

## CHAPTER 5

### Conclusions

#### I The 'monopoly situation'

101. We are required by the terms of our reference to investigate and report whether a monopoly situation exists in relation to the supply of services of solicitors in England and Wales. We are also required to limit consideration to agreements and practices relating to the advertising by solicitors of their professional services, whereby they conduct their affairs as mentioned in section 7(2) of the Fair Trading Act 1973. By virtue of section 7(1) and (2) of the Act a monopoly situation exists if the supply of services of solicitors in England and Wales is, to the extent of at least one-quarter, supply by or to members of one and the same group consisting of two or more persons who, by any such agreements or practices, so conduct their respective affairs as in any way to prevent, restrict, or distort competition in connection with the supply of the services.

102. Restrictions on advertising, touting and publicity are governed by Rule 1 of the Solicitors' Practice Rules, 1936 to 1972, made by the Council of the Law Society and approved by the Master of the Rolls under section 28 of the Solicitors Act 1957. Rule 1 is part of the professional code of conduct of solicitors. We have set out the nature and extent of these restrictions in Chapter 2. It is clear that the restrictions provide, and that the profession accepts, that (apart from some minor and limited exceptions) all forms of personal advertisement and publicity and of touting are forbidden to solicitors. Solicitors are not therefore allowed to use any form of advertising as a means of competing with one another for business, and it follows from this that the restrictions on advertising involve some restriction of competition.

103. Accordingly at least one-quarter (in fact the whole) of the supply of services covered by the reference is by members of one and the same group consisting of persons who so conduct their respective affairs as to restrict competition in connection with the supply of those services. We conclude that a monopoly situation as defined in section 7(1)(c) and (2) of the Fair Trading Act exists by virtue of agreements or practices of the kind specified in the reference, and that it exists in favour of solicitors in England and Wales.

#### II The public interest

##### Advertising and solicitors' responsibilities

104. The objections to advertising by solicitors, as put to us by the Council of the Law Society, are set out in Chapter 4. We consider the validity of these objections in the following paragraphs. It may be that the objections themselves spring partly from a feeling, common in the professions, that advertising is undignified, commercial rather than professional and incompatible with the status and image which solicitors want for themselves. No doubt mere distaste

for advertising on such grounds plays some part in the opposition to it, but it does not follow that the arguments advanced against advertising on public interest grounds have no validity.

105. The main case against advertising by solicitors appears to have two parts. The first is that the relationship between solicitor and client is one of trust, in which the client's interests have to prevail, and be deemed by the public to prevail, over the solicitor's interests. The client is not normally in a position to assess the value and soundness of advice offered to him by a solicitor and it is therefore essential that the client should be able to feel confident that it is offered in good faith and without ulterior motive. The most obvious example of this is that a client should be confident that a particular piece of advice is not given because it will lead to lucrative business for the solicitor. It follows that nothing avoidable should be done which might tend to undermine this confidence and destroy the necessary relationship of trust. The Council argued that, if solicitors advertised, they would appear to be acting in a commercial rather than a professional way and that because of this the relationship of trust would be destroyed or, at least, damaged. A client would no longer have the same degree of confidence that any advice given to him was disinterested and that the solicitor would always act in the client's interests and not (where there was a possible conflict) in his own.

106. The second part of the case is that some professional men, and especially solicitors, owe a duty to society which goes wider than their duty to their clients. Solicitors, it is argued, have a special responsibility in that they are concerned with the administration of the law in its daily application and, indeed, are officers of the court. 'The preservation of the liberty of the subject under the rule of law' is stated by the Council to be 'the solicitor's highest concern' and it is argued that in discharging this obligation the solicitor owes a duty not only to his client but also to the court of which he is an officer. Considerations of this kind distinguish the lawyers' profession from all other professions; because a solicitor is part of the machinery of justice he should not, it is said, behave 'as though he were a purely commercial undertaking'. Collective advertising of a strictly informative kind is therefore, according to the Council, all that should be permitted.

107. We do not accept the implication that behaviour of a commercial nature, and in particular advertising, necessarily leads to mistrust: it may indeed create trust. However, we accept that the relationship between client and solicitor is, and must be, one of trust, and that anything which might undermine this relationship should be avoided. The question is whether such a relationship would in fact be undermined if solicitors were to advertise individually.

