

THE DIVIDED LEGAL PROFESSION IN ENGLAND AND WALES—CAN BARRISTERS AND SOLICITORS EVER BE FUSED?

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I. INTRODUCTION

At the present time, lawyers in England are divided into two distinct groups, barristers and solicitors.¹ Theoretically barristers are advocates and specialists in various fields of law, and solicitors are lawyers who deal with clients directly employing barristers for advice and advocacy in higher courts. Solicitors are classically called "men of affairs"² who advise the public in legal and business matters. Barristers are not authorized to initiate lawyer-client relations and must wait for work from solicitors.³

In 1987, these theoretical conclusions are only partially true. More clients are represented in courts by solicitors than by barristers,⁴ though solicitors only have a right of audience in the lower courts. Barristers do a large amount of advisory and drafting work that has nothing to do with litigation.⁵ Some barristers are specialists while many are what are called general common law lawyers.⁶ Many solicitors specialize in vari-

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1. M. ZANDER, *LAWYERS AND THE PUBLIC INTEREST* 1 (1968).

2. Today, this expression is used in conversation by solicitors almost with disdain although the description is an old one. It is interesting to note that one of the reasons given for barristers acting as accountants, brokers, financiers, entrepreneurs and land agents in the 16th century was because there was a need for "men of affairs." W. Prest, *The Inns Court under Elizabeth I and Early Stuarts* 22 (1972).

3. M. ZANDER, *supra* note 1, at 2.

4. *Id.* at 3.

Most laymen still believe that the division of the legal profession is much as it always was- that barristers are the advocates, whilst solicitors are office lawyers. Few realize that, in point of fact, more clients are represented in court by solicitors than by barristers- though solicitors only have a right of audience in the lower (Magistrates' and County) courts. Conversely, barristers do a considerable volume of advisory or drafting work that has no connection with litigation.

5. *Id.*

6. *Id.*

ous fields of law, and some are as specialized as any barrister.⁷

Journalists have commented about the seeming anomalies involving the English legal profession.⁸ *The Economist of London* said in 1983 that:

The original reasons for dividing lawyers into two categories – barristers and solicitors – have long since disappeared, but the distinction remains. In theory the 4,800 barristers are supposed to be the specialists in advocacy or in particular areas of the law. The 44,000 solicitors are, often misleadingly, described as the general practitioners. In fact, some barristers are not specialists, some solicitors are. Some solicitors are better advocates than many barristers.⁹

Although there has been continuous agitation for granting solicitors greater rights of audience, the clamor for outright unification of the legal profession and the discarding of any distinction between barristers and solicitors, *i.e.*, “fusion,” has recently been given impetus by official recommendations from the solicitors body, The Law Society.¹⁰

7. *Id.*

8. There are many instances but an editorial in the *Financial Times*, June 2, 1986, at 20 is a good example:

The main argument of the leaders of the Bar is that it provides specialists needed by the generalist solicitor. This is no longer true. The training of solicitors is more demanding than that of barristers. City law firms now have more specialists in the field of business law than the Bar. They can well look after the interests of their clients in the High Court when they appear in chambers without barristers. It is ridiculous to assert that, after six months' pupillage, a barrister is better equipped to appear in a court than an experienced solicitor.

Any deregulation of the profession would give barristers direct access to clients; this would probably more than compensate for the loss of the monopoly of higher courts. Some members of the English Bar have already had a taste of working with large clients – accountants and insurance companies, for example – without the intermediary of solicitors, and they like it.

9. *The Economist*, July 30, 1983, at 25.

10. *Lawyers and the Courts: Time for Some Changes*, A Discussion Paper Issued by the Law Society's Contentious Business Committee, January 1986. The Report said that the publication of the paper was approved by the Council of the Law Society. An impetus for this change in attitude by the Council came from the Young Solicitors division of the Society. Back in 1984 they said:

Clearly, the Bar cannot simply stand up and say that it does not want solicitors to plead in the High Court because barristers will then be out of a job – it has, therefore, produced an argument which is more likely to have universal appeal, namely, the standard of advocacy will decline if solicitors are allowed to plead in the High Court. It is only barristers and judges who

This article is an effort to assess this unique professional situation through an American perspective.

II. THE MYTH OF THE TWO BRANCHES

The division of lawyers in England and Wales into solicitors and barristers is often euphemistically described as a profession with two equal branches.¹¹ In fact, the barristers, unified in the Inns of Court, are

claim that the standard of advocacy will fall. Outside the Bar, the great weight of informed opinion is in favour of allowing solicitors a right of audience. Sir Gordon Borrie, the Director-General of Fair Trading and himself a barrister, expressed the following view at a recent meeting of young solicitors and barristers: "It seems to me that the arguments in favour of the [barristers' monopoly on pleading in the High Court] are difficult to sustain on their merits."

Others have been more forthright in their views. Marcel Berlins, until recently Legal Correspondent of *The Times*, referred to the 'absurdity' of the rule preventing solicitors pleading in a High Court. The rule is even more absurd when one remembers that solicitors have a right of audience which, I am pleased to say, they exercise in the European Court of Justice, a more senior court in some areas than the High Court, Court of Appeal or House of Lords.

