CHAPTER 6

IMPARTIALITY: NO AXE TO GRIND

It is axiomatic that professional advice must be untainted by any private interest of the practitioner. It is a prime justification of the basic proposition laid down in chapter 1 (page 15) that advice should ideally be given by an individual who is beholden to no one, free from personal concern or involvement, and subject to no pressures or influences restricting his independence. The professional bodies have rightly regarded the securing of this state of independence, both for their members and for themselves, as one of the principal objects of their existence. W.J. Reader begins his book Professional Men with a nineteenth-century quotation which bears repeating: "The importance of the professions and the professional classes can hardly be overrated, they form the head of the great English middle class, maintain its tone of independence, keep up to the mark its standard of morality, and direct its intelligence." (1) It is obviously of the greatest public concern that anyone who con- stilts a professional practitioner should feel completely confident that the advice he receives will be impartial, and it is a paramount duty of the practitioner to decline to act if he has any commitments or connec- tions whatever which might prevent, or appear to prevent, this being so. 'The last qualification is important, for he must not only be impartial, he must manifestly appear to be impartial. Any factors which might arouse suspicion if discovered by the client should be treated as pre- cluding the acceptance of instructions, even though the consultant feels confident he would be able to ignore them in practice. The cruder forms of partiality, e.g., that induced by a bribe, are of course pun- ishable by the criminal law. The professions echo the criminal code, as instanced by the consulting engineers: 'a member shall not receive directly or indirectly any royalty, gratuity or commission' without the written authority of the client. (2) The professional code goes much further, however, and embraces a large number of possible situations. Personal Financial or Property Interests

Little difficulty arises where the practitioner has a direct pecuniary 81

 interest in the matter on which he is instructed: unless his interest is merely trifling he should decline the instructions. Thus members of the Bar are told that it is in general undesirable for a barrister to appear in a matter in which he is himself pecuniarily interested. (3) He should not, for example, act for a creditor in a bankruptcy petition when he himself is also a creditor of the same debtor. (4) Similarly, a barrister who is a member of a group of underwriters at Lloyds should not act professionally in any case relating to a policy on which his name appears. (5) Again, it would be improper for an accountant to hold the position of auditor of a company in which he held a substantial block of shares. (6) Strangely enough, although the Companies Act, 1948 dis- qualifies directors from acting as auditors it has nothing to say about shareholders, though a major shareholder would be likely to act as a director within the widened definition of that expression used in the Act.

Complete impartiality is safeguarded by the rule which discourages professional people from becoming personally involved in the actions of their client — especially where this could have financial consequences for the consultant. Thus the Council of the Law Society have expressed the opinion that it is in general undesirable for a solicitor to stand bail for a person for whom he or any of his partners is acting. (7) Some professions also feel that advice may be less than completely objective if the consultant's remuneration depends on the nature of the advice given. Thus the Institute of Chartered Accountants frowns on the calcu- lafion of fees as a percentage of the value of the subject matter of the work. It is felt, for example, that an accountant reporting on profits for prospectus purposes might be embarrassed if it were thought that his fee was related to the estimate of profits stated in his report. These considerations have not prevented the scale

fees laid down by the R.I.C.S. for valuations of real and personal property from being calcu- lated as a percentage of the value found by the consultant.

Particularly frowned on, as contrary to the whole spirit of professionalism, is the practice of "no win, no fee". By this the professional man, usually a lawyer, takes a stake in the success of his client's case by agreeing to share in the proceeds if victory is won but going unpaid if it is lost. Until 1967 such an arrangement was illegal for lawyers, amounting to the crime of champerty. It is outlawed by the professions as tending to produce inequality of effort, since a hopeless and therefore unproductive case is likely to be ill-prepared; and also as giving the consultant an unduly large stake in the success or failure of his efforts, thus imperilling proper professional disinterestedness.

