MUST RELUCTANTLY confess that I have been a working advocate for over 50 years – in South Africa, England, and, occasionally, some other jurisdictions. That presumably is why the leader of this circuit invited me to give one of this series of lectures on advocacy. Unfortunately, the longer I go on in this profession the less I have to say about what is sometimes called the art and sometimes, more modestly, the technique of advocacy. So I hope that nobody has come here this evening expecting hints on advocacy. There are some basic techniques that can certainly be taught with advantage to young and not-so-young advocates. But in the end your advocacy will be a reflection of your own character and personality, and your own particular talents. Each one of us in the law has seen in a courtroom some counsel whom we particularly admire, whom we think of as a truly great advocate. But that does not mean that one should try to imitate his or her style of advocacy. It cannot be done, and the attempt may be disastrous.

There are, after all, many different styles of advocacy, both national and individual. If I had to classify the English style, I would describe it as idiosyncratic. Recently a retired chancery judge in London was heard to say that in his time at the Chancery Bar they did not take much account of advocacy. In fact, he said, even audibility was regarded as an affectation. On the other hand, there was Sir Hartley Shawcross QC. Appearing in an appeal presided over by that formidable Lord Chief Justice, Lord Goddard, he began by saying, 'My Lords, there are three points...'

* This is the text of a talk given at the Inner Temple in January 2003 as one of a series of talks on The Art of Advocacy organised by the South Eastern Circuit of the Bar of England and Wales.
in this appeal. One is hopeless, one is arguable and one is unanswerable. To which Lord Goddard said impatiently, 'Sir Hartley, just give us your best point.' 'Oh no,' said Sir Hartley, 'I don't propose to tell your Lordships which is which.'

Those are illustrations, not recommendations.

If I could not speak about the art or technique of advocacy, what was there to say on the subject? I should like to venture a few remarks not so much on the Rules of the Bar (which we are all supposed to know), but rather on the ethical basis of our profession. It is a profession (and not the only profession) whose practitioners face ethical problems. Some of them are old chestnuts. Most lawyers at some time in their career are asked by friends (or critics) 'How can you appear for someone whom you know is guilty?' That is not generally a very difficult question. Our Codes of Conduct tell us what we must or may do if a client confesses guilt to us but still wishes to be defended. We may not make any suggestion to a witness which we know to be untrue; we may not suggest to the judge or the jury that the crime was committed by someone else; we may not put the client in the witness box to give evidence which we know by his own confession to be false. But we may put the prosecution to strict proof of the guilt of the accused and may argue that the proof is insufficient. If the client is not prepared to proceed on that basis, we must withdraw from the defence.

That is plain enough, and in any event, it does not often arise in the real world. When do we 'know' that a client is guilty? I did many criminal cases in South Africa, and I can recall only one instance where a client told me that he was guilty. He explained in detail how he had committed an ingenious fraud. It then became clear that he had no intention of pleading guilty and he told me the equally ingenious defence he was preparing to put up. I explained that on that basis I could not appear for him. He was a quick student. He took the point, thanked me and went off with his silent solicitor—no doubt to another advocate, with whom he was presumably more circumspect.

That is not to say that every problem of professional conduct has a simple solution. It is a trite proposition that counsel must not mislead the court by word or deed and must not suppress what ought to be disclosed. But what ought to be disclosed? A few years ago, in an English case, Vernon v Bosley, a plaintiff who had witnessed the previous proceedings brought an action to recover damages for personal injury. The finding of the jury was that the illness was caused by the negligence, not the fault, of the first defendant. The second defendant was an insurance company who had conventionally offered to indemnify the plaintiff for the personal injury. The plaintiff had rejected this offer and had proceeded to trial before the Court of Appeal.