We should also not forget that although the Bar claim to be experts in advocacy, people are nine times more likely to be represented in court by a solicitor than by a barrister and barristers did not, until very recently, have any special training in advocacy. The Law Society's advocacy training courses were, and possibly still are, attended by a large number of barristers and the leading book on advocacy is written by a solicitor, not by a barrister.

Barristers, or some of them, are, of course, expert advocates in the High Court — but this is simply because they are the only ones who can do it — and, indeed, the standard of their expertise in this area of advocacy where they have a monopoly has come in for some criticism. The *Financial Times'* reviewer of Sir David Napley's recent autobiography commented: ". . . anyone who spends any time in the High Court is likely to conclude that, given the indifferent quality of some of the advocacy, there is much to be said for opening the doors to solicitors who could hardly do worse than some of the barristers they are obliged to brief."

It is submitted that in a fused profession there would, as now, be lawyers — whether solicitors or barristers — who specialize in advocacy and that the standard of advocacy, far from falling, would increase." Young Solicitors, An Argument for Fusion, *The Law Soc. Gaz.* Jan. 25, 1984, 193.

11. An example of this attitude was found in the so called "Declaration of Bath" in 1975 wherein the Bar and the Law Society agreed that the legal profession consisted of two "equal branches." The Law Society's Contentious Business Committee, Lawyers

the most politically powerful segment of the profession,¹² and in legal affairs, of course, their colleagues in the Inns, the Judges of the higher courts, bolster this power.

Although it was the accepted wisdom of legal historians that the Inns were originally intellectual collegiate ways of life with "masters of the bench"¹³ participating in a "complex system of legal instruction by aural learning exercises"¹⁴ with "hierarchical grades of membership,"¹⁵ it was recently discovered that they were actually formed by practicing lawyers "whose business brought them regularly to London each term"¹⁶ who needed a place to serve as offices and lodging.¹⁷ These lawyers banded together to create a club "providing their small bank of members with food, shelter and companionship in an inhospitable urban environment."¹⁸

This inauspicious beginning has evolved into a joint operation known as the Bar, which controls the status and conduct of barristers through the Senate of the four Inns of Court.¹⁹ The Lord Chancellor, a

and the Courts; Time for Some Changes § 1.6 (1986).

12. An editorial in the London Evening Standard, March 27, 1987, at 5, demonstrates this fact.

Rarely do solicitors deserve to be commiserated with. But the Government's plans for the most far-reaching reforms yet in the legal aid scheme add up to a sharp reminder that the law officers of the state are traditionally drawn mostly from the Bar, and when a deeply conservative Lord Chancellor is of their number, solicitors can expect to get the short straw.

Lord Hailsham's plans take a lot of responsibility out of the hands of solicitors — including the Law Society's right to set rates of pay for legal aid work — without giving them anything in return. In particular the Lord Chancellor has rejected outright the Law Society's proposals to abolish the restrictive practices which divide solicitors from barristers, and to grant solicitors the right of audience in crown courts.

13. W. PREST, *THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS- 1590-1640* 1 (1972).

14. *Id.* at 3.

15. *Id.*

16. *Id.* at 4.

17. *Id.* at 16 and 237. See also R. Roxburgh, *THE ORIGINS OF LINCOLN'S INN* 35 (1963).

18. W. PREST, *supra* note 13, at 4.

19. M. ZANDER, *supra* note 1, at 2.

Many of the powers of the Inns, including examinations and discipline, have recently been delegated to the Senate of the Four Inns of Court established in 1966, two-thirds of whose members are practicing barristers, the remainder being judges. The General Council of the Bar, or Bar Council, by contrast, is a voluntary association, founded as late as 1895, whose function it is to look after and promote the interests of practitioners. It is

barrister and a politician appointed by the Prime Minister, is the highest judicial officer in the government of the day. All high judicial offices are held by barristers.²⁰

To this day, a student at the Bar is not admitted to the Bar of a Law Court, but is "called" to the Bar of an Inn, a tradition which the courts have recognized at least since 1547.²¹

Barristers have enjoyed greater prestige in English society than have solicitors, and it has been argued that the higher status of barristers as a group vis-a-vis solicitors is justified because barristers' activities involve greater "skill and responsibility."²² Because of the formal legal distinction between barristers and solicitors, an artificial barrier is placed

the Bar Council, rather than the Inns, which has promulgated the Bar's rules of etiquette and practice that are examined in this book. About ninety per cent of the 2,200 or so practising barristers subscribe to the Bar Council.

20. An example of the power exercised by the Lord Chancellor and high judicial officials is the process a barrister must endure to rise in the profession. In its study of the profession *The Economist*, August 6, 1983, at page 25 describes the situation in this manner:

QCs (also called "silks," from the material their gowns are made of) are the top 10% of the bar. Ordinary stuff-gown barristers, regardless of age, are called "juniors." QCs give written opinions, but normally leave other paperwork to juniors. Where a case merits a silk, a junior is briefed first. He does all the preliminary work, and assists his "leader," the QC, at the trial. The client (or in a criminal case usually legal aid) has three bills to meet—for the QC, the junior and the solicitor.

