

**Key note address for the International Advocacy Teaching Conference, Nottingham
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“Advocacy in Peril?”

A. Introduction

1. There is now, perhaps more than at any point in the past, a questioning of the role and need for advocacy in our courts. This is ironic given that, next year, we celebrate the 800th anniversary of Magna Carta which laid the constitutional groundwork for fair trial procedures and created the environment in which advocacy has blossomed in this common law jurisdiction. Over the past 800 years individual advocates have in countless arguments before countless courts prayed in aid Magna Carta and have through their fearless advocacy acted as a bulwark for the protection of civil liberties.

2. Yet that same advocacy is now under threat. Why is this? I would like to identify some of the reasons for this but I also wish to identify some of the solutions and conclude with a net “profit and loss” analysis.

B. Public v private funding: a growing schism

3. The point of departure is to draw a distinction, which becomes dangerously more schismatic by the day, between the privately and publicly funded parts of the profession. It is no exaggeration to say that for privately funded advocates, and in particular practitioners in the most specialist fields, practise

has in recent years (with of course some ups and downs) boomed. The specialist civil and commercial Bars are thriving. The English Bar has an enviable reputation internationally. It is common place for barristers from the Bar of England and Wales to be seen representing foreign nationals in all of the world's international courts and in many foreign courts where lawyers from abroad have rights of audience. And it has been good to see solicitor advocates beginning to do likewise. Solicitor advocates do not, in the main, seek to compete in the higher domestic civil and commercial courts with barristers. In my normal work in the High Court for example in a commercial case or in the QBD or in the Administrative Court, I virtually never see a solicitor advocate. However, solicitors compete in some lower civil courts and in many tribunals. They compete with the Bar in arbitrations and provide, in conjunction with the Bar, a source of effective and able advocacy for arbitral proceedings across the world. Competition between solicitors and the Bar in the private arena is healthy; the market chooses. The chambers system works remarkably well in this competitive, modern, world. It brings together specialists who are available at an essentially incremental cost. The economic model of the Bar is that of the "brain on a stick", where the sum paid by a client is predominantly devoted to the fees of the barrister with only a modest percentage being used to defray costs and overheads. The client pays for the brain and not for the stick. This has proven, and continues to prove, an effective and attractive model. Even during the recession, competition for places at the privately funded Bar has been fierce and some chambers have even expanded recruitment. Fabulously talented young lawyers are joining

both branches of the profession. Put shortly I can detect no real perils in the privately funded advocacy market.

4. But of course when one looks over the wall at the publicly funded advocacy market things are very different indeed and the grass is truly very thin and far from being green. The privately funded advocacy market serves an often international clientele; it is important to the public interest and to the economy of the United Kingdom for that reason. But the publicly funded market is at the epicentre of the rule of law and is crucially important to the vibrancy of our democracy. It exists to protect civil liberties and the rights of the individual against the State. This is particularly so in the Youth Court, the Magistrates Court, the Crown Court, in the family courts and in the Administrative Court. It applies equally before statutory tribunals for instance relating to immigration and asylum. It is imperative that the quality of advocacy should not dwindle in these arenas.
5. So is this sector in peril? The answer is yes. The answer is “yes” because there are at present a series of difficulties and possible crises which have caused a dramatic and negative impact upon the quality of advocacy.
6. This dichotomy between public and private funding constitutes the framework for my consideration of advocacy and I leads me to my starting point, which is to identify some of the problems - or “perils” – which are arising today in relation to advocacy in the publicly funded arena.

C. “Perils”

7. I wish now to identify six points about the quality of advocacy.

(a) Falling standards

8. The first point to make is that there is convincing evidence of falling standards. It is of course difficult to measure accurately on any quantitative basis the level of this deterioration but qualitatively the evidence abounds. In his recent review entitled “Independent Criminal Advocacy in England and Wales”, Sir Bill Jeffrey found a level of disquiet about current standards of advocacy amongst judges including some with long experience as solicitors, which he said was remarkable for its consistency and the strength with which it was expressed. He stated that it would be a mistake to discount these views. The Report cites a number of sources. For instance in 2012 the CPS Inspectorate, albeit based upon a small sample, identified deficiencies in the performance of in-house CPS advocates including, by way of illustration, failures to challenge inadmissible and hearsay evidence in court, a lack of preparation and over-reliance upon case notes. On a broader canvass in 2011 the BSB commissioned consultants to undertake perception studies of the standards of criminal advocacy. This included over 750 online surveys completed by barristers, legal executives, lay justices and others and it was supplemented by 16 in-depth interviews. Over half of the respondents felt that existing levels of underperformance in criminal advocacy were exerting a negative impact upon the fair and proper administration of justice: 31% concluded that the impact was “very high”; and about one quarter felt that criminal advocates “very frequently” acted beyond their competence. In their evidence to Sir Bill Jeffrey the Council of Circuit Judges reported a widespread view amongst members that the basic level of competence displayed by an increasing number of advocates in the Crown Court had diminished in

recent years which they said was a matter of serious concern to the judiciary. They observed that in particular there was a risk that in smaller solicitor practices employed in-house advocates would, for commercial reasons, retain cases that were beyond his or her expertise and which might, otherwise, have been handed to a barrister in self-employed practice. Individual judges expressed concern about an “inequality of arms” between prosecution and defence if one side or the other was inadequately represented. District Judges reported the same thing; as did the Magistrates’ Association which commented on the overall decline in the quality of advocacy before them as they saw it, attributing some of this to remuneration rates, limited funding for training and also an overall lack of preparedness on the part of those presenting the cases.