The Bar Council had questions of propriety.
advocacy, to venture (which we assume of our own) whose old chest-asked by whom you: question. If a client's may not be untrue; crime was sent in the own conscience proof of is insuffi: basis, we often ariseility? I did only one explained it. It then lity and he was ing to put or him. He and went sitate, with al conduct insel must suppressed? A few untiff who had witnessed the drowning of his two children in an accident caused by the negligence of the defendants obtained substantial damages for post-traumatic stress disorder and serious mental illness. The findings in favour of the plaintiff were based on the evidence of a consultant psychiatrist and a trained psychologist. Now it happened that there had been quite separate contested proceedings between the plaintiff and his wife in a different court, with different counsel, over the custody of their surviving children. In those proceedings the same psychiatrist and the same psychologist had given very different evidence for the husband, supporting his claim for custody, saying that his condition had improved dramatically, and giving a prognosis far more optimistic than that which they gave in the personal injury action. The husband's legal advisers in the personal injury action learnt of this contradictory evidence of their own witnesses only after the close of evidence in their case, but before the judge had given his judgment. They advised that this contradictory evidence need not be disclosed to the other side, or to the judge. So the judge made his substantial award of damages in ignorance of it. The defendants somehow later found out about the evidence in the custody case and appealed to the Court of Appeal. They challenged the propriety of the conduct of the plaintiff's lawyers in failing to make disclosure of what they had learned. They argued that the new evidence ought to have been disclosed and that the failure to do so amounted to misleading the court. There were three judgments in the Court of Appeal. Stuart-Smith LJ said that the counsel in the personal injury case should have advised his client that disclosure should be made. If the client had not agreed to that course, counsel should have withdrawn from the case; but, he said, it was not for counsel to make the disclosure himself contrary to the client's wishes. (What good counsel's withdrawal would have done once the hearing was over and the judge had reserved judgment Stuart-Smith LJ did not say.) Thorpe LJ, on the other hand, said that, whatever his client's attitude, counsel had a positive duty to disclose the relevant material to his opponent and to the judge. This duty to the court was paramount. But Evans LJ said that, once the evidence in the personal injury case was closed, there was no duty on counsel to make any disclosure at all. So, even on what may have seemed a relatively simple professional question, an experienced Court of Appeal spoke with three voices.

The Bar Council is constantly asked to rule on such specific questions of proper professional conduct. They come up in the
advocacy exercises which are part of training for newly qualified barristers. What I want to consider is a more general subject – the moral underpinning of the profession which we practise, that is, the profession of representing clients in court. You might think that a learned profession which has been lawfully practised at least since the days of the Roman Republic should have no need to examine its collective conscience. But there are old and nagging questions which, however often answered, do not seem to go away.

In one of the best-known passages in Boswell’s Life of Johnson, Boswell (himself a practising Scottish advocate) asks: ‘But what do you think of supporting a cause which you know to be bad?’ Dr Johnson’s robust reply was: ‘Sir, you do not know it to be good or bad until the judge determines it.’

But Dr Johnson did not dispose of the question, which still lingers more than two hundred years on. His is a good enough answer if the cause is a matter of pure law, or if its goodness or badness can only be determined after all the witnesses have been heard.

As I have already noted, short of a confession by his client, counsel cannot be said actually to ‘know’ that his client is guilty, whatever counsel may suspect. In the strict sense of the word (which was Dr Johnson’s sense), we may not ‘know’ that our client’s cause is bad. But there are many states of mind which are short of knowledge but which still provoke Boswell’s question. Many of us practising lawyers must have had the client who stoutly professes his innocence or good faith, but whom we, with our experience, our observation of the client in conference, and our knowledge of the facts of the case, just do not believe. We may warn the client that the judge or the jury are not likely to believe him, but the client may persist in his version of events and may insist on his case going forward. We are in no position in such a case to prevent him from giving evidence. We cannot assert that his evidence will be perjured. He may even persuade the court to accept his evidence. Yet we in our hearts and minds remain convinced that his cause is a false one.