Since 1977, QCs have been allowed to work alone, with no junior, but the practice is still far from common. The decision to dispense with a junior is for the QC to make, not the client. In some cases the amount of work justifies using two barristers.

Successful juniors apply for silk in their forties or fifties, when the load of paperwork becomes too heavy and they think clients will be willing to pay a QC's fees for their services. In consultation with the senior judges the Lord Chancellor chooses 40 to 50 names each year from the 180 or so who apply. Unsuccessful candidates can reapply, and may be lucky on their second or third try, after which most give up. No reasons for refusal are ever given.

It seems odd that a profession living by the principle that justice should be seen to be done should placidly accept such a system. In effect, the power to blight or advance a barrister's career lies in the hands of a single officer of state, the Lord Chancellor, accountable to nobody. Failure in the QC states effectively blocks the way to further advancement. High court judgeships, the pinnacle of a successful barrister's career, are virtually reserved for QCs.

21. W. PREST, *supra* note 13, at 50.

22. Q. JOHNSTONE & D. HOPSON, *LAWYERS AND THEIR WORK* 394 (1967).

between the two groups. This lowering of the status of one segment of the profession has occurred even though the solicitor's legal education is more demanding than that of the barrister's and even though there is no evidence that barristers are more intelligent or more capable than solicitors.²³

The absolute distinction between barristers and solicitors is a matter of historical accident,²⁴ and it is not as old as it is often thought to be.²⁵ The barristers sprang from the serjeants-at-law who were early "counters" or pleaders.²⁶ Though the barristers do descend from early lawyers who were mainly associated with the courtroom,²⁷ they were not clearly distinguished from other similar practitioners called attorneys.²⁸ It has been said that attorneys, serjeants-at-law and later barristers were in the same business²⁹ and that barristers frequently dealt directly with clients and that attorneys appeared for clients in courts.³⁰ Attorneys were members of the early Inns of Court and some were still members as late as 1872,³¹ although attorneys and solicitors were often prohibited from membership and then reinstated.³² Unequivocal exclusion from the Inns was not fully accomplished until the relatively recent past.³³ The roles of attorneys and solicitors were practically merged by 1749 although many of them did not care for the joinder.³⁴

The historic division between barristers and solicitors probably effectively began at a point when the courts refused attorneys the right of audience before them.³⁵ Once the Inns embarked on exclusion of attorneys,³⁶ it was merely a matter of time before judges recognized

23. M. ZANDER, LEGAL SERVICES FOR THE COMMUNITY 170 (1978).

24. P. REEVES, ARE TWO LEGAL PROFESSIONS NECESSARY? 98 (1986).

25. M. ZANDER, *supra* note 23, at 170.

26. J. BAKER, THE ORDER OF SERJEANTS-AT-LAW 27 (1984); J. DAWSON, THE ORACLES OF THE LAW 14-15 (1968); A. Pulling, Order of the Coif 4 (1884).

27. W. PREST, *supra* note 13, at 8.

28. H. KIRK, PORTRAIT OF A PROFESSION 18 (1976).

29. *Id.* at 10.

30. W. PREST, *supra* note 13, at 22 and 43. "Besides their purely litigious functions, common lawyers acted as accountants, brokers, financiers, entrepreneurs and land agents; the barrister's sphere of operations was far less restricted than it is today. . . ." *Id.* at 22.

31. H. KIRK, *supra* note 28, at 19.

32. W. PREST, *supra* note 13, at 42.

33. H. KIRK, *supra* note 28, at 18.

34. *Id.* at 16.

35. *Id.* at 18.

36. *Id.*

The wretched attorneys were therefore being told by the Inns of Court

“the policy of exclusion.”³⁷

Legal historians do not discuss the question of the solicitor's part in the denial of the right of audience in the courts to attorneys. We do not know if some kind of a deal was struck between the barristers of the time and the solicitors. It could have been that the denial of the right of audience was exchanged for the right to deal directly with clients and to interview them before the trials. Whatever the facts, whether there was a negotiated settlement or simply an exercise of raw power, the barristers created a monopoly and along with their brothers, the judges, effectively drove out competition for advocacy in the higher courts.³⁸

and the Privy Council to leave the Inns of Court and on the other hand told to join them by the judges. By 1704, however, it is clear that the judges had recognised the policy of exclusion, and their order of that year to the attorneys was to join an Inn of Court, 'if those Honourable Societies should be pleased to admit them.' Exclusion was not really effective until the latter part of the eighteenth century when the Inns began to require a gap between cessation of practice as an attorney and call to the Bar; it became difficult, though not impossible, for an assiduous man to earn his living as an attorney while training for the Bar or at least keeping his terms.

37. *Id.* at 19.

These events had the most important consequences. The Bar had cut itself off from those members of the legal profession whom it stigmatised as ministerial persons of an inferior nature and had committed itself to the courts as the main sphere of its activity. From the seventeenth century outer and inner barristers ceased to act as attorneys. The day-to-day work and its necessary consequences, the day-to-day contact with the lay client, were left by the Bar to the attorneys and solicitors, and by so doing it gave these men the means to thrive. At the time Roger North noted with regret that barristers had very imprudently transferred to attorneys the work of personally examining witnesses. Two hundred years later the Bar, and particularly the junior Bar, contemplated also with regret what had been done and the work which had been lost.