In the field of estate agency, the Chartered Auctioneers' and

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83 Estate Agents' Institute has a rule that "agency and dealing are two incompatible occupations, and any attempt to combine them in one person or firm must inevitably be fatal in any pretension to a pro- fessional reputation." This view is supported by a well-known chartered surveyor, Norman J. Hodgkinson: "I suggest that a practising surveyor should not himself specu- late in property. This may seem a surprising statement when so many individual surveyors and firms have made fortunes in this way. It may be asked why should not a surveyor speculate in the one thing about which he should have special knowledge. There is no reason wky he should not speculate in property in respect of which he is not acting for a client, but in my experience once he speculates he is likely to be tempted to do so in cases where he is retained to advise a client, and even sell his own property to a client or buy from a client. It makes little difference whether or not he explains the position to his client, as when he once begins doing this sort of thing it becomes impossible for him to give a client sound and impartial advice." (8)

The same view was taken by the majority of the House of Commons committee considering the Estate Agents Bill in 1966. An amendment was moved by Mr Shepherd, the Conservative member for Cheadle, to require the code of conduct of the proposed Estate Agents Council to include regulations designed to prevent any registered agent from dealing in or developing property, or taking any equity share in such dealing or development, either directly or indirectly, except with the permission of the Council. Mr Shepherd complained that whereas the professional societies said that an agent should not be a dealer at the same time, they did not attempt to enforce this regulation. In dis- cussing the advisory function of estate agents Mr Shepherd said: "I assure the Committee that very big sums of money are staked on the advice given by professional agents. The outlay of millions of pounds is often determined by their advice. It is therefore crucially important that an agent who gives advice should be free from the complication of being involved in dealing or development, either directly or indirectly."

Mr Shepherd's amendment gained general support and was added to the Bill. It raised in acute form the question whether a professional man should refrain altogether Gom financial or property transactions likely to lead to conflict with his professional duties, or whether the position is adequately met by imposing a duty of disclosure. In the case of solicitors full and frank disclosure is considered adequate, (9) and the same view is held by the R.I.C.S. Mr Shepherd and his supporters

 thought otherwise however. Arguing that a client might be harmed in circumstances where no particular property was in question, and dis- closure did not therefore arise, he went on: "If I say to Mr X, 'I am thinking of doing this or that. Would you advise me to do this or that?' and he is engaged in the activity, either directly, through a nominee or as an equity shareholder in a property company, there will be a clash between his personal interest and the advice which he tenders to me as an individual."

Architects observe a similar rule in a slightly different field. They are forbidden to carry on business as builders or manufacturers of building components, or be concerned in any business of dealing in land or

buildings to an extent which might affect the independent exercise of professional judgment. (10) A consulting engineer may not, without disclosing the fact to his client in writing, have any substantial financial interest in, or be an agent for, any business operating within the field in which he practises. (11) Links with Commerce

The professions are usually wary about links between their members and commercial undertakings. In part this may spring from a snobbish disdain of “trade”, but it is also founded in a genuine apprehension of the risks and temptations involved. The B.M.A. has laid it down as a general ethical principle that a doctor should not associate himself with commerce in such a way as to let it influence, or appear to influ- ence, his attitude towards the treatment of his patients. He should not allow use to be made of his professional status in order to enhance a business; nor, conversely, should he allow a business to enhance his professional status. (12) These are rules which the other consultant professions would agree with, and enforce.

An obvious abuse arises where a professional man has entered into arrangements with commercial interests providing him with a com- mission or “rake-off’ on goods sold through his recommendation. Clearly there is a serious risk that advice as to an appropriate remedy will not be impartial if the practitioner stands to gain financially by recommending one remedy rather than its competitors. The Royal Institution of Chartered Surveyors, and kindred societies adopting the same code of conduct, have laid down the explicit rule that “no member shall accept or give any illicit or secret trade or other discounts, commission, or allowance in connection with any professional business which may be entrusted to him, or any goods he may order on behalf of clients”. (13) The wording of this rule absolves the practitioner if he discloses the fact that he is receiving a financial benefit to his client.