108. In our view the tradition of the solicitors' profession is such that the great majority of solicitors act as a matter of course in a correct way towards their clients, that they habitually put their clients' interests first and that it would be alien to them to do otherwise. The temptation to depart from the high standards required of the profession no doubt exists, but we do not believe that

solicitors would be likely to succumb to it more easily or more frequently merely by reason of the supposed contamination of advertising; the traditions of the profession and the sense of responsibility of its members are in our view too strong for this to happen. It follows that we do not think that advertising would lead to solicitors becoming any less worthy of trust than they are at present. In reaching this view we have recognised that an additional aspect of the relationship between solicitor and client is the fact that a solicitor's service may involve holding clients' money in trust; we do not regard restrictions on advertising as having any bearing on this.

109. There is, however, the question whether solicitors would appear to their clients to be less worthy of trust if they advertised, even though there would, in our view, be no justification in fact for this. In our judgment the answer to this question is that, if there were certain limits on the advertising (see paragraph 136), this would not be the case. The public is well accustomed and is constantly exposed to a great deal of advertising of all kinds and, although it may well take a sceptical view of some kinds of advertising, we do not believe that advertising itself necessarily leads the public to take a sceptical view of the trustworthiness of those who supply the goods or services advertised. It is difficult to believe that solicitors' clients are so naive as not to recognise that there is inevitably a commercial element in their relationship with their solicitors; but the relationship of trust exists in spite of this. We do not think there is a serious risk that the situation would be altered if solicitors were allowed to advertise within limits but it does not follow that there is no kind of advertising which could have the harmful effects envisaged by the profession. If misleading or extravagant claims were made this might lead to deterioration of the public's confidence in the profession and also to a loss of confidence within the profession; but in our view it is highly unlikely that the great majority of solicitors would advertise in this way, since they would recognise that inappropriate advertising was self-defeating. Nevertheless the possibility should be recognised and guarded against.

110. As to the point that advertising is incompatible with the discharge of the wider obligation to society (paragraph 106), the same factors as we have considered in paragraph 108 lead us to believe that the solicitors' attitude to this obligation, and the way in which they discharge it, would not in fact be affected by advertising if it were contained within certain limits (see paragraph 136).

111. The Council also argued that, if an individual solicitor were to advertise that he did certain types of work, members of the public would be likely to take it for granted that he was an expert in those particular fields. We attach little weight to this argument. As stated in paragraph 109 above, we think that the public is well accustomed and constantly exposed to much advertising of all kinds. We do not believe that there would be any risk of the public being misled in this respect.

112. To sum up, it is our view that the argument is overstated that advertising would damage or destroy the necessary relationship of trust with the client and adversely affect the wider, public obligations of solicitors. We

do not think that in general either of these consequences would follow if solicitors advertised. Nevertheless we think that there is a case for the continuance of a degree of restriction on advertising by solicitors.

### **Possible disadvantages of advertising restrictions**

113. There appear to us to be two principal objections to the restrictions on advertising currently imposed on solicitors. These are first that they deprive users and potential users of solicitors' services, and also potential entrants to the profession, of helpful information which might otherwise be available to them, and secondly that they reduce the stimulus to efficiency, to cost-saving, to innovation, to the setting up of new practices, and to competition amongst solicitors. We shall consider both these objections in the following paragraphs, together with a third objection concerning the possible effect of the restrictions on covert means of attracting business and on public confidence in the profession. Finally we shall deal with certain points in connection with the operation of law centres.

### **Information to the public**

114. There are no doubt some situations in which the public, particularly private individuals, do not realise that a problem has a legal content and that they would benefit from the advice and assistance of a solicitor; but it seems to us unlikely that the present restrictions on advertising have any significant effect on the ability of most individuals and of organisations merely to recognise the need for a solicitor, or indeed to find one. More important is the difficulty, which several witnesses mentioned, of finding a solicitor who is accustomed and prepared to handle a particular type of business. Not all witnesses who made this point argued that there was therefore a need for individual advertising by solicitors; some argued simply that more information should be supplied about the services which solicitors can supply and that information about particular solicitors' services should be available in referral lists, directories, yellow pages etc.

