I am well aware in preparing this paper that I have appeared to be skipping somewhat lightly over the water lilies. There is no doubt that the incorporation of a professional practice raises many issues from a liability point of view which to date have no firm answers. There is no doubt, also, that the list I set out above is by no means exhaustive. I have not even begun to analyse the various criminal offences which one might encounter upon incorporation.

"GREEN PAPER" PROPOSALS – AN AMERICAN'S VIEW

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INTRODUCTION

In January 1989, the Lord Chancellor's Department published three "green papers", two of which were "The Work and Organisation of the Legal Profession" and "Contingency Fees".

The papers are published at a time of an ever-increasing trend of international and multi-national practices and the inevitable comparative analysis of the legal and judicial professions of different countries.

I have been asked to comment on these two "green papers" from the perspective of an American practitioner with some exposure to an international practice.

THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION

One could read this "green paper" as an effective summary of some of the topical issues prevalent in the American legal and judicial systems. It touches on specialization, mandatory continuing legal education, competency, technology, training of law students, use of paralegal or non-legal personnel to perform legal services, legal aid, advertising, use of lay people on professionally-focused committees, professional discipline and victim compensation funds. At the same time, there are some particularly British issues raised – the distinction between solicitors and barristers, rights of audience, attendance on counsel, Queen's counsel, pupillages, tenancies, chambers and partnerships vis-à-vis barristers and Inns of Court.

There can be little argument that the British legal system is historically much more restrictive than the American system, both from a societal and a professional perspective. This "green paper" suggests that these restrictions will become less evident in the future, notwithstanding those citizens and professionals who may wish to retain the old ways of doing things.

This is so if for no other reason than national and international market forces demand it. Competition in the legal marketplace is at an all time high, from getting one of the limited seats in a law school to being able to support one's self and family from a law practice.

I concur wholeheartedly with the Marre committee's statement contained in its report "A Time for Change" that "specialisation is inevitable". While competition in the legal marketplace increases, it is an inescapable conclusion that specialization is one of the best ways to maintain a viable position in the legal community.

Many of the states in the U.S.A. not only require continuing legal education to guard against erosion of skills and knowledge but are increasingly permitting practitioners to become "specialists". In order to obtain certification as a specialist, a practitioner must successfully complete an examination in the chosen area. The most common areas of specialization in the U.S.A. are estate administration, real estate and bankruptcy. In my view, it is only a matter of time until certification is routinely offered for corporate, business and tax practitioners as well as trial lawyers. In England, of course, some specialization already exists because barristers are by definition specialized trial lawyers.

While I do not agree that the "promotion of competition" should be "one of the government's fundamental policies" and that when "effective competition is lacking, client's choice is artificially constrained", I do think that competition, with some control, can be a healthy inducement to force the profession to deliver efficient, economical and ethical legal services to the public. Theoretically, specialists should be more efficient in handling a matter than a generalist. Thus, these two factors should interact to achieve one of the government's goals of a free and efficient legal market with competent practitioners.

I concur that the Lord Chancellor's Advisory Committee on Legal Education must be "vigorous and active" in fulfilling its important rôle of dealing with "education and conduct". And in my view equal attention must be paid to conduct, for that is where the American system has slipped most miserably in the past few decades. From the perspective of a lawyer in a "fused" profession, I am not persuaded that there should

be two separate codes of conduct (advice work and advocacy) since professionals should be required to comply with the highest standards. Surely one code of professional conduct and responsibility can be implemented to apply to all practitioners.

The minimum core curriculum proposed in Section 4 of Annex C, paragraphs 2. and 5., should suffice as a foundation for a common system, which combines vocational training with the academic stage of training. If this were implemented, it necessarily implies some restructuring of the dual systems existing in the U.K. today, though the government and profession may still wish to distinguish in some way between advocates and non-advocates as set forth in Chapter 5 and Annex E. Would this not be one way to achieve a more efficient and economical delivery system for legal services in the United Kingdom?

A restructuring of the dual system would be highly likely to lead towards a system much like that which is present in the U.S.A., where all lawyers share a generally uniform educational and professional background. To become a lawyer, they must graduate from a college or university, the law school, and must pass a bar examination in the state where they intend to practice. Once they are admitted to the bar, they are free to select the type of practice which they want to pursue, without limitation. They may be required to be admitted to practice before different courts, but this is simply a matter of application and routine admission. After entry into practice, the only continuing restrictions are compliance with ethical rules, the law and, where mandatory, continuing legal education requirements.

Almost certainly, if the dual system were restructured, then barristers' practices and multi-disciplinary and mutli-national practices would be more likely to evolve into some form of association, whether it be general partnerships or corporations including all disciplines or partnerships or corporations comprised of those with similar specialties.