Take another case. Our client has in law a good case; the facts and the law support him. He is not acting out of malice, but we view his cause with distaste. We see it as a bad cause not because of the client’s character, or his politics or reputation (all of which are irrelevant), but because we believe that the action we are instructed to bring is oppressive, or in our view contrary to the public interest. For example, a financial institution instructs us to bring a well-known shopkeeper a writ to evict him from his shop. We are instructed to defend the client who is assertively seeking the right to be briefly in occupation of his business premises. Surely a man of good character will not be prepared to go on resisting his eviction and the determination of the judge will determine its right.

One theory is that the cab-rank rule preserves the integrity of the Bar as a who we serve. The Bar as a whole thinks that the court is a moral arbiter and that it is wrong to be briefed in defence but try to illustrate the fact that the client is guilty. From the medical point of view, it is not an official duty to defend. The Bar in accordance with its tradition and the Cab-rank rule tried to illustrate this fact. It is a matter of conscience for each of us. Surely a man of good character will not be prepared to go on resisting his eviction and the determination of the judge will determine its right.

Rhetorical as it may sound, but this is an old and nagging question which still lingers in the hearts and minds of many of us. It is a question which has been asked by Dr Johnson, Boswell, and many of our predecessors. It is a question which has been raised by the greatest of Englishmen, Tom Paine, in his Rights of Man, a work which was read for two hundred years in the courts.

From the medical point of view, it is not an official duty to defend. The Bar in accordance with its tradition and the Cab-rank rule tried to illustrate this fact. It is a matter of conscience for each of us.

This duty of conscience is a duty which we owe to ourselves, our clients, our profession and society. It is a duty which we owe to the rule of law and to the public interest. It is a duty which we owe to the court and to the administration of justice. It is a duty which we owe to the spirit of the law and to the traditions of our profession.

2 R v Paine (1

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The Ethics of Advocacy

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2 R v Paine
bring a well-founded suit which will result in the ruin of a small shopkeeper and his family. A property-owner has the right to evict from his land a community which will be left homeless and instructs us to take steps to do so. Or the client is a developer who is asserting a good legal right which we know will result in the destruction of the amenities of a neighbourhood. Or we may be briefed in a criminal case for a client who has a good legal defence but whose conduct we regard as morally indefensible.

Surely a modern Boswell would be entitled to classify those as bad causes and to put his question to us?

One theoretically possible answer must immediately be rejected. It is not an option to refuse to act in such cases. That is the cab-rank rule. There may be personal reasons why a particular barrister may refuse to handle a particular case, eg a conflict of interest or a relationship to one of the parties, but the duty of the Bar as a whole to afford representation in the type of case which I have described is inescapable. Whatever a lawyer's personal reason may be for declining a brief, it may not be because he thinks that the cause is a bad one in the sense which I have tried to illustrate. It is a fundamental constitutional principle of any country which would describe itself as free that every person accused of a crime should be entitled to legal representation. That greatest of English advocates, Thomas Erskine, in his defence of Tom Paine, addressed the court in words which still resound after two hundred years:

> From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end.

Rhetorical as that may seem, I do not consider it to be an exaggeration. During the long years of apartheid in South Africa, I believe that one of the things which kept the flame of liberty flickering was that opponents of the apartheid regime charged with offences including high treason were able to find members of the Bar to defend them with such skill as they had and with vigour. This was not because they necessarily sympathised with the aims or methods of the accused, but rather because they recognised their professional duty to take on those cases.

This duty of the Bar extends to civil cases. It cannot be doubted
that the right to counsel is one of the principles of fundamental justice in civil actions as well as in criminal prosecutions. It hardly needs stating that the right to counsel would be of little value if the Bar did not recognise a moral and professional duty to make its services available without regard to any consideration of whether the client's cause be categorised as good or bad.

Some years ago Lord Pearce, in the House of Lords, restated this principle more prosaically than Erskine, but just as forcefully:  

It is easier, pleasanter and more advantageous professionally for barristers to represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, displeasing and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter.

