin with at least there will at most be only one member of the team drawn from inside the Service who can be expected therefore to absorb the particular atmosphere in which Crown Counsel work. Once the scheme has been operating for a few years the Lord Advocate of the day can decide whether this limit can safely be relaxed to any extent.

In summary then on the matter of prosecutors I would say that there is nothing in our experience in Scotland which would lead me to accept any argument that permanent members of a prosecution service are in principle incapable of conducting prosecutions in an independent and objective way. They can do so. What is essential is that they should be trained and required to act in this way. Providing that is done, permanent members of a prosecuting service will be at least as vigilant as temporary prosecutors in vindicating their high calling as ministers of justice.

15. *Crown Office Staff Notice.*

If we turn now to the more general situation in Scotland, I can start by giving you some statistics. There are at present 330 practising members of the Faculty of Advocates, most of them based and living in Edinburgh but with a relatively small but increasing number based and living in Glasgow, forty-four miles away. All advocates have rights of audience in both the Court of Session and High Court, but most tend to work predominantly in one or the other. As at January 1994 there are in total 44 solicitor advocates, but unlike advocates they may choose to qualify for rights of audience only in one branch or the other. Most have done so and accordingly there are 34 solicitor advocates with criminal rights of audience only, 11 with civil rights only and 1 with both. Solicitor advocates come from all over Scotland, but fifteen of the thirty-four with criminal rights come from the west of Scotland where many of the High Court trials take place, while seven of the eleven with civil rights are from Edinburgh where the Court of Session is based.

Eight of those with criminal rights are members of the Procurator Fiscal Service. There are another 26 solicitors in training at present and they are likely to be admitted at the end of April 1994 bringing the total to 52. You will appreciate that even at present the actual number of solicitor advocates is significant, being roughly 13% of the number of practising advocates. A number of solicitor advocates have joined together in an organisation known as Solicitor Advocate Services in order to provide a point of contact through which solicitors may instruct them. These solicitor advocates are therefore seeking to provide their instructing solicitors with a service which is similar to that provided by advocates. It is therefore liable to be open to precisely the same criticisms, e.g. that the solicitor advocates are unfamiliar with the case, have not seen the client at an early stage or return instructions too late. We shall see.

In order to qualify for rights of audience solicitors must have had relevant court experience for 5 years immediately before applying.<sup>16</sup> They also require to undergo a course of training approved by the Lord President of the Court of Session. While some more experienced solicitors can obtain exemption from certain elements of the course, in broad outline they are required to attend a certain number of hearings of the Court of Session or High Court, to sit an examination and to attend a course organised by the Law Society of Scotland.<sup>17</sup> They are then admitted at a special ceremony in the Court of Session.

It is too early to judge what the lasting impact of the extension of rights of audience will be, but it looks as if it will be considerable. Many of the pleas and procedural matters are now being done by solicitor advocates who can easily fit in such appearances, even if taking a particular trial might disrupt the rest of their business. But they are also taking on the conduct of trials. For instance I understand that in a High Court sitting in Glasgow the accused or one of them was represented by a solicitor advocate in about one-sixth of the cases. Two solicitor advocates have appeared in

16. Solicitors (Scotland) Act 1980 s.25A(2)(c) and Admission as a Solicitor with Extended Rights (Scotland) Rules 1992, Rule 3(2)(b).

17. Admission as a Solicitor with Extended Rights (Scotland) Rules 1992, Parts III–VIII.

effect as senior and junior in a murder trial. Crown Counsel report that some of the solicitor advocates have been very good indeed, others less so. Perhaps that is just what one would expect. The civil practitioners seem to have made less use so far of their rights, but this may simply be because the opportunities are fewer and it is noteworthy that some have appeared both at first instance and in the Inner House of the Court of Session, the civil appeal court. One has conducted a judicial review. Overall it appears that the legislation has had the effect of introducing a significant degree of competition in the provision of representation in the supreme courts, though the competition may consist more in the existence of an additional number of persons who can take cases in the supreme courts rather than in the creation of a new rival kind of service. In view of this competition advocates have complained that solicitors who are solicitor advocates do not inform their clients that they could have the services of counsel, if they preferred. It should be noticed, however, that the Law Society Rules expressly cover this point and require any solicitor (which includes a solicitor advocate) to explain all the relevant advantages and disadvantages of selecting a particular solicitor advocate or counsel.<sup>18</sup>