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The medical profession goes further and lays down that it is undes- irable for a doctor to have “a special direct and personal financial interest” in the sale of any pharmaceutical preparation he may have to recommend to a patient. The possibility is recognised that this may be unavoidable in certain cases, but he is then required to disclose his interest to the patient. This rule does not apply to the acquisition of shares in a public company marketing pharmaceutical products. (14) The B.M.A. state that collusion between doctors and chemists for financial gain is reprehensible. A doctor should not arrange with a chemist for the payment of a commission on business transacted, nor should he hold a financial interest in a chemist’s shop in the area of his practice. To avoid even the suspicion of profiteering of this kind, doctors are advised not to recommend that a patient should go to a particular chemist unless they are specifically asked to do so by the patient. (15)

Where a doctor invents a new form of medical instrument or appl- iance, or develops a new drug, he is permitted to take a financial reward. Wherever possible however this should be in the form of an initial lump sum payment from the company which is to market the article; only where this cannot be arranged is it legitimate to receive royalties on sales. Remuneration in the form of royalties clearly offers an inducement to the doctor to encourage the greater use of his inven- tion, and thus prescribe it unnecessarily. (16)

Another possibility of abuse relates to testimonials given by pro- fessional people. There is always the suspicion, even if it turns out to be unfounded, that a person giving such a testimonial has been paid for doing so and that it does not represent his own sincerely-held convic- tion. The Architects Registration Council has laid down a specific rule that an architect must not allow his name to be used as recommendmg specific building materials in advertisements in the press or otherwise. The B.M.A. say that testimonials written by doctors on the value of proprietary products have often been abused by the manufacturers. Doctors are advised to refrain from writing a testimonial on a com- mercial product unless they receive a legally-enforceable guarantee that the testimonial will not be published without their consent. (17)

Most professions discourage their members from taking up private practice while they are in the employment of a commercial firm if the interests of the employer might influence the advice they would give in private

practice. The Bar goes further and discourages a practising barrister from holding salaried employment in any business concern. (18) Even more extreme has been the attitude of the R.I.C.S. and the R.I.B.A. towards employment with building contractors. The R.I.C.S. has a rule

 that no member shall in any way be connected with any occupation or business if such connection is, in the opinion of the Council of the Institution, inconsistent with membership. (19) This was introduced in 1902. It was soon taken to mean that a chartered quantity surveyor could not remain a member of the Institution if he entered the employ- ment of a building contracting company, or became a director of such a company. The Architects Registration Council has laid down a similar rule, though strangely it does not extend to employees of building companies. (20) The Association of Consulting Engineers forbids a member to be a director or salaried employee of any company, firm or person carrying on any commercial, contracting or manufacturing business which is or may be involved in the class of work to which his appointment relates. (21)

These rules were criticised by a committee set up by the Government in 1962 to report on the placing and management of contracts for building work. The committee, whose chairman was Sir Harold Banwell, felt that a new searching examination of the case for retaining the rules was required. (22) In consequence of this recommendation, the R.I.C.S. re-examined the rule and concluded that they were not justified in depriving quantity surveyors who entered the contracting field of their membership of the Institution. The rule was therefore modified in 1967, but its essential principle was preserved. The Institution felt that there continued to be a need, in the public interest, for chartered surveyors in private practice to be independent of the building industry. Accordingly it remains forbidden for a member to practise as a private consultant at a time when he is employed by a building company. Thus the public may continue to be aware that when they appoint a consultant chartered quantity surveyor for a particular project there is no risk of his being influenced in the advice he gives by a link with a particular contractor.

The Minister of Public Building and Works hailed the modification as “a historic decision”, and the Architects’ Journal commented that the architects might be obliged to follow suit, and stressed the view that “the built environment must be designed by independent professional people, for it is only in this way that we can ensure that the vital decision-making is free from commercial interest”. (23) Another similar rule of the surveyors’ profession, known as the Harrods rule, precludes a member from employment in the estate department of a multiple store. It is felt that a conflict of interest could arise between a surveyor s duties in advising clients on all matters relating to the sale or ourchase of a house and a department store’s interest in pushing the sale of furniture or the provision of removal services needed by the same clients.