Given our cab-rank rule, what can be the present significance of what I may call the Boswell question? It remains a live question, but I would venture to rephrase it, in this way: how should an advocate, as a member of an honourable profession, conduct himself or herself in a cause which, on rational grounds, he or she firmly believes to be unmeritorious or morally objectionable?

I emphasise, in passing, the words 'honourable profession'. Nowadays one hears it said that we barristers must realise that we constitute a service industry; and that in a competitive world we must market ourselves competitively. Nonetheless, I believe that we are still a profession and not merely a business. As Lord Devlin pointed out nearly 50 years ago, in a case concerning not lawyers but architects,  

many activities which in the business world are regarded as laudable examples of enterprise may by the rules of a profession be considered an offence. The old rules against advertising and against undercutting our colleagues have undergone considerable relaxation, but the distinction between a profession and a business still, I hope, remains. Some things permitted in the business world are not open to us.

I return to my rephrased question. One response, as robust and as simple as Dr Johnson's, is that, whether the cause be good or bad, once the brief has been accepted, the advocate has a single duty — his duty to his client. This was stated in terms of unsurpassed eloquence and power by a great English legal

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figure, one of Erskine's successors as a leading counsel and later
Lord Chancellor, Henry Brougham. In 1820 he defended Queen
Caroline against the charge of adultery brought against her by
her husband, King George IV. The trial was before the House of
Lords. In addressing the Lords, Brougham described the duty of
counsel in these words:5

An advocate, by the sacred duty which he owes his client, knows
in the discharge of that office but one person in the world – that client
and none other. To save that client by all expedient means, to protect
that client at all hazards and costs to all others, and amongst others
to himself, is the highest and most unquestioned of his duties; and he
must not regard the alarm, the suffering, the torment, the destruction,
which he may bring upon any other. Nay, separating even the duties
of a patriot from those of an advocate, and casting them, if need be,
to the wind, he must go on reckless of the consequences, if his fate it
should unhappily be, to involve his country in confusion for his client's
protection.

That statement of the duty of the advocate was not wholly
endorsed by the leaders of the profession. Some even thought it
outrageous, but Lord Brougham, as he became, never de parted
from it. It has unfortunately and, I think, wrongly been invoked as
demonstrating an absence of any moral standards in the advocates'
profession. One of the critics of our profession who did invoke it
for that very purpose was able to match Brougham in eloquence.

In 1838, Benjamin Disraeli was a young Member of Parliament.
Thirty years were to pass before he became Prime Minister of
England. In that year of 1838, following a parliamentary election,
a petition was brought to unseat one of the successful candidates.
Disraeli himself was not a party to the proceedings, or in any
way concerned in them, but in the course of the court hearing a
Mr Austin, counsel for the petitioner, had referred to Disraeli in
what Disraeli took to be insulting and defamatory terms. What
Mr Austin had said in court was, of course, absolutely privileged: Mr Austin could not be sued for defamation. So Disraeli published
a letter in the newspapers. It is worth quoting at length, as a
salutary reminder of an opinion of our profession which some hold
to this day. Disraeli began by indicating that he would have taken
action in court but, he said, he had been:6

5 The Queen's Case (1820) 2 Brod & Bing 284.
6 This passage and those quoted below are taken from WT Moneypenny, The Life
of Benjamin Disraeli (John Murray, London, 1912) vol II, ch II.
assured that Mr Austin, by the custom of his profession, was authorised to make any statement from his brief which he was prepared to substantiate, or to attempt to substantiate ... I take the earliest opportunity of declaring, and in a manner the most unequivocal that the statement of the learned gentleman is utterly false.

I am informed that it is quite useless to expect from Mr Austin any satisfaction for those impertinent calumnies, because Mr Austin is a member of an honourable profession, the first principle of whose practice appears to be that they may say anything provided they be paid for it. The privilege of circulating falsehoods with impunity is delicately described as doing your duty towards your client, which appears to be a very different process to doing your duty towards your neighbour. This may be the usage of Mr Austin's profession, but, for my part, it appears to me to be nothing better than a disgusting and intolerable tyranny, and I, for one, shall not bow to it in silence.