Even in the short time that the new rights have been operating, certain things have become clear. The first is the need for codes of conduct and practice for both branches of the profession to be revised to take account of the changed relationship between them. While the legislation was going through Parliament, neither branch of the profession took any steps in this respect. More surprisingly, even once the legislation was passed, nothing was done. The Law Society of Scotland produced a code of conduct,<sup>19</sup> largely based on the Faculty's Code,<sup>20</sup> but it did not deal with this matter. The Faculty of Advocates kept an eye on the new training schemes in which some advocates indeed acted as tutors, but they did not adjust their code of conduct on this particular point.

The principal development occurred very quickly and came to a head during Wimbledon Fortnight 1993 – hence earning the name by which it became known: “mixed doubles”. The very simplest set of facts is this. A solicitor instructs an advocate to appear in the High Court or Court of Session along with a solicitor advocate, acting either as the advocate's junior or, even more controversially, as his senior. At the end of June the then Dean of Faculty issued a ruling<sup>21</sup> which forbade counsel to accept instructions to appear on this basis, although he indicated that some flexibility might be permitted in certain cases. The Law Society of Scotland protested vigorously against the ruling and the Director General of Fair Trading subsequently asked for information about it.

Speaking for myself, I do not consider that it would be objectionable in principle

18. Code of Conduct (Scotland) Rules 1992, Rule 3. Whether the rule is always observed in practice is, of course, another matter.

19. Code of Conduct (Scotland) Rules 1992, Sched.1.

20. *Guide to the Professional Conduct of Advocates* (1988) (Hereafter “*Guide*”).

21. Dean's Ruling 29 June 1993: ‘No advocate shall appear in any court, whether in a criminal or civil cause, with a solicitor advocate instructed for the same client.’

for an advocate to be instructed by a solicitor to appear along with a solicitor advocate since the solicitor advocate would simply be performing the role which would usually be performed by another advocate. I have difficulty in seeing why it should be wrong for an advocate to appear in this way along with another person who, Parliament has said, is entitled to appear in the High Court or Court of Session. It seems to me that, subject to one point, in these circumstances the relationship between the advocate and the solicitor advocate should be much the same as that between two counsel. That relationship is well understood but has not been spelled out in the Faculty's Code of Conduct. The corresponding rules between an advocate and a solicitor advocate would certainly need to be set out in formal terms in the codes governing the two branches of the profession. Even if they were difficult to formulate in words, the framing of such rules would not seem to give rise to any great difficulty of principle.

But the cases which actually provoked the Dean's ruling were different in an important respect. What happened was that a solicitor advocate wished, *qua* solicitor, to instruct an advocate to appear along with the self-same solicitor acting as a solicitor advocate. It is fair to say, I think, that this particular set of circumstances was not specifically envisaged when the legislation was introduced. In these cases the analysis is very much more complicated since the two persons are really bound together in two quite distinct relationships: the relationship between instructing solicitor and counsel on the one hand; and on the other the relationship between two persons appearing together in effect as counsel. It need hardly be said that the relationship between an instructing solicitor and counsel is very different from that between counsel. So, for instance, one might have the situation where the counsel A was the senior and so *prima facie* entitled to tell his junior, the solicitor advocate, B, how the case should be handled, while B, *qua* instructing solicitor, was entitled to sack A if he disliked the line which was being adopted. The negotiation of fees between B, *qua* instructing solicitor, and A's clerk would also raise sensitive issues, not least in connexion with the proportion which B's fee *qua* solicitor advocate should bear to A's fee as senior counsel.