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Another aspect of connections between a professional practice and commercial interests is the possibility that business may be attracted to the professional firm because of the commercial connection. Apart from the risk, discussed above, that such a connection will give rise to partial advice, or may arouse suspicion of this, it is also frowned upon by the professions as tending to attract business unfairly. Links with Other Professions

The consultant professions have traditionally preferred to avoid forming connections with other professions. This has led to rules re- stricting a person carrying on one profession from at the same time carrying on any other profession, and restricting a member of one pro- fession from being in partnership with members of other professions or sharing premises with them or indulging in “fee-splitting”. A number of reasons combine to produce this result, not all of them concerned with preserving impartiality. The tradition of the exclusiveness of each pro- fession involves that a specialty forming a distinct avocation is to be re- garded as the preserve of one set of people, organised in a single pro- fessional society. The mysteries of the profession are jealously preserved, and so is its independence and freedom from outside interference. Claiming self-

determination for one's own profession, one readily yields the same principle to members of other professions. The boundaries are clearly defined and movement across them is discouraged. The Pilldngton Commission found that less than one per cent. of professional people practised in more than one profession. (25)

Apart from the tradition of exclusiveness, the factors operating to discourage intermixing of professions include the desire to maintain the qualities of impartiality, independence and responsibility, the belief that the client should not be influenced in his choice of a consultant, an occasional snobbish reluctance to be associated with activities regarded as lower in the professional scale, and detestation of the practice of attracting business unfairly. The last-mentioned is dealt with in Part III of this book, since it essentially concerns relations of professional people with each other. The other factors are dealt with in the course of the following discussion.

The most sweeping condemnation of attempting to carry on another profession along with one's own applies to the Bar. A Bar student is obliged to give an undertaking that he will not, while practising as a barrister in England or Wales, also act as a member of any of the other consultant professions. Nor must he do so anywhere else, unless the local rules of the Bar so permit. (26) The position of other professions

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as follows:- Solicitors. Apart from the usual ban on professions which might detract from status as a solicitor, the only test is whether business might be attracted unfairly or there might be encouragement of any other breach of practice rules. There is no objection to a solicitor in practice as such also acting as a stockbroker, land agent, insurance agent or patent agent. There is however a ban on practising solicitors also act- ing as barristers (since otherwise the separation of the two sides of the legal profession might be endangered), estate agents, auctioneers and mortgage brokers. (27)

Architects. A practising architect must not permit auctioneering or house agency to form part of his business; otherwise there is no restriction. (28)

Chartered A ceountants. A practising chartered accountant is not allowed to carry on the practice of a barrister, solicitor, estate agent, auctioneer or stockbroker. Other professional activities are permissible, though accountants are advised that activities such as insurance broking, which have a close relationship to the accountancy profession, should preferably be carried on separately and from a different address. (29)

Surveyors. The only restriction in the case of chartered surveyors and members of kindred societies is that they may not engage in work recognised as being properly that of a solicitor. (30)

Doctors. Partnership of doctors with members of connected pro- fessions is discouraged, as is partnership between general practitioners and specialists. It is felt that such partnerships may lead to fee-splitting or undue direction of patients to the doctor, thereby interfering with the principle of free choice of doctor by the patient. (31)

How far can these restrictions be justified? The arguments for and against discouraging "unfair" attraction of business are examined in Chapters 10 and 14. Of the other underlying reasons, preservation of free choice by the client and securing impartiality and independence of the practitioner can hardly be faulted. It is doubtful however whether in themselves they ever justify prohibiting the carrying on of different pro- fessions by persons within the same partnership. In such a case the con- nection is overt, the firm is in effect a multi-purpose one, and the client's position is hardly different from that of a man who having hitherto gone to a firm of solicitors only for conveyancing transactions and having dealt with partner A, needs to make a will and is passed to partner B, or requires income tax advice and is passed to the firm's taxation specialist, partner C.

Preservation of the exclusiveness of the professions can be defended on two grounds: discipline and identity. It is axiomatic that a partner is

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89 responsible not only for his own misconduct but also for that of his partners and the staff employed by the firm. How, it is said, can this salutary principle be enforced when some of the partners belong to a different profession, with different practices and standards? The sense of identity of a profession, and its spirit and values, may be impaired by intermixing. This could strike at the roots of professionalism.