Irrespective of any restructuring, I concur that professionals should be allowed to practice where they choose, that appropriate education, training and qualifications, as well as conduct, should be the determining factor in where and how professionals may practice and that outdated or artificial restrictions on one's ability to earn a livelihood should be abolished. From my American perspective I favour the lessening of restrictions so as to permit multinational and multi-disciplinary partnerships and to enable barristers to practice in partnership.

My final comments on this "green paper" deal with advertising and information (Chapter 13) and maintenance of professional standards (Chapter 4). There are many

lawyers in the U.S.A. who feel that advertising was an unwelcome addition to the legal system. However, its evolution into the profession was inevitable in America, just as it will be in the U.K. I concur that there "should be no barriers to the publication of relevant information about the practices of the profession and the services it offers", but only so long as the advertising is "legal, decent, honest and truthful". Advertising in America has not become the universal virus that many thought it would, though there have been documented cases of deceptive, unethical, dishonest or crass conduct by some who have chosen the advertising route. It is my view that many American lawyers and law firms now advertise, even if only through the use of firm brochures or listing of speciality areas in the telephone directory.

The words "legal, decent, honest and truthful" are a natural transition to a comment on maintenance of professional standards. Without reference to the need for one code of conduct or two, it is clear in my mind that professional standards slip because of inadequate measures to deal with detection of and discipline for "shoddy work" and unprofessional behaviour. Historically, professionals are slow to criticize, report or censure members of their chosen professions. Fortunately, this position is changing for the better, and it is the duty of the profession to ensure the change not only continues but quickens its pace. Thus, I wish the government well in prescribing "clear principles and standards covering the provision of legal advice and assistance in the preparation of cases and conduct in court". This effort may be the most critical one in our respective countries to not only maintain professional standards but to restore them to the levels of yesterday, when a profession was a higher calling, with higher duties to the public and the profession itself.

CONTINGENCY FEES

This "green paper" addresses a topic fraught with emotion, irrationality and strong opinions on all sides of the issue. Chapters 2 (background) and 3 (arguments for and against the introduction of contingency fees) clearly and concisely state the opposing views. I concur with the government's willingness to consider some relaxation of the current position of total prohibition in England and Wales.

I have always been a strong advocate of contingency fees in appropriate areas, yet I am compelled to argue that they have created real problems in the American legal system. Large verdicts have unquestionably raised the prices of goods and services in the U.S.A. Yet, balanced against this, we must acknowledge that in many cases the successful litigants may have had a clear-cut right to recover but would have never had access to the courts without a contingent fee agreement.

The American constitutional system is premised on many factors, one of which is that

every citizen is entitled to a day in court to seek redress of perceived or alleged wrongs. However, that system was created long before America became an overly-litigious society, where many lawsuits are filed hoping to receive an early settlement, either because of fear or nuisance or publicity value. This mentality is wrong and must be modified by the legal profession. Simplistically, this could be done by lawyers undertaking "special duties to satisfy themselves that there is a reasonable prospect of success", as done in Scotland when acting on a speculative basis. The problem is, of course, defining "reasonable prospect of success". Not only are Americans a litigious lot, they can also be argumentative and creative when choosing to use the courts to settle their differences.

One sentence in Section 3.3 of the "green paper" really captured my attention and crystallized my feelings towards the issue – "To assume that the financial interest introduced by a contingency fee will override the standards of an individual in relation to his client is to assume an unreasonably low standard of conduct for the profession as a whole". We don't need to prohibit contingency fees, we need to better control greedy or unethical lawyers and litigants! Unfortunately, this has not proven to be an easy task.

As is noted in the "green paper", some American states and courts are beginning to impose themselves into the contingency fee debates. While I tend to oppose governmental and judicial intervention in general, I can understand the broadening concern over abuses in the process. Thus, I would concur with the governmental position to permit contingent fees but on a more limited basis than in America, retaining the "costs follow the event" rule requiring the losing party to pay costs. This rule should act as a strong deterrent to the filing of frivolous lawsuits. I also have no problem in concurring with some restrictions on the amount of fees which can be charged, as suggested in Section 4.6.

CONCLUSION

These two "green papers" will not generate a consensus of the best way to deal with the issues presented. That is as it should be. Easy or early consensus on difficult issues should be cause for alarm in free societies. The best way to improve our societies is by constructive and informed debate, followed by sound judgments and effective implementation of the ultimate decisions.

The Lord Chancellor is to be commended for the direct manner in which these issues have been approached and wished good luck in dealing with the response generated. The legal profession will be better off for it.