9. Almost universally judges who were consulted were at pains to emphasise that many capable solicitor advocates existed. But the principal concern was, as Sir Bill Jeffrey puts it:

“...relatively inexperienced solicitor advocates being fielded by their firms (for what were presumable commercial reasons) in cases beyond their capability”.

(b) The risk to quality caused by the system in operation for the distribution of legal aid

10. The second point concerns what is perceived to be a root cause for the deterioration in the quality of advocacy. The problem is a systemic one which lies in the *manner* in which legal aid work is distributed; it arises because decisions as to the choice of advocate are affected and distorted by this system of allocation. Traditionally in the days before solicitor advocates, the legal aid authorities allocated contracts to solicitors safe in the knowledge that they

would choose the best advocate for the case. However in recent years those contract holders have come into direct competition with (non-contracting) barristers and there is quite understandably a built-in incentive upon contract holders to retain work in-house and not to instruct outsiders. This is not, I emphasise, an attack upon solicitors. An in-house advocate employed by a firm with a legal aid contract may of course be a solicitor but can also be a barrister. Contract holders have an obvious commercial incentive to assign an employed advocate to a case and thereby retain for the firm the full value of the fee. In a system where legal aid rates have been cut to (and beyond) the bone contract holders can only be profitable if they control and constrain with ruthless efficiency costs and this includes fixed and variable costs, including salaries. Experienced advocates, whether solicitors or barristers, are not as cheap as young advocates. It therefore makes perfect sense to insert into cases the youngest advocate available. The problem therefore is not about the intrinsic skill or quality of the instructed advocate, it is about the fact that young men and women of potential ability are put into cases where they are, simply, way out of their depth. And where that occurs the case, as a whole, suffers as does the interests of the client. Sir Bill Jeffrey in his report put his finger on the problem:

“As it exists now, the market could scarcely be argued to be operating competitively or in such a way as to optimise quality. The group of providers who are manifestly better trained as specialist advocates are taking a diminishing share of the work, and are being beaten neither on price nor on quality”.

11. There is of course one solution to this peril, which lies in the hands of the Bar, and which is to compete at source for legal aid contracts and take control of the purse strings. The government awards long term legal aid contracts and

this ossifies the distortion in the marketplace and so opportunities to change the system occur only periodically. When I was Chairman of the Bar Council in 2010 a competitive tendering regime for the Bar and solicitors alike was being contemplated by the MOJ for 2011. Had that occurred it would have compelled the Bar, like it or not (and they did not like it and still do not), to alter the way in which it acquired instructions. The Bar Council, assuming that a D-day would be forced upon the criminal bar, set about working out commercial models which could be used to enable the Bar to compete for contracts yet still retain a chambers structure of self-employed practitioners (the “*ProcureCo*” model). But in the event the government deferred, into some fairly hefty long grass, the new scheme and the old system prevailed and prevails. So as matters stand, and as Sir Bill Jeffrey identified, the legal aid allocation system allocates advocacy work neither on quality nor on price and, furthermore, makes instructing of an advocate contingent upon the decision making of a category of person (the legal aid contract holder) with an economic incentive to refrain from instructing out of house.

12. The system also creates other forms of perverse incentive; one such is the practice of selling litigation rights. Contract holding solicitor firms (and sometimes their more sophisticated clients) will instruct an outside advocate but upon the basis that a portion of the advocacy fee is remitted to the client or the solicitor or split between the two. The fee is of course the pared down legal aid rate for the advocacy element of the case. It means that an advocate is selected not by reference to quality of representation but by reference to his or her preparedness to pass on a commission on the fee to someone who is already being paid by the legal aid authorities for the solicitor part of the work

on the case. The consequences of this are obvious: the instructed advocate takes on a case for a very low fee and is not chosen for his or her quality or experience but upon the willingness to split the fee. Referral fees are proscribed by the regulators but they remain rife and are an incident of the distorted allocation system and the incentives which it creates which are adverse to the selection of the best advocate for the job.

13. Let me again be crystal clear. My objection is not to solicitor advocates who are a permanent and valuable part of the landscape. My objection is to the failure of the State to find a payment system which creates a level playing field as between advocates and which preserves quality and choice. This is a systemic peril but it is not one which at present looks like been remedied.

(c) The risk to quality caused by reductions in the level and scope of available legal aid

14. The third threat comes from the implications of the austerity programme imposed by the Treasury on legal aid, both in term of level of fees and reduction and curtailment of scope of availability. With regard to scope fewer and fewer people receive any legal aid in the civil arena. Justice Ministers have driven through reforms which have sliced through the scope of those eligible for legal aid. This has therefore shifted a category of case from the publicly funded market to the privately funded market and, at present, the privately funded market has not been able adequately to cope which has resulted in individuals who are in distress not having access to a court or having to seek to act for themselves. The principal illustration has been in the area of civil family disputes.