The advantages of multi-purpose partnerships within the same field are nevertheless coming to be recognised. The Banwell Committee noted that group practice of architects, engineers and quantity surveyors, in formal partnership or ad hoc consortia was already taking place in 1964. Since then it has grown considerably. The Prices and Incomes Board, reporting in 1968, saw no reason why a solicitor should not be free to enter into a partnership with, say, a foreign lawyer or an accoun- tant. They quoted the Secretary General of the Law Society, Sir Thomas Lund, as saying that in 2000 A.D. "the larger firms will have in partnership accountants, surveyors and even doctors and other pro- fessional men, while smaller firms will work in the closest association with members of such other professions, in order to provide an efficient service for their clients". (32)

While overt links of this kind can be defended, the same is not always true of less formal or obvious connections. Two particular cases arise, the sharing of premises and "fee-splitting".

Many professional bodies frown on the sharing of premises with members of other professions not embodied in the same partnership. Again, the reasons primarily concern undue direction of clients and "unfair" attraction of business. The medical rules state that there is no objection to a doctor and a member of a profession supplementary to medicine practising from the same building if the premises are separate, with separate entrances and addresses, but not otherwise. The same rule applies in the case of a doctor and a pharmacist. (33) The Law Society regard it as highly undesirable for a solicitor in practice as such to share office accommodation, staff or telephone arrangements with any person who is not a solicitor. (34) The Institute of Chartered Accoun- tants has expressed a similar view. (35)

The agreement to divide a fee received from a client with a practi- tioner of another profession who is not a member of the same firm is condemned. The reason usually given, and advanced for example by Carr-Saunders and Wilson, (36) is that "there results something very like a fraud if a general practitioner recommends his client to see a cer- tain consultant, and the recommendation is based on any other ground than the ability and reputation of the consultant". If this were indeed the reason underlying the prohibition it would be met by imposing on

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PROFESSIONAL ETHICS the practitioner a duty of disclosure to the client. This is not con- sidered sufficient however. Furthermore the rule is usually expressed the other way round, i.e. as a duty not to share the fees one receives rather than as a duty not to recommend another practitioner from whom one is to receive a share of his fee. Thus Rule 3 of the Solicitors' Practice Rules 1936 states: "A solicitor shall not agree to share with any person not being a solicitor or other duly qualified legal agent . . . his profit costs". The rule does not apply to receipts not falling within the phrase "profit costs". He is therefore allowed to share remuneration not being profit costs, such as brokerage or insurance commissions. (37) Again in their submission to the Monopolies Commission the B.M.A. condemned partnerships between general practitioners and specialists "as leading to fee-splitting or dichotomy". (38) This could hardly be objectionable on the grounds given by Carr-Saunders and Wilson, since it is common knowledge that the receipts of a partnership are pooled and no question of secret commissions can arise. It is true that the B.M.A.'s handbook "Medical Ethics" defines dichotomy as "the secret division by two or more doctors of fees on a basis of commission or other defined method", adding that any undisclosed division of professional

fees “save in a medical partnership publicly known to exist” is highly im- proper.(39) This only showswhat muddled thinking exists on the question.

The chartered accountants’ formulation of the rule limits it to cases where the consent of the client is not obtained (40) but the chartered surveyors’ rule is expressed in absolute terms, and separate from the rule prohibiting secret commissions: “No member shall directly or indir- ectly allow or agree to allow any person, other than a member of his own profession, to participate in his remuneration.” (41) The Institute of Chartered Accountants explains its rule by stating that it is directed against the introduction of professional work to a member by a third party for some consideration and thus prevents corruption in removing the temptation for a member to bribe persons who would not other- wise introduce work. (42) The petition for the charter of the Institute, which was granted in 1880, stated that the charter was required to “put an end to the practice which has been much objected to of the division of profits with persons in other professions or callings in the form of commission or the like”.