38. *Id.* at 18; W. PREST, *supra* note 13, at 43-44. The Bar will often try to marshal exaggerated arguments for the continuation of their monopoly. For example they often say that American lawyers envy the divided system. The following letter from the Law Soc. gazette, 26 March 1986 at p. 924 answers this claim.

“*Fusion – American Views*”

I am an American law teacher now on sabbatical leave in London. I have been an interested observer of the English legal profession for 30 years and I have spent a substantial amount of time since 1972 talking to British lawyers and, of course, reading about them.

In [1986] *Gazette*, 26 February, 626, Robert Alexander QC, Chairman of the Bar, stated that arguments against fusion are 'supported by most of those who have experience of the US system.' This statement is not only

III. WHY HAS THE DIVISION CONTINUED?

The affirmative reasons for the divided profession in England have often been articulated.³⁹ It is said that barristers offer low cost competent specialty services because their offices and work place costs in the Inns of Court are relatively low.⁴⁰ Many small solicitor firms, they say, depend on this low overhead help, and it is a convenient device to protect clients and their solicitors.⁴¹ Barrister services are said to be generally available to the entire country, and they are not merely at the beck and call of large solicitor firms.⁴²

It is often argued that fusion or unification of the legal profession would weaken the specialist services which the barristers supply to the country,⁴³ and that the barristers would tend to become generalists.⁴⁴ It is also said that the overall competence of the Bar would be dimin-

an unsubstantiated general conclusion but like most general statements says very little.

There are no studies about how most American lawyers feel about 'fusion.' In fact, most American lawyers do not even know the concept. However, when I have posed the problem to numerous lawyers, they find the idea of a stereotyped, divided system rather amusing. When asked whether they would like to be part of such a system they emphatically answer in the negative.

One may suppose that Mr. Alexander's conclusions arise from statements made by Chief Justice Warren Burger, who has been roundly criticised by US lawyers for his numerous ill-founded charges against the American legal profession.

These conclusions also may arise from some chance discussions between big firm lawyers in London and New York and between courteous American lawyers and some barrister friends. Within the large American "law factories" where firms number 300 to 500 lawyers there is a semblance of a divided profession. This kind of artificial environment hardly qualifies as a valid test of what American lawyers do or think.

The problem of 'fusion' or not is not an American dilemma, and references to the legal profession in the US are irrelevant. The American lawyer has pride in a legal system which allows lawyers and clients a great amount of freedom of choice and opinion without too many restrictive practices.

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39. M. ZANDER, *supra* note 23, at 171.

40. *Id.*

41. *Id.*

42. *Id.* at 172.

43. *Id.* at 171.

44. *Id.* at 172.

ished.⁴⁵ If they continued to be specialists they would be mainly available to the larger solicitor firms.⁴⁶ Lawyers would refuse to refer their clients to specialists who could then take over the client to the disadvantage of the referring lawyer.⁴⁷ Sole practitioner barristers, the argument states, would not survive in a unified profession and the sense of detachment, independence and "undiluted commitment" which the Bar demonstrates would be lost.⁴⁸

It has been reported that a majority of solicitors would prefer that the status quo continue and that the Bar remain a separate and viable institution.⁴⁹ Solicitors give many practical reasons for wishing a separate Bar to remain and from interviews⁵⁰ over the years three rationalizations emerge: (1) at least part of the responsibility and blame for a matter can be shifted to the barrister, (2) solicitors say that they do not have time to do legal research and analysis, and (3) more money is made if a solicitor remains free from dealing with the law and practices as one who handles the "affairs" of the client.

There is some evidence today that solicitors are changing their views on fusion, and the younger, better trained solicitors are in the forefront of the fusion movement.⁵¹ The division in the profession continues, however, because the Bar is politically and legally powerful, but solicitors are beginning to realize that they have been patronized and restricted in an irrational fashion.

IV. THE PRICE WHICH IS PAID FOR THE DIVIDED SYSTEM - WASTED TALENT AND ECONOMIC RESOURCES

As one may expect, there is a great deal of waste of human and economic resources in a system which prevents persons within a pro-

45. P. REEVES, *supra* note 24, at 59.

46. M. ZANDER, *supra* note 23, at 172.

47. *Id.*

48. P. REEVES, *supra* note 24, at 54.

49. M. ZANDER, *supra* note 23, at 173.

50. The author has interviewed hundreds of practicing solicitors over a fifteen year period and these responses were given in numerous discussions.

