



Jessica de Grazia's recently published *Review of the Serious Fraud Office* has significant ramifications for the future of the independent Criminal Bar. Embedded in the raft of recommendations directed at improving the Serious Fraud Office's (SFO's) performance, de Grazia recommends the SFO should bring in-house much of its trial advocacy.

While graciously acknowledging that she has watched some "excellent" barristers in action, de Grazia nonetheless concludes that the divided legal profession is responsible for a skills shortage at the SFO because it has failed to breed in a single lawyer all of the skills required for the role of the successful modern prosecutor. Unlike the system in the US, the SFO's "excessive reliance on counsel" has the effect of "de-skilling" SFO lawyers. In de Grazia's view, outsourcing advocacy to the independent Bar prevents prosecutors from developing case analysis skills which enable them to provide

A VITAL ROLE

The de Grazia review of the Serious Fraud Office has slammed the use of external counsel—but [Jonathan Fisher QC](#) argues that the independent Bar is part of the solution, not part of the problem

pre-trial advice and make effective charging decisions. It also “undermines the cradle-to-grave principle of accountability based on continuity of knowledge and decision-making”.

Fisher: outsourcing strengths

Insensitive Bar?

In addition, in an extraordinary outburst directed at the supposed inadequacies of the independent Bar, de Grazia opines that “external counsel, who are paid on an hourly basis, are not as sensitive to the resources implications of adjournments, delayed trials and delays within the trial”. The use of in-house advocates would counter “case drift and the counsel attitude of ‘It’s just a hearing and who cares?’” From my own experience prosecuting and defending in serious fraud cases, however, this is not an attitude I recognise—and I have not spent the last 26 years wearing blinkers.

With the high turnover of case controllers, independent counsel provides a vital anchor

Brave new world

At first blush it is perhaps unsurprising that de Grazia recommends the SFO develops its own in-house advocacy capability. Revenue & Customs Prosecutions Office (RCPO) has an in-house advocacy unit comprising five experienced higher court advocates for pre-trial work, and this is the tip of the iceberg. By the end of next year the Director of Public Prosecutions intends each Crown Prosecution

Service (CPS) area to be conducting its own trial advocacy in around 25% of all Crown Court cases. The CPS also employs in-house advocates to undertake advocacy in serious organised crime and terrorism cases, and the new CPS Fraud Prosecution Service has signalled its intention to employ in-house counsel to prosecute wherever possible, outsourcing to the independent Bar only where necessary.

Indubitably this is the brave new world in which the independent Bar must operate today. As the present Bar Council Chairman, Tim Dutton QC said in his inaugural speech (December 2007) when remarking on the relationship between the CPS and the referral Bar, “there is no reason why a suitably qualified employed barrister should not undertake advocacy for his employer... The days of protectionism have long gone... What matters is that we get the balance right in the interests of the public.”

False premise

What is clear is that de Grazia has struck the wrong balance. To begin with, de Grazia’s view that bringing in-house much of its trial advocacy in-house “would be one of the most effective methods of developing skills and knowledge and reducing case delay at all stages of the process” is naïve and founded on a false premise.

The SFO is struggling at the moment for a number of reasons, ranging from internal management issues to an impracticable legal framework established by Parts 1 and 2 of the Criminal Procedure and Investigations Act 1996, within which serious fraud investigations and prosecutions have to be conducted. De Grazia is correct in her view that the overwhelming majority of serious fraud cases in the US involve guilty pleas because the odds of conviction are so high, but to attribute significant blame for the SFO’s low (61%) average conviction rate on a skills deficit borne of a lack of in-house advocacy capability is, with respect, palpably absurd. De Grazia criticizes the quality of early case screening, but it is difficult to assess the strength of evidence until an investiga-

tion has been concluded. In a criminal system which recognises that financial loss is not always caused dishonestly, case vetting officers (even those with advocacy experience) cannot be expected to perform as if they had been endowed with prophetic powers.

Misleading comparisons

De Grazia unfavourably compares the SFO’s average conviction rate for 2003 to 2007 with the CPS’s Counter-Terrorism conviction rate in 2007 of 92% and the CPS’s Fraud Prosecution Service’s conviction rate of 80% during the same period. However, the comparison is misleading. The time periods are different, and the nature and complexity of the cases are different. There is no indication as to how many successful cases have been handled by in-house advocates as opposed to independent counsel.

The comparison of a 97% conviction rate in the US is equally unhelpful. Guilty pleas abound as a result of the plea negotiation process and again an element of caution needs to be exercised. De Grazia believes “there are no fundamental differences between the role of the prosecutor and the due process rights of defendants in the US and in England and Wales”, but her view is not necessarily shared on this side of the Atlantic.

Looking at the plea agreement in the McKinnon case last year where the US successfully sought McKinnon’s extradition after he had hacked into the Pentagon’s military computer systems, Lord Justice Maurice Kay described it as “a curious document to one steeped in English criminal procedure”, adding: “We make no secret of the fact that we view with a degree of distaste the way in which the American authorities are alleged to have approached the plea bargain negotiations.”

Customary practice

In any event, following the recommendations of the Roskill Report which preceded the SFO’s establishment in 1987, the SFO customarily instructs independent barristers during the investigation stage. As

The de Grazia Review

The Review of the Serious Fraud Office—published in June 2008—was commissioned in March 2007 by the former Attorney General, Lord Goldsmith, and the former Director of the Serious Fraud Office, Robert Wardle. Jessica De Grazia, a former (non-fraud) senior prosecutor in the USA, compared the SFO with two prosecutor’s offices in the USA—a federal prosecution agency and a local prosecutor’s office. The Attorney General (Baroness Scotland QC) has broadly welcomed the report, but has commented: “Not all of Ms de Grazia’s recommendations can be accepted.”

Roskill explained, “a considerable advantage of involving counsel from the beginning is that he will have had the opportunity of becoming familiar with the case and less of his time will be taken up at the stage when the case is being prepared for trial.” Interestingly, in the plethora of reports prepared on the investigation and prosecution of serious fraud cases since Roskill, including the Government’s own Fraud Review published in July 2006, it has never been suggested that the SFO is constrained by the absence of an in-house advocacy capability. In point of fact, the referral Bar enables the SFO to recruit advocacy teams combining specialist criminal and commercial expertise to suit the requirements of the case. With the high turnover of case controllers, independent counsel provides a vital anchor for the case team. The logistical difficulties (and costs) of employing sufficient in-house advocates for around 60 active cases

a year need to be balanced against the high quality (and comparatively cheap) service which the independent Bar can deliver.

Missing the point

There is also an important conceptual point which de Grazia has missed. Roskill recommended the establishment of a new unified organisation responsible for the detection, investigation and prosecution of serious fraud cases. Section 1 of the Criminal Justice Act 1987 reflects this objective, requiring the SFO to act as an investigator as well as a prosecutor.

In this critical respect the position of the SFO is distinct from the CPS and RCPO, whose statutory role is to institute and conduct criminal proceedings after an investigation has taken place. It is axiomatic that the CPS gives legal advice to investigating officers during the course of an investigation, but there is no duality of function. Outsourcing SFO

advocacy services affords the public an assurance that independence of the prosecutorial function has not become blurred by the close involvement of the prosecutor in the conduct of the criminal investigation.

Part of the solution

This is not to say that there is no room for the SFO to develop an in-house advocacy capability to cover some pre-trial hearings and work alongside specialist advocates retained on a case-by-case basis from the referral Bar. Instead of seeing the involvement of the independent Bar as part of the problem, de Grazia ought to have recognised that the contribution of the referral Bar is part of the solution. ❖

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