It is difficult to resist the conclusion that the real reason for the pro- fessions’ almost pathological dislike of fee-splitting is not the desire to protect the public, but the belief that it is a means of attracting business unfairly. The Law Society indeed admit this, in saying that the rule was primarily designed to prevent unqualified staff ‘using unethical means of obtaining professional business for their principals’. (43) In practice

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91 the rule does protect the public however, since it is obviously difficult to explain to a client that in advising him to consult X you are totally unmoved by the fact that X will give you 10% of the resulting proceeds. Such advice should be completely impartial, and the rule against fee- splitting helps to make it so.
Combining Employment with Private Practice

The professions tend to dislike seeing a person who is in the salaried service of an employer engaging in private practice in his spare time. Ideally the private practitioner should be totally free from commitments which bind him to the service of one person or company, even though this service is apparently unconnected with his activities as a private practitioner. Employers are always in a position to exert pressure on their employees, or at any rate are commonly supposed to be, and there- fore the client cannot be assured of impartiality. The same is true of any dominating relationship, such as that subsisting in the eighteenth cen- tury when solicitors and architects, for example, often had patrons to whom they were subservient. It is an aspect of the truth that impartia- lity presupposes independence. The Joint Consultants’ Committee giving evidence to the Royal Commission on Doctors’ and Dentists’ Remuneration 1957-1960, recorded that “the great disadvantage of the whole-time consultant physician is that he lacks the sense of professional independence that is felt by a consultant not wholly dependent on his salaried appointment”. (44)

The Bar Council take the view that the receipt of a salary leads to a relationship between a practising barrister and his client which “would be inconsistent with the independence which is necessary to the proper performance of a barrister’s functions”. (45) This has led to the imposi- tion of a rule precluding a barrister employed as a company legal adviser from representing his company as an advocate before a court. This might be justified on the ground that the court expects an advocate to be committed to his client’s cause only so far as is involved by the acceptance of a brief in the ordinary way. It is however a source of friction between the Bar Council and the Bar Association for Commerce, Finance and Industry. Similar reasoning leads to denial of a barrister’s right to appear in any case involving a person or body with whom he is connected in any capacity such as that of a member of a local authority or company director.

The duty to give impartial advice cuts both ways. The client is enti- tled to expect that the consultant will not prejudice him by serving any indirect interest of the consultant’s own. Equally he is not entitled to undue favour at the expense of, for example, the consultant’s employer.

PROFESSIONAL ETHICS Thus the architects have a rule that an architect employed as a salaried and official architect by a public authority, who is by reason of his office in a position to grant or influence the granting of any form of statutory or other approval, must not undertake private work (even with the consent of his employer) “unless his position and action in the matter can be shown to be free from any suspicion or suggestion of abuse”. (46) Previous Knowledge of Facts or Parties

It may be or appear difficult for impartial advice to be given by one who has prior knowledge of the situation gained through extrinsic means. There is of course no objection where other persons are not involved, so that previous friendship with a person would not prevent a solicitor, say, accepting him as a client — indeed familiarity with the new client’s circumstances might well be a positive advantage. If how- ever a solicitor has acquired knowledge of a potential client’s circum- stances through having held some office or appointment, or might otherwise be embarrassed in acting for him, he should not accept instructions. (47) Similarly it would be improper for a barrister who, in acting as a marriage guidance counsellor, had interviewed a married couple to accept a brief in divorce proceedings between them. (48)

Similar considerations arise where, although confidential information is not involved, the personal situation of the parties could cause embar- rassment. Thus a barrister is justified in refusing to accept a brief where a witness whom it would have been necessary for him to attack is a personal friend of his. (49) Again, the Council of the Law Society has ruled that a solicitor should not appear as an advocate in a court in which his father is sitting as the judge, nor should any partner of his do so. (50) A similar rule applies to barristers, though there has been held to be no objection to a barrister practising in a court where his father is one of several judges, since in such a case it is impossible to know beforehand which judge will try a case. (51) It is illegal for a solicitor who is a magistrate for an area to act in any case before his fellow- magistrates. (52) Rules Against Direct Instructions

Some professional people, notably barristers and medical specialists, act as consultants in a narrower sense. They do not advise the lay client or patient direct, but only through the medium of a general practi- tioner. Often they are in effect advising the general practitioner on matters too difficult or specialised to be within his competence, and thus place him in a position in which comprehensive guidance can be

 given to the client. The rule is most strongly developed in the barristers’ profession: as a general practice they do not see or advise clients or accept briefs or appear as advocates on behalf of clients without the intervention of a solicitor. (53) In certain limited fields instructions may be received from other types of practitioner, such as patent agents, parliamentary agents, local government officials and the Chief Land Registrar. The only case where the ordinary layman may be represented direct is in criminal defences where the accused has insufficient funds to emply a solicitor. (54)