15. For instance in relation to family law far fewer affected persons can obtain access to courts now that legal aid is no longer available. Family court judges regularly tell stories of wives (or occasionally husbands) raising claims of abuse by the other partner to the children in divorce proceedings because this makes it much more likely that they will gain legal aid (which remains available for cases of alleged child abuse). Judges then find themselves having to adjudicate upon disputes where the one partner (usually the mother) is legally aided but the allegedly abusing other partner (usually the father) is a litigant in person and where false claims of abuse have to be pursued and persisted in by the legally aided party in order to justify their funding. Hearings become fraught with emotion and take longer to resolve and therefore become more expensive to conduct. The absence of legal representation for an alleged abuser leaves open the prospect of that “abuser” cross-examining the alleged victim of the abuse. Judges have expressed to me their real concern that the tenuous nature of the justification for obtaining legal aid places advocates under real “ethical” pressures. Fathers feel bitterly that they receive second class justice. Data published by the Legal Aid Agency show, for instance, that aid was provided in 205,617 new family cases in 2012/13 but only 42,798 in 2013/14. The reduction in cases involving social welfare cases was even more dramatic. Legal aid has very largely been withdrawn from civil cases and from judicial reviews. And for litigants in person, who in earlier times might have been funded through legal aid, there is now a double obstacle to coming to court. Not only must the litigant pay for their own lawyers but they are exposed to the costs of the other side if they lose. A legally aided litigant was not so exposed.

16. All of these changes to the legal aid system have obvious consequences for the quality of advocacy. There are simply far fewer cases in which advocates can practice and hone their skills. And where an advocate is instructed on private funds they increasingly confront litigants in person on the other side of the court room. This in and of itself can cause real problems for the reasons I have already alluded to by reference to illustrations from family cases.
17. As to cuts in the level of fees, in almost every year the government cuts the level of fees. When inflation is taken into account barristers get paid over 35% less today than they did for a comparable case a decade ago. The cuts, I should emphasise, cover both CPS prosecution funding and defence legal aid. These reductions also have obvious consequences. Advocates are voting with their feet and leaving the profession because the rates of pay are not sufficient to enable a decent living to be maintained. Smaller solicitors firms are rapidly going out of business. Many of the very best and most able individuals are diversifying away from publicly funded work. Where there is funding it rarely stretches to cover two advocates (a leader and a junior), even in complex cases. Junior advocates of modest experience now accept instructions (to prosecute and to defend) in cases that until relatively recently would have been allocated to a leader, or at least to a very senior junior.
18. Moreover, the curtailment of funding means that the advocate in the vast majority of cases appears unattended by a solicitor behind, and accordingly poor performances are not therefore scrutinised. Judges notice them but they are often reluctant to raise the matter with the advocate or with their senior partners or Head of Chambers, for fear of appearing partial. Most judge

simply grin and bear the performance but they most certainly do complain to each other in the judicial corridors. There is in consequence no longer a routine reporting-back system, such as naturally occurred in the past, whereby the advocacy in a case was monitored by an experienced solicitor or senior practitioner whose self-interest lay in ensuring that the best advocate was instructed for the case. Poor performances were observed and could lead to a disinclination to provide instructions in the future. This market pressure no longer exists in the overwhelming portion of case. It would be churlish to criticise those who remain in the market today but the implications for the quality of advocacy across the board from reductions in legal aid are serious.

19. In making these points I must make one thing clear. These cuts are motivated in large measure by an imperative to save money which goes well beyond the immediate needs of the justice system and I am not in this address concerned with the merits or otherwise of these cuts *per se* (and the legal profession is of course only one of many other professions and sectors dependent upon public funds which have been hit hard by the cuts). I am concerned only with the impact or the consequences of these cuts upon the quality of advocacy in the courts. I equally do not suggest that some of the reforms that have been ushered in were not otherwise needed. But it remains true that access to justice has been curtailed by the denial of legal aid to many in need, and the reduction in scope as well as level of legal aid squeezes opportunities for young advocates to cut their teeth and improve their skills. The austerity cuts are a real and aggressively potent “peril” to advocacy.

(d) Recruitment

20. This brings me to my fourth point which concerns recruitment. At present recruitment to the publicly funded Bar has all but dried up. A related, and indeed very serious, “peril” therefore lies in the dramatic and negative effect which austerity cuts have therefore had upon the recruitment of new advocates. My research tells me that things are scarcely any better amongst solicitors. Yet the welcoming of new blood into the advocacy profession is critical to its survival and to the public interest. It is critical to the rule of law and in the long term to the recruitment of new judges. But legal aid cuts have decimated recruitment and this not only weakens the gene pool of the advocacy practitioner’s market but it raises serious questions about the social make-up of the profession as a whole. No one doubts that those representing clients before the courts should come from as wide and diverse a range of persons as can be achieved. But, at the moment it is mainly those with parental support or deep pockets who can come to the profession even if they can find, which is increasingly difficult, a place (firm or Chambers) from which to practise.

(e) Perceptions of professionalism and ethics

21. This brings me to my fifth point which concerns the perception of the Bar, and indeed advocates in general, by the public and by government and whether this gives rise to issues relating to professionalism and ethics. As to this it would not be wrong to conclude that there is a risk of a crisis of confidence in the role of the advocate as a result of a number of highly publicised disasters in relation to the trial of sexual offences. It is trite that the conviction rate for prosecutions of rape and other serious sexual assaults is worryingly low. It is

also of concern that the police and CPS experience considerable difficulties in persuading complainants to give evidence in court. In the past 24 months a series of catastrophic trials occurred during which complainants in sexual assault and grooming cases were subjected to horrifying experiences when giving evidence. Defence counsel, to my mind, abused their professional responsibilities in conducting quasi-gliadatorial questioning of complainants about their social and sexual histories, notwithstanding that this was tangential to the real issue in the case which was whether the defendant raped or sexually assaulted the complainant at a particular point in time. In some of these cases judges failed to exercise proper control over the questioning; in one case the judge said (wrongly) that he did not consider that he had the right to curtail defence counsel's questioning. And prosecution advocates (regrettably often in-house) failed to stand up for the complainants and to object, and object again, and to continue to object until such time as their objections were paid heed to. In the case in which the judge said that he lacked the power to stop defence counsel questions the prosecution failed to correct that misapprehension in the mind of the judge. Some high profile sexual grooming cases collapsed. At this time the Times journalist, Andrew Norfolk, was conducting research into the treatment of witnesses in such cases and he sat through many months of distressing sexual abuse trials. He wrote about his experiences in a series of disturbing but penetrating articles for the Times. His revelations caused an outcry. The Advocacy Training Council invited Andrew Norfolk to a Chatham House discussion in 2013 with selected senior members of the judiciary and the profession about his experiences. The exercise was illuminating and it reinforced in our minds the need for immediate remedial