51. The Young Solicitor's group of the Law Society has continued to pressure their elders for changes in the right of audience rules. See Young Solicitors, *An Argument for Fusion*, *supra* note 10, and an earlier publication by the group, *Tomorrow's Lawyers* (1972). It is now a fact that young University students are moving more towards the Solicitor's branch of the profession and that there is a significant change in the proportion of Oxford and Cambridge law graduates going to the Bar. Their proportion has fallen dramatically according to a survey conducted by a committee of the Senate. P. REEVES, *supra* note 24, at 101.

fession from accomplishing all tasks which the occupation encompasses. This is true of the English Bar which devours its young to preserve a system which may not be all it purports to be.⁵² The practical formal trial advocacy training the ordinary English bar student receives is questionable, and it is only when he or she enters pupillage that the student *may* receive good training in Chambers under a barrister who may or may not be a good teacher.⁵³ This assumes in the first place that the student is "acceptable." In fact, there is a great deal of discrimination of all kinds in the process.⁵⁴ The English Bar makes available a limited number of openings for bar students in a limited number of Chambers, mostly in London. One cannot become a barrister unless a place is found in Chambers, and such places are not granted on the basis of merit alone, to say the least.⁵⁵ In addition, the bar student's expenses are much higher than other students in the various profes-

52. *See id.*

53. M. ZANDER, *LAWYERS AND THE PUBLIC INTEREST* 28 (1968) ("But whether one lights upon a master who has both the talent and the inclination for teaching is entirely a matter of luck. Moreover, even a Socrates needs leisure to put over his message, and time is one commodity in acutely short supply amongst practicing lawyers. The abler they are, the more work they have and the less time there is to pour over a problem with the apprentice, to discuss possible ways of handling it. . . .").

54. *Id.* at 30-31. In the new London newspaper called *The Independent* on Monday January 12, 1987 a survey showed that political and class bias was very strong among judges.

A Survey of 465 judges shows that the overwhelming majority come from a highly privileged section of society and that many of them have been actively engaged in politics.

The survey by the trade union backed Labour Research Department also shows that more than one in three is past the state retirement age of 65, and that only 17 of those surveyed are women.

Although 4.5 per cent of barristers are black, there are only 250 to 300 black magistrates out of 25,000. There is no black judge in the High Court, Court of Appeal or the House of Lords. There are however three white South African High Court judges.

One in 14 of all judges has been actively involved in party politics at some stage. Three have been Conservative MPs and one a Labour MP. A further four have stood as Conservative candidates, six as Liberals and four Labour.

55. *Id.* at 52, 71-73, 84, 261. "It is sometimes said that the Bar is already open to all classes and the isolated example is given of someone with working-class or other modest background who makes a successful career at the Bar. But these are exceptional cases."

sions in England.⁵⁶ Within the bar, status and conduct is controlled by a small group at the top, and selection to the rank of Queen's Counsel ("silk"), and thus to the Judiciary are often based on subjective rather than objective standards.⁵⁷ It comes as no surprise, therefore, that the English Bar is homogeneous and conformist, with a "lack of inclination to criticize either fellow lawyers or legal institutions."⁵⁸ In addition, the English barristers do not follow many of their own highly praised ethical precepts. For example, we are told that an important ethical rule demands that the barristers are open to all who want their service and that a barrister cannot refuse a brief for reasons of convenience or personal attitude or situation.⁵⁹ Yet it is often said that the English barrister is quite regularly "unavailable;" it is "a fact of professional life" that the barrister's clerk is the decision-maker concerning what cases his principal shall accept.⁶⁰ Often barristers are underemployed, and some find that they may be better suited for a solicitor's office practice than for litigation.⁶¹ Similarly, solicitors may discover that they are really better suited for advocacy and/or specialization in a particular legal sub-

56. *Id.* at 49-52. "Although at present the Bar is in a flourishing condition compared with the 1950's the profession is still chancy and it is still the case that men fail to make the grade through no fault of their own or lack of ability." *Id.* at 52.

57. *Id.* at 130-32. "The accolade of silk is a license to earn more money than could be earned without it. It is bestowed on the basis of principle. No reason for refusal of silk is ever given and it is not surprising that some of those who are refused should, rightly or wrongly, believe that the reason was questionable — possibly a matter of religion, political views, nonconformity on social or professional attitudes, background, accent or other equally discriminatory grounds. More likely it is simply that the person refused wasn't 'in the swim' of those who play a role in life at the Bar, in the Inn, on Circuit, or in Chambers. The system is by its nature open to doubts of this kind. No one knows on what principles applicants are accepted or rejected and justice is therefore not seen to be done." *Id.* at 132.

58. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 106 (1975).

59. C.D. WICKENDEN, *THE MODERN FAMILY SOLICITOR* 15 (1975) ("While in theory one could treat the Bar as a cab rank, and secure the barrister of one's choice, barristers' clerks were adept at saying that Mr. So-and-So was unfortunately not available.").

60. *Id.* (The author stated that when he told this to a judge of the Court of Appeal he exclaimed that it was illegal. He said that the solicitors should let him know about it. Yet Mr. Wickenden says it is a fact of professional life and little can be done about it!)

The barrister has always been represented by a non-lawyer Clerk who wields tremendous power over the barrister's work and fees. The young barrister must placate the chamber's Clerk or not receive any retainers. The Clerk deals directly with solicitors. The system is under tremendous strain and is one of the pressure points. Even barristers are interested in changing. See Fiennes, *No Room At The Inn*, *London Portrait Magazine*, June, 1987, at 186.