What is the reason for these rules against direct instructions? Partly it is a question of function. If it is the function of a professional man to give specialised advice to other professional people in a form which, since it is couched in expert professional language, may be incompre- hensible to the layman, the business can be conducted in no other way. The specialist will be organised to operate in a certain fashion and can- not be expected to carry out functions for which he is neither trained, experienced nor equipped. This particularly applies to the preparation of cases to be brought before the courts; barristers are not equipped for the assembly of evidence through factual enquiries. This is recognised as the function of the solicitor, and is invariably left to him.

A more fundamental reason for the rule, which does not merely depend on demarcation of functions, is stated by the Bar Council: “One of the great values of the services of the Bar as at present rendered is that barristers are less closely involved with the client and his affairs and are thereby enabled to bring a fresh and more objective mind to bear on the case. This is of great value both to the client, and to the administration of justice. Without it the barrister would be less able to do his duty to the court, which involves sometimes taking a course which is unwelcome to the client and may be against his interests.” The Bar Council feel that if barristers were not kept at one remove from the general public in this way, they would soon find

themselves expected to do the work which solicitors now do . This would involve a total re- organisation of the profession, for which the buildings and staff em- ployed by barristers would be quite unsuitable. (55)

In the medical field the B.M.A. rule is that except in emergencies, and certain very restricted cases, a practitioner in any form of specialist practice should not accept a patient for examination and advice except on a reference from a general practitioner. The report of the specialist, and his advice, should be given not to the patient direct but to the general practitioner, who will pass it on to the patient in whatever form he thinks suitable. (56)

The "no direct access" rule of the Bar is carried to what some may

 feel to be absurd lengths in prohibiting a barrister from accepting instructions from another barrister who is employed as a legal adviser to a company. If the company requires counsel's opinion it must obtain it through the medium of a solicitor. Thus where the company's legal adviser is a barrister he has to go through the formality of instructing a firm of solicitors to act as an intermediary between himself and a practising barrister. Alternatively he may brief counsel through the medium of a solicitor employed in the same company, who may well be junior in rank. In criticising the rule the Bar Association for Commerce, Finance and Industry state: "The argument that is usually used today to support the rule is that in accepting instructions from a solicitor, counsel can rely upon their being prepared by an indep- endent person who is himself personally uninvolved in the matter upon which instructions are given. This situation exists in the case of the solicitor in private practice, even when he is acting for a company. The same situation does not exist when the solicitor is an employee of the company concerned, for as an employee he is subject to just those pressures which the advocates of the rule find objectionable. His barrister counterpart is in exactly the same position and is penalised by the rule of his profession." (57) The legal profession may well have lost work by insisting on the rule against direct access where the client or would-be client is another pro- fessional man, such as an accountant. (57A) Acting for Two Competing Clients

It is difficult to give impartial advice to one client if another client may be adversely affected. A professional man should therefore avoid getting into a position of having two separate clients whose interests conflict. If he finds himself in that position he should release himself from it by parting with one of the clients.

An example of this kind of conflict is frequently met with by estate agents. A prudent prospective purchaser of a house will have a struct- ural survey made before binding himself to buy. For this he will usually consult a local firm of surveyors, though not of course the one entrusted by the owner with the sale of the house. Often the purchaser will need a mortgage from a building society, and the building society will require a valuation of the property before agreeing to lend. For this purpose building societies instruct local firms of surveyors and thus the same firm may well find itself instructed both by the prospective purchaser and the prospective mortgagee. A conflict of interest can arise because

95 mortgagees are frequently unwilling to lend as much as the would-be purchaser needs if the purchase is to go through. The proper course is to decline the second instructions, though this is not in fact always done. (58) A ruling of the R.I.B.A. provides that an architect com- missioned to prepare a plan for a planning authority must not concur- rently accept an architectural commission from a private client to design a building within the area of the plan. (59)