action. I will return to this later. For present purpose the “peril” lies in the fact that public and governmental perceptions of advocates have been tarnished by the experiences of a few disastrous trials. I say a “few” because in actual fact the number of trials that went horribly wrong was a very small proportion of the ever increasingly large number of sexual abuse trials that are being conducted (effectively) in the Crown Court.

22. One might counter that public perception is fickle. It waxes and wanes. But in truth reputational integrity is important. The public not only needs to have total confidence in the independence and impartiality of the judiciary, they need to also to be able to hold firm to the belief that advocates are bold and fearless in the defence of clients’ interests; but at the same time principled and professional. Every advocate owes his or her first and paramount duty “to the court” and not to the client. Our judicial system relies upon advocates knowing where their first duty resides and in their behaving accordingly and Judges *must* feel entitled to repose confidence in the advocate before them to assist the court since, in this jurisdiction, judges do not routinely have judicial assistants and must rely upon the advocates before them to be fair and honest and candid. When economic or other failings in the system lead advocates to forget this or, worse still, ignore this, then the public and government can quite rightly express concern. A dilution or a distillation of professionalism or ethics amongst the profession is a real “peril”.

(f) Regulatory inertia

23. The sixth point is the failure or inability, collectively, of the regulators to address the issue of declining standards. The first attempt to do so, the

introduction of QASA, has served to demonstrate that collective regulatory action can be an ineffective motor of change. The idea for a minimum standard in criminal advocacy was first proposed by the Legal Services Commission (LSC, now the Legal Aid Authority) in 2008 and 2009. The specific plan then suggested met with widespread opposition. So, in early 2010 the BSB wrote to the LSC and informed it that in its view the duty to regulate standards under the Legal Services Act 2007 lay with the front line regulators and that the BSB intended to produce its own scheme, in conjunction with other front line regulators. The stance was taken (correctly in my view) that if standards needed to be introduced to meet a decline in performance then this was for the profession to address and not government, which was far removed from the advocacy front line. From there on in progress has been painfully slow. In late 2014, now over four years later, the QASA draft scheme is held up (mired might be a better description) by litigation. My view is that the scheme should be viewed as a protective measure for all advocates. It is not in the interests of any advocate (barrister or solicitor) that those who are simply not qualified or competent to perform should be left in the marketplace at all. They should either be weeded out or they should be not permitted to practise unless and until they have established competence. QASA is intended to set out a *minimum* level of competence. It is not a “gold standard”. I am not going to become embroiled in this address in working out the rights or wrongs of the various views and positions which have been adopted by the protagonists in this episode. The relevance of QASA to my present thesis is that it shows that initiatives taken at the macro-level between regulators represent too cumbersome a means of achieving

higher standards of advocacy. Amidst the intense in-fighting that has surrounded the introduction of QASA we have lost sight of the protective nature of the scheme for all good and competent advocates. For the “perils” that present themselves a cure brought about by regulators is not, on this present track record, a prospect that augurs well.

(g) Quality and justice

24. Where does this litany of woes take one? The Sir Bill Jeffrey report starts with language which closely reflected the terms of a joint submission made to his review team by the Advocacy Training Council (“ATC”) and by the Council of the Inns of Court (“COIC”) and it focuses upon the critical importance of good advocacy to the due administration of justice:

“Effective advocacy is at the heart of our adversarial system of criminal justice. If prosecution and defence cases are not clearly made and skilfully challenged, injustice can and does result. Effective advocates simplify rather than complicate; can see the wood from the trees and enable others to do so; and thereby can contribute to just outcomes, and save court time and public money”.

25. Sir Bill Jeffrey also commented that in the light of the present problems, and especially the systemic problems caused by Government legal aid policies, the future of the self-employed (publicly funded, criminal) Bar was unclear. He concluded that, although there were signs that the position was improving, if the trends described in his work continued unabated the Bar would take a diminishing share of the available work, the intake of younger barristers would decline and the “talent pipeline” for criminal QCs and judges would dry up. He also concluded that the concerns were not fanciful. He stated:

“This matters, because the particular strengths of the English and Welsh Criminal Bar are a substantial national asset, which could not easily be replicated. There is also a distinct national interest in having sufficient top-end advocates to undertake the most complex and serious trials, and senior judges with deep criminal experience”.

26. The Bar is therefore under severe pressure at the present time. Sir Bill also added that solicitor advocates were a valuable and established part of the scene. He, of course, made this point to differentiate between questions relating to the individual quality of advocates, on the one hand, and systemic issues on the other hand. Solicitors have been hit as hard as the Bar has from cuts to legal aid. A multitude of small firms, comprising practitioners with great experience of the justice system, have gone out of business and their skill base has been lost.
27. If the “perils” that I have identified of falling standards perpetuate then, there can really be no shadow of a doubt, the due administration of justice, and the rule of law, is threatened.