I therefore repeat that the statement of Mr Austin was false, and, inasmuch as he never attempted to substantiate it, I conclude that it was, on his side, but the blustering artifice of a rhetorical hireling, availing himself of the vile licence of a loose-tongued lawyer, not only to make a statement which was false, but to make it with a consciousness of its falsehood.

Disraeli hoped to provoke a challenge to a duel. Instead, Austin had Disraeli cited for contempt. Disraeli was forced by the judges to make an apology in open court. It must be the least grovelling apology in history. After formally apologising to Austin, he said he feared that he had really been brought to court not so much for an offence against the law as an offence against lawyers. He expressed the belief that there is in the principles on which the practice of the Bar in England is based a taint of arrogance; which is the necessary consequence of the possession and the exercise of irresponsible power ... I confess that I myself have imbibed an opinion that it is the duty of a counsel to his client to assist him by all possible means, just or unjust, and even to commit if necessary, a crime for his assistance or extrication. This may be an outrageous opinion,

he said, 'but, my Lords, it is not my own.' He then quoted the passage from Brougham's speech which I have already read out. Brougham by then was an ex-Lord Chancellor, so this quotation was something of a knockout blow. Disraeli, in a final thrust, appealed to the Bench to shield him from the vengeance of an irritated and powerful profession.
The Attorney-General wisely accepted this dubious apology as 'ample' and no sentence was passed. One is grateful not to have had the experience of crossing Disraeli. Of course the profession was irritated. Disraeli's attack was exaggerated, and it was unfair to Brougham. Brougham did not say that it could ever be the duty of counsel to commit a crime. Nor was it true that the ethics of the Bar permitted an advocate to utter a deliberate falsehood. It was not permissible then or now, and I do not think that Brougham was saying that it was. When Brougham spoke of the duty to save the client by all means and expedients, I do not doubt that he meant honest means and expedients. Yet we cannot simply dismiss Disraeli's harsh criticism of our profession. When we speak in court, we do enjoy great latitude and great privileges. I fear that these advantages do sometimes lead to a professional arrogance, and, especially in the heat of battle, to an excessive licence in attacking the parties or witnesses on the other side. I am uncomfortably conscious in the course of a long practice of having (only occasionally, I hope) transgressed in this way. It is a danger which confronts all of us who call ourselves trial lawyers. Our duties to all our clients, good or bad, must be limited by ethical considerations. Brougham's statement that we need take no account of 'the alarm, the suffering, the torment, the destruction' we may bring upon others is not to be taken literally, without qualification.

I shall return to this point later. But first there is another (not unrelated) aspect of professional practice especially worth stressing. The advocate should not identify himself or herself with the client's cause. The advocate speaks for the client in court, as a professional representative, not as a partisan. The corollary strictly applied in England and Wales as part of our Code of Conduct is that it is highly improper for an advocate to assert either to a judge or a jury any personal belief in the rightness or justice of the client's cause. It is equally improper to make any such assertion to the media outside court. In recent years it has become common after some high-profile case to see and hear on television the solicitor for one of the parties either protesting the client's innocence or (depending on the outcome) announcing that justice has triumphed. This is apparently permissible for solicitors. I trust that the Bar Council will be firm in ensuring that members of the Bar do not follow that practice. As a barrister, you are the legal representative of your client, not the client's general agent or spokesman or public relations adviser. This clear
limitation on the role of the advocate is an important aspect of the independence of the Bar. It includes a degree of independence even from the client. It is this rule which provides an honourable basis on which we can give our professional services to a client whose integrity we doubt and whose conduct we disapprove of. Yet another nineteenth-century Lord Chancellor (this time Lord Herschell) said, in words which may today seem pompous, but which are nonetheless relevant to our consideration of the ethical basis of our profession.\(^7\)

It is only by keeping this rule [ie of not identifying oneself with the client's cause] constantly in mind, and by a strict adherence to it in practice, that the risk of injury to the moral character of the advocate by his seeking to convince others by arguments which have not brought conviction to his own mind can be avoided.