115. The Council accepts that there is a need for the public to be better informed about services which solicitors can provide and also about the availability of individual solicitors or firms of solicitors and the types of work they do. The Council has in recent years taken steps towards meeting this need, by means which we have described in detail in Chapter 2, and which include expenditure of £5,000 on certain informative publicity and the preparation of a computerised referral list in connection with legal aid and advice. We welcome this activity on the part of the Council and we hope that, in any event, it will continue. In particular we attach importance to the continuance of arrangements for the proposed referral list and to making information more widely available.

116. However, we consider that such activity, undertaken by the Council on behalf of the profession as a whole, is not likely to be an adequate substitute for individual advertising. Individual advertising is likely to be more effective than mere lists and directories in disseminating information about the kinds of work undertaken by particular solicitors or particular firms, and about special

services or facilities available (for example unusual office hours or foreign languages spoken). In addition, in so far as there is a need to educate the public about solicitors' services, individual advertising is likely to be more effective than collective advertising in increasing awareness on the part of the public of the need for a solicitor in various situations, or, where there is awareness already, in getting it acted on.

117. Moreover, although it is expected that the referral list will give information about the areas of work which solicitors will undertake, it seems unlikely that it will list the kinds of work in which they specialise. The Council is reluctant to allow this because of the lack of any objective test of specialisation. While this may present a problem in connection with a referral list prepared and sponsored by the Council, we see no reason why solicitors, if they were allowed to advertise individually, should not announce that they specialise in some particular branch of the law (provided that such claims were not unfounded).

118. Accordingly, it is our view that, valuable as the Council's activities are in this field, individual advertising would be likely to yield additional useful information or spread information more effectively. Such additional information would be useful not only to the general public but also to potential new entrants to the profession. We think that it is a significant disadvantage of the existing restrictions on advertising of solicitors' services that they prevent the public and potential new entrants being given information about the services offered by individual solicitors or firms of solicitors which it would be useful for them to have and which in our view could be allowed to be given without undue risk of abuse.

### **Efficiency and the competitive situation**

119. With regard to the second objection mentioned in paragraph 113, the possibility is that the restrictions on advertising deprive the more efficient solicitors' practices of something which might help them to expand at the expense of the less efficient; that, by depriving practices which wish to introduce new methods or new kinds of service of some part of their means of attracting demand, they discourage innovation; that similarly they make it more difficult to set up new practices, and that, in so far as enhanced competition among suppliers may be expected to stimulate efficiency and so contribute to cost reduction, the restrictions may be expected to produce contrary, disadvantageous effects.

120. The Council argued that there was already competition between solicitors in the standards of efficiency, promptitude and reliability of service. In its view there was already sufficient stimulus to efficiency and cost reduction, and the Council considered that advertising which was merely intended to increase a solicitors' case-load was likely to diminish his ability to provide a high standard of service. Moreover a solicitor who lost work because he failed to provide the necessary personal services would be more likely to attempt to recover business by advertising than by increasing his efficiency, with resulting increase in legal costs.

The Council said that there was plenty of incentive to innovate, indeed that it was essential for solicitors to adopt new techniques and introduce modern office machinery; the profession was in fact doing so. As to the setting up of new practices, the Council did not dispute that if new practices were allowed to advertise this would assist them to become fully established more quickly. The Council nevertheless saw no need on this account for, and no case for, departing from the principle that individual advertising was objectionable.

121. We know of no method of making a quantitative comparison between the present state of efficiency of solicitors' practices and their hypothetical state of efficiency if advertising were permitted. There is at least no obvious reason for supposing that freedom to advertise would lead, on average, to a lower degree of efficiency than exists at present. The Council argued that freedom to advertise would simply lead to increase in overhead costs, and that even if advertising led to increased business there would be little or no corresponding economies of scale. We do not dispute that some advertising cost might be incurred simply to neutralise the advertising initiated by other solicitors, thereby raising total costs without causing any re-allocation of business. But not all advertising would be of this kind. Moreover, we think it likely that some practices are more efficient than others (either generally or in some branches of activity), so that re-allocation of some work could improve the efficiency with which the work as a whole was carried out. Finally, it seems to us likely that solicitors in general would see no advantage in advertising on a lavish scale, though on occasions some firms might wish to spend relatively heavily in an attempt to expand their business (for example, in order to secure such economies of larger scale as might be available to them in the employment of more specialised staff).