D. Solutions – the evolution of common standards

(a) No succour from government

28. Where, in all of this gloom, is there a ray of light?
29. I believe that there is a glimmer of light in the fact that the profession, *as a collective*, has joined in order to find ways and means to address the issue of the risk of declining standards. I use the term “profession” in the broadest sense to cover all those involved in advocacy from the practitioners themselves to those that work with advocates in court and those that train

advocates and to those who rely upon good and effective advocacy in the courts.

30. In the run up to an election, there are no votes in paying extra fees to lawyers. So restoration of previous levels of legal aid is not going to be part of the remedy. And there is, realistically, little prospect of an immediate and wholesale reform of the legal aid contracting regime to smoothen out and remove any of the distortions which are created by that regime in the advocacy market. For this reason the systemic distortions caused by the Government's legal aid policy will not disappear, at least not in the short term. Moreover, far from Government being a solution there is a risk that the issue of advocacy quality in the courts becomes a political football, especially when it is wrapped up in the problems of protecting vulnerable witnesses (and in particular complainants in sex cases) in court. Clearly, the issue of quality of performance is a matter of genuine public concern and, equally, the question of the protection of vulnerable individuals and the way in which the judicial system treats them is also a topic of the most anxious and serious public debate. But this being so there is an attendant risk that Government sees the issue as a chance to make political capital and objectivity is lost. I have already explained that there is also little prospect of a solution arising from the regulators. So, solutions must come from elsewhere and must co-exist with the threats caused by legal aid policies and the profession cannot dally.
31. Recently the profession has come together, without pressure from government or from regulators (and in some ways *despite* government and regulation) in order to seek solutions. It has done this because it has – as a body –

recognised that the public interest demands prompt action and because there is little confidence that anyone *other than* the profession itself has the necessary knowledge and skill to find and deliver answers.

(b) The recognition of a pressing need for the wider profession to co-operate

32. In this context, there is an emerging and strengthening recognition that as an entire profession we must collectively assume for ourselves responsibility for upholding standards and we must do so sooner rather than later. And here there is progress because in the past year or so the profession has begun to grapple with the problem of deteriorating standards that I have identified in a truly tangible manner.
33. Perhaps I would say this but it is the Inns of Court and the ATC which have taken the most immediate steps to ensure the maintenance and improvement of standards of advocacy across the board. This is based upon a belief that as the ancient home of advocacy the Inns have a duty to reach out and, in the public interest, act. The Inns and the ATC are institutions with advocacy as their *raison d'être*. We are not regulators; nor are we the representative organs of the profession (which mantle belongs to the likes of the Bar Council and the Law Society and the specialists Bar and solicitors associations). The Inns and the ATC hence have the ability and opportunity to act a focal point for *all* those who are truly concerned with advocacy to join to address current problems.
34. Solutions however cannot be found in recreating the old distinctions or by the adoption of measures which entrench or perpetuate the sometimes fractious

relationship which has existed between solicitors and barristers conducting publicly funded advocacy. Nor can solutions come solely from the legal profession. Solutions to fundamental problems relating to *standards* must be found from across the entire profession, very broadly defined. Under the umbrella of the ATC the profession is now conducting fundamental research and development into a range of advocacy and training issues and techniques which, so far as we can gather, no one else worldwide is undertaking or performing. The work is being participated in by judges, barristers, solicitors, intermediaries, government officials, charities, academics and others.

35. Let me now turn to explain what is now happening and hence why there is some basis for optimism.

(c) The emergence of cooperation between practitioners in the development of standards

36. First, in 2011 the ATC published a report entitled “Raising the Bar”. This contained an analysis and a guide to the treatment of vulnerable witnesses in court proceedings. Drawn from evidence gathered over a period of 20 months from experts including practitioners, members of the judiciary, intermediaries, psychiatrists, officials from the Ministry of Justice and social workers, the report made 48 recommendations both for the profession and for other bodies. The report also included a series of “toolkits”, designed to be used by advocates as they prepare to question vulnerable people in court.
37. A central recommendation of the ATC “Raising the Bar” report was that all advocates should be issued with “toolkits” identifying common problems

encountered when examining vulnerable witnesses and defendants together with suggested solutions.

38. In 2012 the ATC launched “The Advocates Gateway” or “TAG”. The impetus came not just from the ATC (which was on the cusp of developing its own portal) but from the wider legal community where there was a recognition that there needed to be a single place that all concerned in the justice system could turn to for access to relevant guides and materials. TAG is thus a website or portal whereby important guidance material, including toolkits, is placed into the public domain. The toolkits set out good practice guidance for advocates and judges when preparing for and conducting trials in cases involving witnesses with communication or other needs.
39. In the past two years a whole series of toolkits have been placed upon TAG which deal with a range of problems extending from case management in young and other vulnerable witness cases right the way through to planning to question persons with hidden disabilities. In July 2014 a series of four new “toolkits” were placed upon TAG. There is, furthermore, a growing list of new research projects which are extending to non-criminal areas of work (such as family law) which will generate yet further toolkits and guidance material over the next 12 months or so.
40. In this regard the ATC has obtained much needed financial support from The Legal Education Fund (LEF). There is no irony in the fact that the LEF is supporting TAG and the ATC. It is a fund made up of the proceeds of the sale of the educational assets of the College of Law which was dissolved in 2012. This sale raised circa £200m and generates an annual income of about £5m.