While these are real problems, they are not necessarily insuperable. Indeed it seems to me to be highly desirable even from the point of view of the Bar alone that they should be solved in some way which does not debar advocates from this field of work. The fact that certain clients are known to have wished to instruct an advocate and a solicitor with rights of audience on this basis suggests that there is a market for the provision of services in this way. Putting the same point slightly differently, it would be unfortunate for members of the Bar if they could not accept such instructions and earn the fees which the work would bring, especially if the result were that clients in future chose to instruct two solicitor advocates instead. It is therefore good to know that the Law Society of Scotland are apparently working on a possible set of rules to deal with problems which undoubtedly exist.

I mentioned that there was one qualification to the proposition that there would really be no difference between two advocates appearing together and an advocate and a solicitor advocate appearing together instructed by another solicitor. The



qualification is that if we have two advocates, then neither can speak to a lay witness,<sup>22</sup> whereas if we have an advocate and a solicitor advocate, the solicitor advocate can,<sup>23</sup> but the advocate cannot, speak to the witness. For this and other reasons, the Faculty have argued that the advocate and the solicitor advocate are in effect not operating on the famous level-playing field. This was indeed one of the reasons why the Dean of Faculty condemned any arrangement for a counsel and a solicitor advocate to appear together. The difficulty here results at least in part from the Faculty's own rules of conduct.

The relevant aspect of the Faculty's rules is its "general rule . . . that an advocate should not interview or discuss a case with, or in the presence of, a potential witness",<sup>24</sup> the two usual exceptions being the client and an expert witness.<sup>25</sup> Solicitors are bound by no such rule. You will recognise the Faculty rule as being broadly similar to that applied by the Bar Council, the first formalised version of which was laid down in 1927.<sup>26</sup> Dock briefs always constituted an exception to the English version. Quite when the rule was adopted by the Scottish Bar is hard to determine, since it was at one time a matter of pride for the Scottish Bar that decisions on questions of conduct were neither published nor recorded.<sup>27</sup> None the less we can be sure that this was certainly not among the Faculty's most ancient rules. We know this from an incident recorded by Dr Johnson's biographer, James Boswell, who practised as an advocate in Edinburgh.<sup>28</sup> In 1774 he agreed to defend a certain John Reid on a charge of sheep-stealing. He tells us that on the Sunday evening before the trial began<sup>29</sup> he "examined separately two exculpatory witnesses as to his getting the sheep (with the theft of which he was charged) from one Gardner. One of them seemed so positive, notwithstanding my earnest request to tell me nothing but the truth, that I began to give some credit to John's tale; but it afterwards appeared that great endeavours had been used to procure false evidence". Boswell was the son of a judge and had been in practice for some years, and yet he apparently saw nothing improper in interviewing these potential witnesses at home on a Sunday evening without any agent being present. Admittedly his interviews appear to have done his client no good, for he was hanged. Despite this unfortunate denouement, we must infer from Boswell's account that the present rule came in at some later date. It is not unlikely that the Scottish Bar took it over from England.

22. *Guide*, para. 9.2.4.1.

23. Code of Conduct (Scotland) Rules 1992, Sched. 2, para. 7(6).

24. *Guide*, para. 9.2.4.1.

25. *Guide*, para. 9.2.4.2.

26. *Annual Statement of the General Council of the Bar 1927*, p.7. The latest version is contained in the General Council's *Code of Conduct of the Bar of England and Wales Adopted by the Bar Council 27 January 1990*, paras. 607 and 609.

27. Cf. Lord Clyde, 'The Profession of the Law' (1922) 38 *Scottish Law Review* 1 and 29 at 39.

28. See W. K. Winsatt, Jr., F. Pottle (eds.) *Boswell for the Defence 1769-1774* (New York, Toronto, London, 1959), entries between 15 July and 24 September 1774, pp. 227 *et seq.*

29. *Op. cit.*, entry for 31 July 1774, p.237.

