

[The following is an edited & shortened version of a talk presented to the Scottish Young Lawyers Association on 16 May 2008. All views and opinions expressed in this text are those of the speaker alone.]

**THE LAW SOCIETY OF SCOTLAND
SCOTTISH YOUNG LAWYERS ASSOCIATION
Annual Conference 16 & 17 May 2008**

STEPHEN O'ROURKE, Advocate
of
Terra Firma Chambers
stephen.orourke@terrafirmachambers.com

“Opportunities in Advocacy & Dispute Resolution”

1 Opportunities in Advocacy: career models

- A changing world.
- The Legal Services Bill, England & Wales
<http://www.dca.gov.uk/legist/legalservices.htm>

Good afternoon and thank you for the invitation to come and take part in your annual conference. The title of this talk is an attempt at diplomacy, since it is perhaps important to emphasise at the outset that a career at the Scottish Bar is of course not the only way of practicing as a lawyer advocate or a lawyer engaged in dispute resolution. Nevertheless, it remains one of the significant ways in Scotland by which you can develop a such a career.

This discussion will hopefully be of interest to:

- Those wishing to pursue a career as an Advocate or Solicitor Advocate – the two routes in many ways achieve the same goal but are significantly different business models, at least at present – my own experience is obviously more limited to the Bar itself.
- Those who instruct Advocates or Solicitor Advocates as litigation solicitors, criminal solicitors, conveyancers, family lawyers, indeed anyone who requires external assistance with legal work at some time or another.
- Finally, to every lawyer at this conference, for the simple reason that this is an unprecedented time of change in the Scottish legal world and for legal professionals everywhere. The structures and regulatory regimes (Law Society for you, Faculty of Advocates for me) which we know and have a working knowledge of today, are in my view likely to change significantly as a result of significant changes to the way legal services are provided to what we all think of as clients, but the Office of Fair Trading and others continually remind us are ‘consumers of legal services’.

In response it is my own personal view that we will have to fight harder than ever before to retain the value and integrity of our professional and business structures, taking nothing for granted in an industry where established practice is no longer unchallenged. In this environment it is for us all to promote and advocate the very best features of our professional structures and why these are of advantage to consumers and the people of Scotland at large.

Take a look at the Legal Services Bill for England & Wales, currently going through Parliament, likely to be enacted in 2011.

Key changes:

- New Regulatory Body - ‘The Legal Services Board’ – single oversight body, independent of the Law Society and Bar Council in England & Wales.
- Regulation of ‘Reserved Legal Activities’.
- New ‘Alternative Business Structures’, allowing lawyers and non-lawyers to work together on an equal footing – external investment will be possible (so possible stock exchange listings).
- New independent Legal Complaint Body – The Office for Legal Complaints.

It is perhaps worth noting that we as lawyers may be fortunate at this time to have an administration which may be sympathetic to Scottish perspectives and Scottish solutions, rather than adopting wholesale the changes envisaged south of the border.

Nevertheless, it is my view that we must all be prepared in the immediate future to become radicals in the interests of preserving what is best about our industry.

I am conscious that you are young lawyers and that we perhaps crave security in our career structures. The future may be rather uncertain, but in my view those who strive for the highest quality and integrity in their practice will of course have the least to fear in a changing world.

2 The Bar

As regards my own progress to the Bar, you will see a little information about me set out at the bottom of your handout (included at the end of this note).

Traditionally, (and still most significantly) progression to the Scottish Bar is by way of training and qualifying as a solicitor in Scotland; however a significant number of Advocates come to the Scottish Bar having practiced as barristers in England or elsewhere.

Qualifying as a Solicitor Advocate is an alternative - By way of illustration this afternoon you are privileged to be hearing from John Scott, Solicitor Advocate on the subject of Advocacy, a subject he is very well qualified to speak on as a prolific practitioner in the criminal courts.

- Independent, Referral Bar.

What is the Bar for?

The concept of the Bar is that it is, in a real sense, a college of independent, self-employed lawyers specialising in advocacy: namely pleading, arguing, presenting,

resolving and avoiding court actions at every level. Those last two specialties are often under emphasised! Most cases do settle. As John Scott would no doubt confirm, for every trial embarked upon a plea will be negotiated with the Crown in 10. While that is common sense, it speaks a greater truth about what makes for a good advocate – finding solutions is equally if not more important than terrier tactics.

Crucially, the Scots Bar (like other models, most notably in other Commonwealth jurisdictions) is an Independent Referral Bar

Cases are taken by advocates on referral from solicitors. Traditionally there has been no system of ‘direct access’. However this has now changed to a limited extent and it is now possible for a range of professionals (including Accountants, Surveyors, Architects and others) to instruct an advocate directly on any matter short of actually conducting litigation in a Court.

Independent

The Guide to the Professional Conduct of Advocates states:

“...The multiplicity of duties to which a lawyer is subject requires his absolute independence, free from all other influence, especially such as may arise from his personal interests. The disinterestedness of the lawyer is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore show himself to be as independent of his client as of the Court and to be careful not to curry favour with one or the other.”