The funds are used to advance legal education and the study of the law, which the Foundation does by making grants to a wide variety of organisations working in different social, professional and academic settings, by commissioning research and by bringing people together. The ATC has been successful in obtaining invaluable LEF funding for the simple reason that it is bringing the profession together in very significant projects. I cannot underestimate the value of the contribution being made by the LEF in supporting this work and the enlightened and supportive way in which it has been operating.

41. “TAG” is run by a committee chaired by an academic (Professor Penny Cooper). But it is populated by a range of specialists from a wide range of disciplines. The TAG committee is an *ad hoc* committee of the ATC but it has a remit to act independently and in the public interest. The development of these toolkits has therefore brought together specialists from across the profession, whether they be members of SAHCA, the Law Society, the CPS, MoJ, children’s charities, intermediaries, academics, and of course the Bar and the judiciary. The ATC is intent on generating standards that can, and should, be adopted by all advocates and which are adhered to and accepted by the judiciary. In this fundamental work traditional rivalries have been set aside and a new spirit of cooperation is evident. So the first solution to the “perils” is that in the field of the development and protection of advocacy standards the profession – in its widest sense – is combining to address the problems that exist. The standards that are being promulgated are being drafted by real experts in their fields. There is no perception that there should be a race to the bottom; the exercise is to identify “the” right standard, not one which the

courts can just about scrape by with, at a push. They are not being framed by reference to the minimum standard that a practitioner can get away with. The experts are drafting documents which reflect the professional standard which all advocates *ought* to demonstrate and they are being framed by reference to what is needed to protect witnesses and defendants and others coming into contact with the justice system. There has been no in-fighting. The toolkits are emerging at a speed and frequency which starkly contrasts with the progress of QASA. Where there is a will there is a way.

(d) Cooperation with the judiciary in the development of standards

42. Secondly, and this is implicit in my first point, the new spirit of cooperation between the professions is echoed in cooperation between practitioners and the judiciary. It has always seemed to me self-evident that for toolkits and standards promulgated by the advocacy profession to have real utility at the sharp end – in the court room - they had to be accepted by the judiciary who have control over the advocate’s working environment.
43. Moreover, having Judges involved in the drafting and promulgation process means that as a standard is being drafted it is being benchmarked by the judicial members of the drafting groups against an understanding of what actually happens in court and what, objectively speaking, is needed to ensure a fair trial.
44. Ultimately, this has meant that if serious efforts were to be made by the Inns and ATC to lead the way in promulgating advocacy standards then neutrality was critical; the Bar could not with a straight face say to the judiciary “take our standards and apply them in court” since were the judiciary to concur this

would risk it being seen to be partisan and slanted towards the Bar. To be capable of universal adoption the new standards have to be accepted by one and all and this includes not just the lawyers but other professionals working within the system. Only in this way can we breed widespread confidence in the efficacy of our output.

45. Advocates owe their primary duty to the court and must be responsive to the efforts made by judges to ensure that trials are fair. If there was daylight between the views of the judiciary and those of the profession as to the required standards to be adhered to then these toolkits simply would not perform their task. In the development of the standards that the ATC and the TAG Committee is working upon, the judiciary are therefore closely involved and there has to date been a seamless liaison between profession and judiciary. The second solution therefore to the “perils” is that practitioners are engaging with the judiciary in the development of standards that the judges can have confidence in and can therefore apply in the courts.

(e) Transparency/communication

46. Thirdly, a further and important development is the making of this research and guidance material openly available to the world at large. We have taken a deliberate decision that the output of our work should be in the public domain. There is no attempt to place materials behind a pay wall or become accessibly only to those who know a pass code or who sign up to “membership”. Anybody can use the toolkits that are on TAG (subject to copyright), and increasingly anybody is. There is evidence that the guides and toolkits have been picked up and used in courts and in other judicial and quasi-judicial

proceedings in the USA, Australia, New Zealand, Hong Kong, Mauritius, and in other places around the world. We believe this to be important. Over time we seek to stimulate an international debate about advocacy techniques. We hope to influence but we hope and expect also to be influenced.

47. Promulgating best standards is not however just about putting documents or training videos onto a website. It is also about “person to person” engagement. The ATC is very active in sending experienced practitioners and judges to provide training for advocates and judges in multiple other jurisdictions around the world (there are over 10 ongoing projects). In developing best practice for use in our own jurisdiction we are also therefore promulgating ideas about fair trial procedures which reflect the rule of law and which are being absorbed in other legal systems. The ATC is not alone in this; SAHCA, for example, has also been engaging internationally in certain African and East European jurisdictions spreading advocacy best practice.

(f) Development of specialist training

48. Fourthly, the profession has also combined, again under the umbrella of the ATC, to devise specific training packages to address the problems that have arisen in sexual assault cases and cases involving vulnerability. Earlier this year I invited HHJ Peter Rook QC to chair a multi-disciplinary team with a view to devising training courses for advocates in sex cases and then in rolling those training courses out across the profession. The object is to produce training courses which reflect what is perceived to be an appropriate standard of advocacy within a relatively short period of time and then to embark upon a series of exercises to train additional trainers. Thereafter it is intended that, in

a devolved process, the various professional bodies (individual Inns, Bar Council, circuits, Law Society, CBA, SAHCA and others) will roll out the training so that all advocates who deal in these sorts of cases will receive specialist training in best practice techniques. The training courses will be consistent with the training given to judges.