The justification for the rule is as difficult to pinpoint as its origin. The Code of Conduct of the Faculty of Advocates says that the spirit of the rule is “that counsel should not under any circumstances do or say anything which might suggest to the witness that he should give evidence otherwise than in accordance with his honest recollection or opinion”.<sup>30</sup> But that certainly cannot have been the rationale of the rule as originally adopted in England. In the early nineteenth century the rule was that a barrister was not entitled to see either his client or a witness. The rule in that extended form never seems to have applied to clients in Scotland – again we have good evidence for that in Boswell who certainly sees clients and sometimes sees them indeed without any agent being present.<sup>31</sup> The English rule against seeing clients in criminal cases seems indeed to have lasted until about 1889 when Charles Russell – the future Lord Chief Justice – saw Mrs Maybrick whom he was defending in her famous trial for murder.<sup>32</sup> (On this occasion the client was convicted, but was in due course reprieved.) Yet the important thing to remember is that up until the middle of the nineteenth century parties to a civil litigation were not allowed to give evidence<sup>33</sup> and a similar bar applied to accused persons until 1898<sup>34</sup> – so the part of the English rule relating to clients could not have been intended to stop counsel from infecting their evidence. It is therefore doubtful whether that was the explanation of the emergence of the rule as it applied to witnesses. It is in any event rather unclear why the Bar should think that discussions with counsel could be more dangerous in infecting witnesses’ evidence than conversations with the instructing solicitor. The alternative rationale is that, by not speaking to the witnesses, counsel remain at one remove and so take a more objective approach, which is of advantage to the administration of justice as a whole.<sup>35</sup> Even if that were a proper justification for the rule today, it seems doubtful whether the rule was introduced to achieve this result. Certainly in the past there were suggestions that due to social vanity the Bar had adopted a rule which operated not in the interests of barristers at all, but in the interests of attorneys who, by restricting barristers’ access to clients and witnesses, were able to keep to themselves all the lucrative work involved in taking instructions from the client and seeing the witnesses.

Whether true or not, those suggestions surfaced in the 1840s when the English Bar felt under threat from the growing number of attorneys who had rights of audience in the new County Courts.<sup>36</sup> In the face of this apparent threat of competition –

30. *Guide*, para. 9.2.4.4.

31. *Op. cit.* (note 28), entry for 15 July 1774 when compared with the entry for 30 July 1774, p. 236 *init.* See also the entries for 14 July and 13 August 1774 relating to Lady Dundonald.

32. E. B. Rowlands, ‘The Etiquette of the Bar’, (1895) 100 *The Law Times* 107 at p. 108 (first column).

33. The rule was abolished in England and Wales by s.2 of the Evidence Act 1851 and in Scotland by s.3 of the Evidence (Scotland) Act 1853.

34. Criminal Evidence Act 1898, s.1 which applied to both England and Wales and Scotland.

35. *Stair Memorial Encyclopaedia* Vol. 13, para. 1357; Rowlands, 100 *The Law Times* 107-108.

36. ‘The Etiquette of the English Bar: A Barrister’s Grumble’ (1898) 104 *The Law Times* 546.

which seems to have been not dissimilar to the threat of competition now facing Scottish advocates — some barristers at least argued that the Bar would be handicapped by those rules of etiquette which prevented them from seeing clients or witnesses.<sup>37</sup> Happily the level playing-field had not yet been invented, and so that metaphor was not invoked, but the sentiment was the same: it was not fair that barristers should have to compete with attorneys whose rules of conduct allowed them to see clients and witnesses in a way in which barristers could not. Barristers should therefore dispense with the rules of etiquette which really in effect worked only to protect attorneys.