122. As regards innovation, we accept that the profession has not stood still and that new methods and modern office techniques have been adopted. But the decision whether or not to introduce innovatory methods or services into an individual practice, particularly if the introduction would involve capital expenditure or expansion of staff, can depend upon the amount of additional business that could be handled as a result of new methods and that could be expected as the result of new services. Not all practitioners will wish to take the risk; and at present some of the more enterprising who might wish to do so might be deterred by the consideration that they would be unable to make proper use of these methods or services through their inability to increase their business by advertising.

123. As to the establishment of new practices (whether partnerships or individual practitioners), we think that the restrictions on advertising must indeed impede new practices in their efforts to establish themselves. This we regard as undesirable since to the extent that they discourage the setting up of new practices potential competition is reduced, and the incentive to efficiency and a high standard of service to the public is diminished.

124. It is our view that it is a significant disadvantage of the existing restrictions on advertising of solicitors' services that they have an adverse effect on the competitiveness and efficiency of the profession, on the introduction of innovatory methods and services and on the setting up of new practices.

125. There is another aspect of the matter related both to the supply of information and to competition. Solicitors do not compete only with other solicitors. For certain types of business, for example advice on taxation matters, they compete with others including firms of accountants and banks. There are no restrictions on advertising by banks comparable to those on advertising by solicitors, and we have recommended in an earlier report<sup>1</sup> that the restrictions on advertising by accountants should be relaxed. Similar relaxation in the case of solicitors should thus both provide the public with more information on how best to obtain help in such matters and also increase competition. These results we would regard as in the public interest.

### **Effect on the public's attitude to the profession**

126. We considered the possibility that the present restrictions on advertising, by imposing a limitation on the use of explicit claims in advertisements, might enhance the importance of other less direct means of attracting business. These means might be entirely honourable, such as, for example, the establishment of a reputation in public affairs, or on the other hand they might be less creditable. But in either case there would be no claims in a form open to challenge. We also considered the possibility that public confidence in the profession might be diminished, rather than increased, by restrictions on advertising which preclude any open attempt at promoting an individual practice and which thereby deter solicitors from acknowledging frankly that they are in business to make a living. We doubt whether these effects are likely to be sufficiently serious or widespread to justify condemnation of the restrictions on this ground alone. However, the possibility of these adverse effects strengthens the case, on public interest grounds, against the present restrictions.

### **Law centres and waivers**

127. There was some evidence that the proper operation of law centres may be, or may have been, adversely affected by the current restrictions on solicitors' advertising. Solicitors who provide their services to law centres may be in breach of the rule against touting if they adopt as their own clients members of the public who approach the law centre for advice or assistance. Waivers of the rule are therefore necessary to enable them to do so.

128. As we have explained in paragraph 60, we were told of dissatisfaction with the operation of the mechanism for granting waivers and with the condi-

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<sup>1</sup>'A report on the supply of accountancy services in relation to restrictions on advertising'—1975.

tions which may be attached to waivers when they are granted. The Council recognised the need for solicitors' services in areas of the kind in which law centres have sprung up, but it considered that the right way to meet the need was by implementing Part II of the Legal Advice and Assistance Act 1972 rather than by the establishment of law centres (see paragraph 95). We are not in a position to form any view on this point. The issue with which we are concerned is the effect of restrictions on advertising on the proper operation of the law centres which have in fact come into existence. Although waivers are granted, we think that the complaints concerning delay and conditions attached to waivers have some justification.

129. However, the Council accepted in principle that waivers needed to be given, and told us that a body of experience had now been accumulated and that there should not be any substantial delay in the grant of a waiver, especially as, if any such delay did occur, the Lord Chancellor now had to be informed and the reasons for the delay explained.

130. We think that the operation of law centres has on occasions been impeded by the restrictions on solicitors' advertising in connection with touting, and we regard this as being a further disadvantage of the restrictions. In the absence of the restrictions, there will of course be no need for waivers; but as long as the relevant rule against touting persists we hope that the Council will take a liberal attitude towards the grant of waivers for law centres and will ensure that there is no undue delay in granting them.