49. We have, upon this occasion, sought to pre-empt the concerns which have been expressed to me subsequently by politicians about the treatment of vulnerable witnesses in these highly sensitive cases. I have been able to communicate the message that we, as a profession, fully recognise our responsibility in addressing the problems. And I have been able to explain that we have already seen a marked improvement in the quality of advocacy in such cases. Indeed, albeit that I confess that the evidence is anecdotal, the number of reported problems in sexual abuse cases attributable to the conduct of advocates (or judges) has reduced. The judges are almost universally given specialist training in the handling of sex cases and are aware of the existence of the toolkits and increasingly require advocates who appear in such cases to have studied the relevant toolkit(s) before they embark upon any formal cross-examination or questioning of a vulnerable witness. We are making real and rapid progress.

(g) The identification of new problems

50. Fifthly, and importantly, there is an ongoing process of identifying *new* potential problem areas in the field of advocacy and then embarking upon research into new advocacy techniques to solve the identified problems. For instance, the ATC is presently working on linguistic and language problems in

courts. We are devising, in conjunction with translation specialists (interpreters), courses for advocates designed to ensure that the evidence given by those who do not speak the language of the court is accurate and fair. We have also embarked upon a wide scale research exercise into professional ethics with Professor Richard Moorhead (from UCL). Further we have embarked upon joint research with the Law Commission into expert evidence in criminal proceedings, chaired by Professor David Ormrod.

(h) Conclusion

51. In short, and for perhaps the first time, the profession is working together, and with the judiciary, in identifying particular problem areas relating to standards and beginning to grapple with them. It is engaged in research that nobody has conducted before and it is coming up with new, and often novel, solutions. This work is multi-disciplinary and multi-faceted and brings together not just lawyers, but children's charities, intermediaries, psychiatrists, medics, psychologists, academics and consultants of all types.
52. It is for this reason that one can have some cautious sense of optimism. I have no doubt that it will be difficult to overcome many of the systemic problems created by government austerity and legal aid funding regimes and there is no guarantee that these problems will in fact be addressed or will not even get worse. But in those areas where the profession can, acting together, work to maintain and develop standards then we are now actively doing that and this is capable of generating tangible results.

E. Training

(a) *The need for common training standards*

53. Let me now turn from the issue of the setting of standards to the related question of training requirements.

54. As a profession we need to take a long and hard look at the way in which we train advocates. This should encompass not only the elementary qualification stage but also the requirement for on the job, and continuing, education. It seems to me quite incomprehensible that the requirements for qualifying as a barrister or as a solicitor advocate are so profoundly asymmetrical. To qualify as a barrister, entitled to appear in any criminal court, that person must have undertaken approximately 120 days of specific advocacy training prior to qualification. On top of that the individual must have passed through pupillage. However a qualified solicitor can appear in the Magistrates' Court and, albeit subject to obtaining higher court rights accreditation, in the Crown Court with as few as 22 hours training. Sir Bill Jeffrey concluded that the disparity in training requirements was "*almost impossible to defend*". I also can see no possible long term justification for the disparity. It cannot be in the longer term interests of solicitor advocates to be exposed to advocacy without adequate training. This is a view I know is shared by many solicitors. In the longer term the cadre of solicitor advocates can only be strengthened and enhanced by the introduction of a far more rigorous entry training regime.

(b) *The need for specialised post-qualification continued training*

55. Further, there needs to be, across the board, far more intensive, post-qualification training at all levels. Professionals tend to resent the requirement to comply with CPD. However, this is, as I well recollect from my days in

practise, as much a reflection of the fact that in order to “get the hours” one had to sit through numerous, invariably futile and useless, instructional sessions or even, if desperate, watch some video presentation or podcast purchased off the net (whilst multitasking on some other activity, such as feeding the cat as one practitioner recently and candidly confessed to me). In the past few years the Inns of Court, and the ATC, and I know others such as SAHCA, have introduced far more specialised and intensive, CPD supported, specialised training sessions. These are proving to be popular and effective. In my view, it should be treated as axiomatic, that post-qualification training should be specialised and intensive and directed at honing existing skills to the maximum possible degree. It should also be treated as axiomatic that all advocates who perform the same tasks in the courts subject to the same duties, from whichever branch of the profession, should be subject to the same requirements. But the chance of this occurring is negligible. In this regard the SRA has recently decided to abandon an hours based (CPD) post-qualification training requirement and to move to an output based approach. This is a reflection of the fact that CPD has proven to be of limited success. The SRA has indicated that it will in due course provide a competence statement which describes what a “good solicitor” should be like. It will be interesting to see if the SRA focuses in depth on what the good advocate should look like. This shift to deregulation does however highlight that it must be the profession that leads in the maintenance of standards because there is little prospect that consensus could be achieved by the regulators themselves in this area.

(c) The need for mandatory training in particularly sensitive areas of practice

56. In certain highly sensitive areas of practise there should, in my view, be mandatory additional training. This is by no means free from contention. For instance, the training courses presently being devised by the “Rook Committee” will, it is hoped, be rolled out within the next 12-18 months. They will be directed at possibly as many as 2 - 3000 (and possibly more) advocates who appear, either regularly or from time to time, in sexual assault cases or other cases involving vulnerable witnesses or defendants. The question arises whether those advocates should, in the future, only be entitled to act in such cases if they are accredited as having undertaken the relevant training. The question of accreditation or “ticketing” is controversial. My view to date has been that the profession should take the responsibility for introducing this scheme without regulatory intervention. I have been concerned to ensure that the important work of the Rook Committee on the essential training that should be introduced for advocates engaged in sexual assault cases and other cases involving vulnerable witnesses should not be sucked into a mire of regulatory delay. However, without making the training mandatory there is the risk that the least able or most truculent and resistant advocates will simply refuse to undertake the training and there will be nothing to prevent them from continuing to act in an incompetent manner. There are a number of potential solutions to this which have been mooted. One is “ticketing” pursuant to which there would (were it to be introduced) be a requirement, backed in some way by law or regulatory condition, to the effect that no advocate could accept a case without having first acquired the requisite “ticket” which would necessitate having undertaken the training. This however assumes regulatory intervention and for reasons I have referred to there is a concern to prevent