Another English judge said\(^8\) that '[t]here is an honourable way of defending the worst of cases'. I would add that there is an honourable way of prosecuting and defending all cases, the best as well as the worst. In either case, there are things which, even if not illegal, an honourable advocate would not do – like suggesting to a client what would be a good defence, or attempting to play on what are, or are believed to be, the racial or other prejudices of the jury or the judge, or deliberately employing certain tactics. Let me take an example, unfortunately not entirely hypothetical. Suppose you have a client to whom money is no object. He suggests that if the case is drawn out as long as possible the other side will be battered into submission. This tactic may be furthered by opening the case at inordinate length, reading out every possible document. I hope you will all agree that no honourable advocate would do that, even if a weak judge were to permit it. So the basic answer to the Boswell question is that the advocate must conduct himself in a bad cause as in a good cause. He must represent the client resolutely and honourably within the limits of the law.

When it comes to 'the honourable way', there is one aspect of practice which I have found peculiarly difficult. The Code of Conduct of the English Bar states that a barrister conducting proceedings in Court:

\(^7\) The Rights and Duties of an Advocate (Wm Hodge & Co, Glasgow, 1890) 11.
\(^8\) Hannen P in Smith v Smith (1882) 7 PD 84, 89.
must not suggest that a victim, witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersion on the conduct of any other person or attribute to another person the crime or conduct of which his lay client is accused unless such allegations go to a matter in issue (including the credibility of the witness) which is material to his lay client’s case and which appear to him to be supported by reasonable grounds.

This, of course, qualifies Brougham’s statement that in doing our duty to our client we must not regard the suffering or torment we may bring on any other person. But that rule does not allay our doubts.

Consider this case. Your client’s version of events may require you to cross-examine a witness who gives a materially different version damaging to your client. Your client’s own evidence would under this professional rule constitute reasonable grounds for impugning the witness and thus permit you to challenge the veracity of the witness. The Code of Conduct certainly permits you to challenge that witness. Indeed, it is ordinarily your duty to do so. But, having seen and heard that witness, and understanding the facts of the case, you are convinced, however contrary to your client’s instructions, that the witness is an honest witness giving truthful evidence. Would you still find it morally permissible to cross-examine so as to suggest that the witness is a liar? How far do you feel able to go in such a case? Anyone with long trial experience has faced this problem. I have, on several occasions; and all I shall say is that, looking back, I am not satisfied that my judgment was invariably right.

This situation was graphically illustrated in Trollope’s great legal novel, Orley Farm. A young and idealistic barrister is junior counsel for a lady who is the defendant in a perjury prosecution arising out of a disputed will. A simple, ill-educated serving man, who was one of the witnesses to the will, is called by the prosecution. Her straightforward evidence contradicts that of the barrister’s client and is seriously damaging to her. To the young barrister it is plain beyond dispute that this witness is giving her evidence with complete honesty. Chaffanbrass QC, the elderly leader who cross-examines her, also sees this, but that does not deter him. As the author puts it: ‘He could not make a fool of her, and therefore he would make her out to be a rogue.’

* First published in serial form in 1861 and in book form (by Chapman & Hall) in 1862.
At the end of the cross-examination, the author continues:

[The QC] knew well enough that she [the witness] had spoken nothing but the truth. But had he so managed that the truth might be made to look like falsehood . . . ? If he had done that he had succeeded in the occupation of his life.