131. Much of what we have said above about waivers in connection with law centres applies also to the grant of waivers for solicitors' rota schemes for attendance at Citizens' Advice Bureaux (see paragraph 60), though in this case we understand that waivers are more readily obtainable.

### **Advertising in relation to the profession's international position**

132. The Council pointed out that advertising restrictions in the EEC and other countries were broadly the same as those in England and Wales and in Scotland and considered that, if the 'broad identity of view' were to be 'distorted by unilateral action on the part of a member country, serious practical problems in connection with such matters as the right of establishment would arise'. We recognise that professional opinion in overseas countries could have a powerful influence upon the ability of British solicitors to practise there if they were not regarded as conforming with the local rules or conventions. A solicitor who operates internationally must, of course, take account of the likely effect upon his business elsewhere of what he does in this country. If advertising were permitted, no solicitor would be compelled to advertise. A solicitor in England or Wales might decide that it was inadvisable to advertise here by any method which was not allowed abroad; this could possibly mean that he would decide not to advertise at all. We do not regard this as a reason why solicitors should be debarred from advertising in the United Kingdom.

### III Conclusions

133. As indicated in paragraph 103 we conclude that a monopoly situation exists in favour of solicitors in England and Wales. We further conclude that the monopoly situation results in disadvantage to the public interest in that the existing restrictions on the advertising of solicitors' services (i) prevent the public and potential new entrants to the profession being given information about the services offered by individual solicitors or firms of solicitors (paragraphs 114 to 118), (ii) are likely to have disadvantageous effects on the competitiveness and efficiency of the profession generally, on the introduction of innovatory methods and services and on the setting up of new practices (paragraphs 119 to 125), (iii) may in some degree enhance the importance of other, less open and challengeable, methods of attracting business and detract from public confidence in the profession (paragraph 126), and (iv) have on occasion impeded the operation of law centres (paragraphs 127 to 130). We have considered the various benefits claimed to result from the restrictions but find that the disadvantages outweigh the advantages to the public interest. We conclude therefore that the monopoly situation operates, and may be expected to operate, against the public interest. Within our limited terms of reference, we have not found that any steps (by way of uncompetitive practices or otherwise) are being taken by solicitors in England and Wales for the purpose of exploiting or maintaining the monopoly situation, nor have we found that any action or omission on the part of these solicitors is attributable to the existence of the monopoly situation.

### IV Recommendations

134. It does not follow from our conclusions in paragraph 133 above about the disadvantageous effects of the existing advertising restrictions upon the public interest that solicitors should henceforth be allowed to advertise without any restriction. We recognise, indeed, that there is a case for the continuance of a degree of restriction on the advertising of solicitors' services. Some kinds of advertising could lead to a deterioration in the public's confidence in the profession, and also, through deterioration in confidence within the profession, to impairment of the profession's ability to carry out those special responsibilities which it is in the public interest that it should assume (paragraph 106). We recognise that no clear distinction can be drawn between informative and promotional advertising, since all individual advertising by solicitors would inevitably contain a promotional element. This is no doubt why the present rules severely limit publicity of all kinds, the only permitted kinds being those with a minimum of promotional content which are regarded as essential to inform the public of the availability of solicitors' services or desirable in the interests of the profession as a whole. This, basically, is where we disagree with the Council. We accept that there are some kinds of advertising which, if permitted and indulged in, could have harmful effects in the context of the solicitors' profession and its services, and that there should continue to be a safeguard against the risk that individual solicitors' practices might bring disrepute upon the whole profession by the methods or matter of their publicity. But we think that, for these purposes, the line between allowed and disallowed

advertising does not have to be drawn where the Council now draws it, and that a new approach, providing considerable scope for advertising, is required. In paragraphs 135 *et seq* we describe the arrangements which would, in our view, substantially remedy the adverse effects, as summarised in paragraph 133, of the present restrictions while they would continue to provide the necessary safeguards.