regulatory involvement becoming a distraction to the work that is ongoing. An alternative might be for the Legal Aid Authority to introduce a requirement that no publicly funded practitioner would be paid for appearing in such a case unless they had obtained the necessary training. There is an additional issue which will have to be considered which is whether the training will contain a “pass/fail” requirement or whether it will simply be a course that is to be undertaken without any final assessment being made of the attendee. I remain to be convinced that it is sufficient for an advocate to “get the ticket”, simply by attending. These are however not easy questions to resolve. I would hazard the position that the profession working together as professionals can find workable solutions to these logistical issues.

57. The Lord Chancellor announced in September 2014 that he proposes to introduce a statutory requirement that those appearing in sex cases have been subject to appropriate training. I welcome this proposal for reasons which are obvious from my earlier comments. We will now need to work with Government closely to ensure that the overriding public interest and need does not become bogged down in the details or become prey to regulatory squabbling or dilution.

(d) The review of training methodologies

58. Training methodologies need to be continuously improved. The Inns of Court and the ATC have recently embarked upon a comprehensive exercise in examining all aspects of the way in which it conducts training. We of course take as our template the “Hampel” method. But good trainers already intuitively mould Hampel so that it reflects the level and seniority of the

student or advocate before them and, certainly on the basis of my own experience working with many experienced good trainers, deliver a very personalised (but invariably effective) form of Hampel which embraces their own personalities. And in certain areas, for instance in relation to vulnerable witnesses, the traditional Hampel method has in effect had to be turned inside out and upside down. We have therefore embarked upon a project, which might take a number of years to complete, whereby we will review our training methodology from top to bottom in terms of the subject matter of the training but also as to its application to different levels of trainee from introductory student sessions right the way up to specialist master classes. We are doing this by bringing together the Inns and Circuit's senior trainers into working groups and, in effect, letting them set the agenda for review. Each group will shine a spotlight on particular issues and gradually evolve a more refined and sophisticated training system. We started the process with a conference held in the Middle Temple in March 2014 where multiple focus groups of Inns, Circuit and BPTC trainers joined to identify common problems and issues. From this we are synthesising the results and will roll out a much wider programme of review. The initial feeling of existing trainers is that Hampel will remain the core or the pivot of future training for the simple reason that it works, but that it will evolve. The impetus for change will come from within the Inns and Circuits but, in time, will be rolled out as a Hampel based but new "Inns method". We expect that this process will generate numerous new sets of materials, guides, toolkits and training videos. The end result – better training and better advocacy.

(e) The need for judicial training which is consistent with the training provided to advocates

59. Finally, Judges control court rooms. Convergence between advocates and the judiciary over standards is to be encouraged and strengthened. As systemic pressures increase so judges will have to be more demanding in what they require of the advocates before them. They should not tolerate poor behaviour or poor performance. This is not an easy path for judges to tread since it risks bringing advocates and judiciary into conflict. But in my view (which has not in this respect changed in my transition from Bar to bench) a full understanding by the judiciary of the role that it plays in ensuring that standards do not fall will be pivotal to the preservation of justice in difficult times. The work the judiciary is undertaking in working with the profession in devising standards highlights the related need to ensure consistency in training. The Judicial College has an ambitious training programme for all judges. As matters stand there is no suggestion that there is in fact real daylight between the bench and profession and this is as it should be.

D. Conclusion

60. The democracy that exists in this jurisdiction rests upon a rule of law that we have nurtured for 800 years. A central pillar of the rule of law is the independence of the legal and judicial system. And for this to continue to be so we – the profession - must preserve, protect and strengthen the role of the advocate.
61. To my initial question - Is advocacy in peril? - The answer is “yes” and “no”.

62. So far as the privately funded market is concerned the answer is “no”. Where Government is not involved and where normal market forces can operate, the profession is surviving and in the main thriving. There are no persistent or endemic concerns about the quality of advocacy at this level. Where the market provides opportunities to solicitor advocates they take those opportunities. Collectively, the legal profession in England and Wales provides world class advocacy.
63. But where Government intervenes in its capacity as the monopsony payor for services then real perils exist and the answer is “yes”. These problems are causing a dramatic negative effect upon recruitment, a reduction in opportunities for young advocates to learn on their feet or to sit with and observe experienced advocates in action. There are powerful pressures at work which mean that decisions about who to instruct are distorted to the detriment of quality. And there is real evidence that the quality of performances in the courts on a day to day basis is suffering with real knock on effects on the administration of justice. Practitioners have endeavoured to fight their corner in Whitehall. But the profession does not control political decision making and systemic faults in the system of allocating and funding legal aid are not readily cured. It is not easy to predict with confidence whether or when these fault lines will be remedied. These are matters largely out of the profession’s hands and there is not even a single common view from within the profession as to how to resolve these problems.
64. Yet there are reasons for some degree of optimism in that the profession, like never before, has begun to join together to address problems related in

particular to standards in the provision of advocacy and in relation to training.
And in this there is at least a possibility that some of the worst perils, at least,
can be avoided and overcome or at least mitigated.

Nicholas Green

(Although the address was delivered in June 2014, this version reflects
revision made to the draft up until November 2014)