The young barrister is appalled at his leader's cross-examination and cannot conceal his distaste He thereby incurs the scorn of his leader. At the end of the trial (the whole of which makes enthralling reading), the old QC says to the younger man sarcastically: 'You are too great for this kind of work . . . If a man undertakes a duty he should do it . . . especially if he takes money for it.'

Which of them was right? I content myself with suggesting that Orley Farm is a novel which every barrister should read.

I am conscious that, to most of the questions I have raised, I have been able to give no clear answer. You may be thinking that my reformulation of the Boswell question and my examples of bad causes were too bland. There are bad causes and bad causes. What if a client comes to counsel with a cause which seems not merely unappealing or unmeritorious, not merely contrary to some view of the public good, but which is utterly revolting to counsel's conscience? Whatever the general rule requiring counsel to provide their services to clients willing and able to pay their fees, are there not occasions when counsel should be entitled to follow his conscience and refuse to act?

There were cases like that in South Africa where counsel were briefed by the former government in cases designed to enforce the apartheid laws. I was, of course, not on the government's list of counsel, and was never asked to act for the government in such a case. There were fortunately, or unfortunately, any number of pro-apartheid members of the Bar who would take on those cases without, apparently, any qualm of conscience. The rules of conduct of the South African Bar included the cab-rank rule. The issue never arose for me. If it had arisen, I believe that I and many other advocates would have been unable to comply with the cab-rank rule. Perhaps no rule of conduct can be an absolute rule. There may be times, fortunately rare, when one's own conscience rather than the general rule must govern one's conduct.

I return to the words of Lord Brougham. Properly understood, they are rather splendid. 'To save that client by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself.' That phrase 'to himself' is the key to the whole. It is not a licence to act with a licence to act not a licence to act with a licence to act not a licence to act with a licence to act not a licence to act with a licence to act.
continues:

What Lord Brougham was asserting was not a licence to lie and cheat. What he was asserting was that the highest qualities demanded of an advocate are independence and courage in defence of the client. The duty to show those qualities to the best of our abilities remains. Courage and independence sometimes entail standing up to a hostile bench – the annals of the Bar record many examples of that. But courage and independence mean more than that. What Lord Brougham was saying was that, in accepting a brief and in pursuing the lawful interests of the client, we must put aside all consideration of pleasing or displeasing others or of benefiting or harming ourselves. What you say or do in court may displease powerful interests – a government, a trade union, a corporation with much legal business at its disposal, an influential section of the community. It may be unwelcome to another of your important clients. It may offend your friends, colleagues or perhaps even your own family. It may harm your career. All such considerations, Brougham is telling us, must be put aside. That may be an ideal not all of us can attain. But it is an ideal we should all strive for. And, I would add, the duty which Lord Brougham was describing is an intensely personal one. You may take advice from your colleagues, but once you are in court your conduct is your own responsibility, yours alone.

Three of the most important of our Rules of Conduct embody Lord Brougham’s great statement.

Rule 303 states:

A barrister
(a) must promote and protect fearlessly and by all proper and lawful means the lay client’s best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any professional client or other intermediary or another barrister).

Rule 306 states:

A barrister is individually and personally responsible for his own conduct and for his professional work: he must exercise his own personal judgment in all his professional activities.

Rule 307 states:

A barrister must not:
(a) permit his absolute independence integrity and freedom from external pressures to be compromised.

That is one reason why we are all sole practitioners, and why
the Bar has never permitted partnerships. No other profession requires of its members so principled an approach to its professional duties.

Forty years after his defence of Queen Caroline, Lord Brougham made a speech at a Bar dinner in London. He ended it in these words:10

In this country the administration of justice depends principally on the purity of the judges; but next on the prudence, the discretion and the courage of the advocate. No greater misfortune can befall the administration of justice than an infringement of the independence of the Bar or the failure of courage in our advocates.

This is as true in the twenty-first century as it was in the nineteenth. It is what gives our profession its unique value in our society and what ultimately justifies its continued existence.

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10 Featured in (1864) 40 The Law Times 16–18.