61. See Q. JOHNSTONE & D. HOPSON, *supra* note 22 at 393.

ject.⁶² Yet, movement from one branch to another is difficult.⁶³

The fact that barristers are the only lawyers who may become judges in the higher courts is a significant example of the waste of human talent. Under present conditions the choice of judges is restricted by the relatively small Bar and personal contacts within that group's experience play a great role.⁶⁴ Solicitors with a wider range of experience and a more diverse social and educational background are absent from the pool of candidates for judgeships.⁶⁵ It is significant also that one half of the Bar's income comes from public funds, while only eight percent of solicitor's fees come from legal aid.⁶⁶ Thus, if the present separation of barristers continue, the judiciary will in the future be chosen from a group with an even more limited perspective.⁶⁷

62. *Id.*

63. *Id.*

64. P. REEVES, *supra* note 24, at 117.

65. *Id.* at 117.

66. *The Economist*, August 6, 1983 at 25.

67. The narrow social and political perspective of the Bar is widely discussed and it is part of a growing competence problem. In a *New Law Journal* article on November 15, 1979 at page 1116 Mr. Marcel Berlins said:

I spent a good slice of a recent period of enforced leisure going around the courts to judge for myself whether the standards of advocacy, knowledge and presentation exhibited by young barristers were declining as fast as many judges and senior lawyers had been telling me. My visits were haphazard—I was not trying to conduct a survey—and were mainly to criminal trials in the magistrates' courts and the Crown Court in the London area. I deliberately avoided spectacular, widely publicised trials and concentrated on relatively run of the mill cases (many, however, involving serious offences attracting heavy penalties) which would not normally be the subject of great press and public interest.

I was appalled. It was not just that so many young barristers seemed incapable of forming a grammatically correct English sentence (and I am not talking about "immigrant" lawyers). Much more distressing was the poor, sometimes inexcusable, standard of presentation of the lay client's case. I was present on two occasions when counsel managed to forget the crime with which his client had been charged. I saw more than one example of counsel clearly being unaware of the leading relevant case or the relevant piece of legislation. Mistakes about the detail and circumstances of the crime and, in pleas in mitigation, about the defendant's age, occupation and personal circumstances were commonplace. I did not try to ascertain the reasons for the incompetence, but it could not all have been the result of late briefs.

The Senate and the Bar are well aware of the problem and, to be fair, plan in their new vocational courses to provide a grounding in advocacy. The results, however, will only become apparent in future years. What

V. CRITICISM OF THE DIVIDED PROFESSION

As one may expect, the division of the English legal profession has been the subject of numerous Reports, articles in newspapers and journals, and letters to lawyer journals and newspapers.⁶⁸ The same arguments are repeated over and over. The Bar has been the subject of criticism, some coming from within the Bar. In his 1987 book *Straight From the Bench*,⁶⁹ Judge James Pickles demonstrated the waste the Bar creates when many young barristers drift off to other jobs, never getting a chance to show what they can do,⁷⁰ and the deep seated problems concerning the clerks of chambers who can make or break a young barrister.⁷¹ He discusses the entire closed shop arrangement in the Bar where there is bias, discrimination, and general unfairness to many young people.⁷²

In their 1978 book *The Bar on Trial*,⁷³ a number of young barristers analyzed and criticized almost every facet of the Bar and concluded that change and adaptation to the changing patterns of local courts and solicitors growing service in them, are inevitable.⁷⁴ They argued that fusion will not adversely affect the Bar, that specialization of the Bar is greatly exaggerated, and ". . . a large proportion of the Bar has no great experience or skill, certainly not enough to merit the title of specialist."⁷⁵

Perhaps the best analysis of the divided profession has come from the pen of a solicitor. Peter Reeves' *Are Two Legal Professions Necessary?*⁷⁶ is a first rate, well crafted work on the subject.

disappointed me about the Commission's discussion of rights of audience is that there was no evidence that their members had properly considered the quality of the service being provided at present. They had sacrificed the public interest in order to protect the profession without, however, honestly admitting that they were doing so.

68. P. REEVES, *supra* note 24, at 82.

69. J. PICKLES, *STRAIGHT FROM THE BENCH* (1987).

70. *Id.* at 190.

71. *Id.* at 191.

72. *Id.* at 18.

73. R. HAZELL, ed., *THE BAR ON TRIAL* (1978).

74. *Id.* at 189.

75. *Id.* at 174.

76. P. REEVES, *ARE TWO LEGAL PROFESSIONS NECESSARY?* (1986). The book has been widely reviewed in many journals. In *Police Review*, November 7, 1986 at 2252, Professor Michael Zander said:

Up to a year or so ago, a new book about the division of the legal profession into barristers and solicitors would have aroused little interest. In

The book traces the historical background of the divided profession and does a comprehensive job of describing the existing order of things. But mostly, Mr. Reeves discusses the pros and cons of fusion of the profession. On the issue of availability of legal talent, especially of barristers, he points out that the profession is so rigidly divided that it cannot adjust to changing conditions and demands.⁷⁷ "Where it is compulsory to instruct a barrister or for a solicitor to intervene, the client's wishes become secondary to the observance of established practices. In short, the consumer must adapt to the system."⁷⁸ He says that there are "firms of solicitors whose members are specialists with considerable experience both in advocacy and in specific areas of the law. Their services are sometimes used by other firms of solicitors who do not possess this expertise."⁷⁹ In other words, the present status quo is available without the necessity for the Bar. Many of the ills of the cab rank system of the Bar can be considerably affected by the introduction of solicitors along with barristers. The ills of overbooking of barristers, lack

1979, the Royal Commission on Legal Services reported unanimously (15-0) in favour of the status quo. The argument over the pros and cons of the existing system had been going on for decades, but the Royal Commission's was the first-ever independent inquiry. The chairman and a majority of the Commission's members were non-lawyers. So it could not be called a lawyers' committee.