Put another way, an advocate must state his client’s position without fear or favour. This can be strongly to the client’s advantage, in my view, allowing for a more objective appraisal of the legal issue, independent of pressure from the judge or opposite side. Where an objective view is being taken of a case from the outset, then in my opinion the best possible outcome is more likely to be achieved (whether that is pursuing a case in court or seeking early resolution).

- How the Bar can work well for Solicitors.

What is the benefit to a solicitor of instructing counsel?

Here, in my opinion, are some of the benefits which solicitors and their clients may derive from instructing an advocate.

- Firstly, bringing in Counsel provides the opportunity for independent, expert advice in cases where litigation looms in any shape or form (including avoiding the possibility of litigation).
- Secondly, involving Counsel can, and in my view should, provide a significant cost benefit to the client. Solicitors can take on those elements of the litigation (or pre-litigation) process which maximise the efficient use of their time in the office environment. Thereafter, the hugely time consuming process of case analysis, case research, consideration, negotiation and drafting of written

pleadings should be delegated to Counsel. Where this is done properly, it is my view that there is a cost benefit to the Solicitor and his client alike.

- Thirdly, instructing Counsel allows access to the very highest quality of legal resources available in the country; a fact perhaps more likely to be of benefit to smaller firms everywhere. Across the country it is often the smaller practices which may not have the resources to service a client's needs in a specific case. In my experience the opportunity for those solicitors to instruct quality, specialist advice and assistance from Counsel is crucial. Clearly, where a solicitor in such a scenario could not instruct Counsel, he would be unable to service the client's needs and would in all likelihood lose that client altogether to a rival, larger firm.
- Fourthly, it can simply be good for a solicitor to bring in an objective 'third voice' into the legal problem, perhaps in circumstances where it is important to underscore with a client what difficulties or benefits there may be. In such circumstances the input of Counsel's opinion can provide comfort to the Solicitor and client on an issue.

Entry & work.

Broadly, advocates are admitted to practice at the Scottish Bar having completed a period of apprenticeship called 'devilling'. The devil advocate is assigned a devilmaster, an advocate of at least 7 years standing at the Bar with a strong civil practice. This lasts for about 10 months and includes an intense period of training in all aspects of the practice of an advocate. The training is organised and run by the Faculty of Advocates, and counts among the best advocacy training programmes anywhere in the world. Many of the Faculty's own trainers have been trained through the American based National Institute of Trial Advocacy.

Once admitted to the Bar advocates can practice in many areas. My own area of expertise is civil litigation, specialising in property, planning and commercial cases.

3 Reform

Lastly, I would like to turn to the issue of reform, recent and anticipated.

- Devolved Stables.

As a result of certain structural changes, advocates are now able to organise themselves into self-selecting, autonomous structures more akin to the model of English Chambers. My own set, Terra Firma Chambers, is such a structure, and its members and areas of expertise can be viewed at www.terrafirmachambers.com The Chambers structure is in my view more dynamic, allows for greater concentration of specialist groups of advocates with similar practices, and allows advocates to open up access to their services by engaging with professionals and their clients in a way unheard of in previous times. Gone are the days, thankfully, of advocates perceived

as remote individuals far from the needs of clients. Today we seek to provide a range of specialist advice and assistance in a flexible and cost efficient way.

- Criminal & Civil Justice Reforms: Lord Gill's Civil Justice Review Commission.

There is much change under way in Scotland's courts, most notably as a result of the ongoing review of the provision of Civil Justice chaired by Lord Gill. Further information on the topic can be found at www.scotcourts.gov.uk/civilcourtsreview Changes to the provision of summary criminal justice can likewise be found at www.scotcourts.gov.uk/summary_justice_reform

Changes which may be likely as a result of the Gill Review include:

- Building in Mediation as a precursor to litigation.
- Significant increases in the litigation load being dealt with in the Sheriff Courts – most radically, possibly removing a great deal of personal injury work out of the Court of Session (minimum values already been increased in Sheriff Court to £5,000 for Ordinary Causes, £5,000) – this despite well regarded Personal Injury Rules and case management system in the Court of Session.
- Removal of right to raise actions from the Court of Session in certain cases.

4 Conclusion

In conclusion, it is a time of significant change in the Scottish legal market, but one which is exciting and offers great opportunities for those offering a high quality professional service. For those prepared to meet the challenges, there is in my view the potential to expand and develop all our practices to the benefit of Scotland's consumers.

Thank you for your attention. I hope you enjoy the rest of this conference and the great facilities here at Airth Castle.

Biography

Stephen O'Rourke is an advocate at the Scottish Bar where he has been in practice for 6 years. He has a broad ranging civil practice, specialising in commercial, property and planning work. He is a member of Terra Firma Chambers, a newly created commercial set launched in April 2008. He is an Associate Member of the Chartered Institute of Arbitrators. Prior to his career at the Bar he trained at Dundas & Wilson CS. He is a graduate of Edinburgh University, spending his junior honours year at the University of Bologna, Italy.