Solicitors distinguish in this field between non-contentious business and contentious business, i.e. that involving litigation. Clearly, as soon as litigation is probable, the solicitor must see that one at least of the two clients concerned is separately represented, and if he would be embarrassed in representing eyen one by reason of the knowledge which he has acquired of the other one's case he should see that both are rep- resented by other practitioners. In non-contentious business however the Law Society take the view that it is

not necessary for clients with inconsistent interests to be separately represented, provided that they are aware that the same solicitor is acting for both. A solicitor acted for two women in forming a partnership, and when it was later desired to dissolve the partnership each partner wished the solicitor to act for her. He consulted the Law Society whose ruling was that he should advise both the partners in writing that they should be independently repres- ented, but if they both persisted thereafter there was no professional objection to his acting for them, unless and until litigation ensued. (60)

The rule that the same solicitor may act for both vendor and pur- chaser of land has occasionally caused disquiet. This may be partly due to the Law Society's recommendation that full charges should be made notwithstanding that the amount of work involved is necessarily less. The Prices and Incomes Board feel that it may not be in the interest of clients that solicitors should act for both parties. By encouraging the practice, a reduced charge may therefore, in their view, be undesirable. The Board felt that if the practice were indeed undesirable it should be forbidden, otherwise a reduced charge not exceeding one and a half times the total charge if two solicitors had been involved should be permitted. (61) Independence of Government

We have stressed in this chapter that impartiality and independence are indissolubly linked; the one cannot subsist without the other. It is fitting therefore to conclude the discussion with a brief consideration of the question of state interference in the professions. This is a large subject, and we can only touch here on the professions' own attitude. The professions most affected by state intervention during recent years

  have been barristers, solicitors, doctors and dentists. They have been largely successful in retaining the essential attributes of private practice and in particular the independence of the individual practitioner. Dangers exist however, particularly from the State's command over the rates of remuneration of the practitioner. For this reason the Pilkington Com- mission recommended in 1960 that rates of pay of doctors and dentists in the National Health Service should be determined by an independent review body on the basis of external comparison with other pro- fessions. (62) Nevertheless the State uses its financial power to influence professional policy (see page 49).

The operation of the National Health Service and the Legal Aid and Advice scheme is a question of the operation of legal enactments which the practitioner is bound to obey. There is more flexibility in the case of government policies not for the time being translated into law. What should be the attitude of the professions to these? The subject was ventilated in 1966, at a time when the Labour Government were seeking to persuade the nation to adopt a voluntary standstill in prices and incomes. At a luncheon attended by Mr Enoch Powell, M.P., the President of the Institute of Chartered Accountants expressed the view that action by accountants which, though not illegal, was contrary to the spirit of the prices and incomes standstill was undesirable. He was immediately roundly attacked by Mr Powell for meddling in politics. Mr Powell felt that professional bodies had no business to advise their members one way or the other as to government policy which had not been made enforceable by law. The President of the Royal Institution of Chartered Surveyors sprang to the defence of his fellow-president, pointing out that it was a tradition of professional bodies that in matters affecting their members' practices "they give guidance which accords with settled government policy, whatever government may be in power . He went on:

"If members seek guidance from their own Society on matters of this kind, as they frequently do, that guidance must, in my submission, be consonant not only with the law of the land but also with general government policy. Otherwise professional bodies are setting themselves up in opposition to the government, and this would indeed be meddling in politics." (64)

It must be true that professional bodies have no business to sabotage operative government policies, even though not backed by legislation. Nevertheless they retain their freedom to differ where they feel com- pelled to do so, and whatever view his professional body takes the individual practitioner is of course free to act as he thinks fit. This freedom is vital. It could be undermined by a failure on the part of

97 governments to ensure that the economic conditions necessary for the survival of private practice are maintained. If it is desperately difficult to make ends meet, that is when temptation becomes most acute — temptation to take secret commissions, even bribes; to play one client off against another; to spin out consultations unnecessarily; to advise action with the main purpose of inflating the consultant's bill and so on. To this extent responsibility for preserving the disinterestedness of the professions rests with the government, and through them with the public at large.