135. Subject to certain specific restraints (see paragraph 136) we would see nothing improper or harmful to the relations between solicitors and the public in allowing firms of solicitors to advertise to the extent and by the methods they think fit. Such publicity, whether by way of advertisements in the press or other news media or of circulars or by any other means, could not only draw attention to the existence of a firm and the qualifications of its members but also describe the nature of the practice, including allusions to particular classes of client to whom services were offered or to particular kinds of service which were offered. Nor would we see any objection to the firm, should it think it appropriate, drawing attention to any other features of the practice, eg the convenience of its location, its expedition in dealing with clients' affairs or the level of fees which it charges. The above considerations apply with equal force to individual solicitors. A firm (or individual) which advertised in such a way would, to an extent, be inviting custom, including the custom of other solicitors' clients; and it might, perhaps, be inviting particular kinds of custom. But the public are well aware that solicitors are in practice for the purpose, among others, of earning a living. We do not think they will be surprised or shocked if members of the profession invite custom explicitly and informatively. Nor, given the appropriate restraints, do we think such advertising will be likely to create any new risk of misleading the public or adversely affecting the ability of solicitors to discharge the wider public obligations required of them. Although, as we have said in paragraph 115, we welcome the collective activity of the profession (particularly in connection with the preparation of a referral list) and hope that it will continue, we would nevertheless expect that the increased freedom to advertise would be conducive to improvements in communication and relations between the public and the profession, would serve to promote the efficiency of the profession and would facilitate the introduction of new methods. We would also expect that it would make it easier for new practices to establish themselves.

136. We consider that Rule 1 of the Solicitors' Practice Rules, which places a general prohibition on advertising and soliciting business, should be terminated and replaced by a rule which would permit any solicitor in England and Wales to use, whenever he thinks fit, such methods of publicity as he thinks fit, provided that:

- (1) No advertisement, circular or other form of publicity used by a solicitor should claim for his practice superiority in any respect over any or all other solicitors' practices.
- (2) Such publicity should not contain any inaccuracies or misleading statements.

- (3) While advertisements, circulars and other publicity or methods of soliciting may make clear the intention of the solicitor to seek custom, they should not be of a character that could reasonably be regarded as likely to bring the profession into disrepute.

137. Since we do not agree with the ways in which the profession has exercised its power to regulate advertising, we have considered the question of independent representation on the bodies concerned with the formulation and enforcement of the advertising code of the profession. Provided the basic changes we regard as necessary are made in the present code, we see no need for modification of the present arrangements.

138. Although we have outlined the substance of the general rule on advertising which we propose, we think that there should be consultation between the Council and the Director General of Fair Trading before the rule is formulated in precise terms. As we have indicated in paragraph 29, the Guide to the professional conduct of solicitors (issued by the Council) contains guidance on the detailed application of Rule 1 of the Solicitors' Practice Rules on a number of matters. While this guidance is not part of the Rule, it is concerned, in this context, with the application of the present general prohibition to particular circumstances and with the regulation of those exceptional forms of advertising and publicity that are at present permitted. Given a rule such as we suggest, we would see no need for additional provisions relating to such matters as are mentioned in paragraph 29 (eg name-plates, signs and window displays, stationery, directories and the like, personal appearances and press announcements, building society agency, clients' advertisements, circulars, visiting cards, position of a lender's solicitor, entertainment of non-clients, announcement of change of address, and communication of professional qualifications to the Press).

139. When formulated in more precise terms, a rule such as we have outlined need be neither vague nor unenforceable. The disciplinary powers of the Council will remain intact; it will still ultimately be for the Professional Purposes Committee and the Solicitors Disciplinary Tribunal to determine whether a solicitor has been guilty of unbecoming conduct and, if necessary, to apply the appropriate penalties. Our recommendation is made in the expectation that the Society, the Council and the relevant committees will accept that advertising, subject to the conditions we propose, will not henceforth be regarded as in any way improper for solicitors; and it is our intention that the expression, in paragraph 136 (3), 'of a character that could reasonably be regarded as likely to bring the profession into disrepute' should be understood accordingly. It is also in this expectation that we have said, in paragraph 137, that we see no need for modification of the arrangements for the formulation and enforcement of the code.

**E L RICHARDS** (*Chairman*)

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14 January 1976