As we know, that view did not prevail, though the fact that the Bar Council was asked for a ruling on the position on witnesses as late as 1927<sup>38</sup> suggests that some barristers may have been unhappy with the position even then. From time to time some advocates have questioned the strict application of the rule — especially as it could seem to prevent them taking on minor sheriff court cases where the client did not wish to pay for both a solicitor and an advocate.<sup>39</sup> It is probably the case, however, that most Court of Session judges support the application of the existing rule to advocates in the supreme courts — because of the element of independence which it is thought to preserve. Yet such a rule has never been applied to solicitors when appearing in the sheriff courts and Parliament was not persuaded that it should be applied to them in the higher courts either. We therefore have two different rules of conduct applying to advocates and solicitor advocates in the supreme courts. While this may seem strange, it is essentially an extension of the practice in the sheriff court and Parliament was well aware of what would happen in the supreme courts once the legislation came into effect. Parliament left the matter to the professional bodies and to the Court and so any changes in the rules in the light of experience gained in working in the new circumstances would be a matter entirely for them; the Government would not be involved.

Even if for some reason the Faculty came to question whether there was a sufficient ethical basis for the existing rule on speaking to witnesses,<sup>40</sup> they would probably think twice before altering it since the practice of advocates or barristers not seeing witnesses can be defended on less lofty but very practical grounds which may well have been behind the continued existence of the rule. Advocates and barristers are able to concentrate on appearing in court, advising on the preparation of cases and giving opinions precisely because they do not spend their time seeing witnesses and taking statements from them or from clients. If advocates or barristers did these things,

37. *Loc. cit.*

38. *Annual Statement of the General Council of the Bar 1927*, p.7. J. E. Singleton, *Conduct at the Bar* (London, 1933), pp.8 and 14 *et seq.* does little to explain the purpose of the rule.

39. Such a question lay behind the Note by Dean to Advocates' Clerks 9 February 1977 on appearances by counsel without solicitors. See *Stair Memorial Encyclopaedia* Vol. 13, para. 1347. The Dean in question was the future Lord Mackay of Clashfern.

40. The Chairman of the English Bar has recently indicated that such rules of conduct may need to be examined.

then they would be indistinguishable from solicitors and would not be able to provide the distinctive kinds of services which solicitors and their clients value. They would also have to set up offices of exactly the same kinds as solicitors with all the attendant overheads. So while an inability to speak to witnesses may be seen in a certain light as a competitive disadvantage, it surely carries with it the important corresponding competitive advantage that the advocate or barrister can offer a particular service without the distraction of dealing constantly with clients and witnesses and without the attendant overheads. A rule which secures the continuance of this type of legal practice can be defended on this basis. In any event the restrictions on advocates seeing clients and witnesses may have comparatively little practical significance in relation to competition with those solicitor advocates who are making themselves available for instruction by other solicitors. In such cases the instructing solicitor will usually have seen the witnesses and the solicitor advocate will be expected to see the client only in the presence of the instructing solicitor.<sup>41</sup> So the position of advocates and solicitor advocates acting on this basis may not be so very different – which reinforces the point that they are simply another group of practitioners offering the same kind of service as advocates.

In drawing these remarks to a close I am only too conscious that this has been a rather parochial discussion and that in particular I have omitted all mention of the possible far-reaching implications of the provisions of European law on lawyers' services and rights of establishment. Apart from post-Maastricht fatigue my only excuse can be that the possible emergence of an establishment directive means that these aspects are very much in flux. I have no doubt that change will come from that quarter too, but in the meantime we in Scotland look forward to watching, and learning from, what happens in England and Wales when the reforms in the Courts and Legal Services Act finally come to pass.<sup>42</sup>

41. Code of Conduct (Scotland) Rules 1992, Sched. 2, para 3(4) and (5).

42. I am grateful to Mr Alan Maxwell of the Lord Advocate's Department, Mrs Pat Lawler of the Faculty of Advocates and Mr Bruce Ritchie of the Law Society for assistance in preparing the revised text of the lecture. It was not possible to take account of developments since January 1994.