Whether one agreed or disagreed with its conclusions, it seemed that the issue had been settled for at least a generation. But today, unexpectedly, the topic is alive again as never before.

Peter Reeves' book comes at a good moment, therefore. It is easy to read, gives the historical background to the division of the two branches of the profession, and explains how the system operates at present. But the guts of the book, and its main interest, lies in its examination of the arguments for and against the status quo.

. . . .
All the heavyweight evidence received by the Commission was in favour of retaining the separate Bar, with its monopolies. But now that the Law Society has changed its tune, would the Royal Commission still reach the same view today?

Members of the legal profession tend to make up their mind on this problem on the basis of a mixture of personal experience, anecdotes and a sense of self-interest. (The fact that the Law Society is now arguing for its place in the sun is due to nothing more elevated than that, with a loss of the conveyancing monopoly; it is looking for new markets.)

Id. at 2253.

77. P. REEVES, *supra* note 76, at 55.

78. *Id.*

79. *Id.*

of preparation, and substitution of counsel can be alleviated by at least, partial fusion.⁸⁰ If authorized, a solicitor advocate could handle a case to its conclusion without fear that an unprepared barrister will be introduced at a late stage to the detriment of the client.⁸¹

As far as competence is concerned, it is clear that many specialist books are being written by solicitors⁸² and that there is an increasing number of solicitor advocates.⁸³ Barristers presently have the advantage of the relationship between judges and advocates. Mr. Reeves suspects that "slipshod work is concealed or matters understood between the judge and advocate which remain unknown to the other parties to the trial or the public."⁸⁴ There is reason to believe that the same degree of understanding does not exist between solicitor advocates and the judiciary.⁸⁵

It is obvious that the expenses of litigation would be reduced if a solicitor could handle a matter to its conclusion.⁸⁶ By eliminating the costs of two persons sitting in court, duplication and unnecessary work would be avoided.⁸⁷

A vaunted argument of the status quo is that the present Bar is a "corps of specially independent advocates and advisors."⁸⁸ It is argued that solicitors are too close to the clients and tend to personally identify with the case,⁸⁹ thus diminishing the solicitor's power of objective judgment. Mr. Reeves points out that judges (who were barristers) are not immune from this lack of objectivity and numerous advocates, whether barristers or not, have suffered from a crusading spirit.⁹⁰ All in all, the barrister independence factor is an extremely difficult one to determine. Experienced advocates, whether solicitors or barristers tend to be objective and rely more on their instincts and experience than on others and their views.⁹¹ Independence can be distinguished from detachment. Often detachment can mask an unfamiliarity and superficiality

80. *Id.* at 56-59.

81. *Id.* at 58.

82. *Id.* at 60.

83. *Id.* at 59-60.

84. *Id.* at 61.

85. *Id.* at 62.

86. *Id.*

87. *Id.* at 63.

88. *Id.* at 64.

89. *Id.*

90. *Id.* at 65.

91. *Id.*

about the case.⁹²

Unfamiliarity with the background to a case or the personality of the client can be extremely damaging where personal relationships are involved. This is particularly so in matrimonial and child welfare matters. A fleeting glimpse of a marriage or history of a child's treatment over a number of years is rarely a sufficient basis for advice which may affect the future course of a person's life.⁹³

It is Mr. Reeves' opinion that objections and fears of the concentration of work in the large solicitor firms resulting from fusion are not based on solid ground. People are often deterred from traveling into the city centers because of travel and parking problems, and they will continue to consult local lawyers.⁹⁴ More solicitor consultants will be available and such legal advice will be of a higher quality than in the past.⁹⁵

Much of the present attitudes, he argues, are based on opinions and not factual evidence. In the Report of the Benson Commission, The Royal Commission on Legal Services, there was backing for the continuation of the present system. Mr. Reeves reported that some experts wrote of the "selective use of evidence" by the Commission and that "sweeping statements are unverified and their choice also illustrates the reliance placed upon anecdotal evidence."⁹⁶ Some points, however, clearly emerged from the Report. It is clear that there is a lack of public confidence in the divided profession.⁹⁷ Some of this is caused by the constant exchange of briefs between barristers, and solicitors are hard pressed to explain the substitution of a stranger for the originally instructed barrister.⁹⁸

According to Mr. Reeves, the question is ultimately one of justifying the restrictive practices which split the profession into two

92. *Id.*

93. *Id.*

94. *Id.* at 70.

95. *Id.* at 69.

96. *Id.* at 73.

97. *Id.* at 74. Recently, the Director General of Fair Trading, Sir Jordan Borrie, called for solicitors to be granted greater advocacy rights in the courts.

He has also called for barristers to be allowed to form partnerships, and possibly even companies, to practise with each other, with solicitors or with other professionals.

His views have been put forward in a submission to the committee on the future of the legal profession under Lady Marre, due to report next year.

The Times of London, May 11, 1987, at 4.

98. P. REEVES, *supra* note 76, at 75.

branches.⁹⁹ The rules are there to preserve the privileges which the Bar enjoys.¹⁰⁰ Mr. Reeves believes that the Royal Commission Report was full of gaps and holes. For example, nowhere is the probability of a group of practitioners offering services solely to other lawyers discussed or contemplated.¹⁰¹ In other words, all lawyers should be allowed to use their talents effectively.¹⁰² "The wastage in this instance is, presumably acceptable as the price to be paid for a separate Bar."¹⁰³

Mr. Reeves argues that fusion must come because there is a necessity for it. Lawyers must be free to practice without unnecessary restrictions to maintain liberty under law.¹⁰⁴ Fusion is necessary to prevent the great waste of talent and monopolistic practices.¹⁰⁵ The division of work between two lawyers based on the distinction between barrister and solicitor, the constant returning of briefs at the last moment, and the substitution of counsel breeds distrust in the system and prevents competent work.¹⁰⁶

He argues that an overall saving in costs will accompany fusion.¹⁰⁷ Client confidence in the legal profession must be adversely affected when a senior experienced solicitor takes a subordinate position to a young and inexperienced barrister who handles a case.¹⁰⁸ If it be asked whether competence in advocacy can be assured when fusion comes, it is answered that safeguards can be introduced.¹⁰⁹ The situation would be at least as good as the present conditions. Also, judicial appointments would not be enveloped in a darkness and secrecy probably unknown anywhere else in the world.¹¹⁰ Political and class bias could be ameliorated and the judiciary could be broadened and democratized.¹¹¹

99. *Id.*

100. *Id.*

101. *Id.* at 78.

102. *Id.* at 79.

103. *Id.* at 80.

104. *Id.* at 97.

105. *Id.* at 101.

106. *Id.* at 109.

107. *Id.*

108. *Id.* at 111.

109. *Id.* at 113.

110. *Id.* at 117.

111. *Id.* Insofar as solicitors being successful advocates and judges, there is already evidence in the Crown Courts that solicitor trial lawyers are doing quite well and the few solicitor judges are presiding successfully. *Id.* at 84. This is in contrast to the growing reports of inadequate barristers "incapable of forming a grammatically correct En-

The question of how change can be effectively achieved is a significant one. Mr. Reeves believes that one single professional body could initiate changes if the proper enabling legislation were created.¹¹² Common educational requirements have to be introduced.¹¹³ Fusion would force barristers into firms which may be a blessing in disguise.¹¹⁴ The profession as a whole could provide for some type of pension plan to ease the retirement of older barristers similar to the so-called "redundancy payments" in the general economic environment.¹¹⁵

VI. THE FUTURE OF THE DIVIDED PROFESSION—SOME CONCLUSIONS

In an article titled "The Decline of Professionalism" an American law professor, Richard Abel, discussed the English legal profession in terms of supplying legal services, the education of lawyers, controlling production of the producers of legal services, influencing demand for legal services, and social and professional organization of the two branches of the profession.¹¹⁶ He emphasized the movement of many lawyers into government and industry and believes that this movement from private practice into government and industry employment along with continued reliance by practitioners on government paid fees will significantly affect the entire profession.¹¹⁷ The future of the profession, he concluded, will be found more in government support, and professional associations will become more irrelevant, especially to employed lawyers.¹¹⁸ For most lawyers "occupational life will mean either employment by a large bureaucracy, dependence on a public paymaster, or competition within an increasingly free market. Whichever they choose, these lawyers no longer will enjoy the distinctive privileges of professionals: control over the market for their services and high social status."¹¹⁹

glish sentence . . ." and examples of barristers managing "to forget the crime with which his client had been charged," and examples of counsel "clearly being unaware of the leading relevant case or the relevant piece of legislation." *Id.* at 86-87. What reinforces the system is the formality and symbolism which is sometimes utilized by Judges in the Crown Courts to patronize and even insult solicitor advocates. *Id.* at 88.

112. *Id.* at 124.

113. *Id.* at 125.

114. *Id.* at 127-128.

115. *Id.* at 128.

116. Abel, *The Decline of Professionalism?* 49 MODERN L. REV. 1 (1986).

117. *Id.* at 25.

118. *Id.* at 41.

119. *Id.*

In this context he argues, a fusion of the two branches of the profession is inevitable, although some lawyers will continue to specialize in advocacy in response to consumer choice rather than professional rules. The Law Society and Senate of the Inns of Court will not be able to govern this increasingly heterogeneous collection of occupations.¹²⁰

The *Financial Times of London* has another scenario for the English legal profession of the future. In a June 11, 1986 "Financial Times Survey,"¹²¹ it projected that procedural reform in all of the courts in England will reduce the need for the services of barristers and solicitors forcing lawyers to offer more complete services and thus fusion.

A possible scenario runs as follows . . . Though Lord Hailsham is still believed to protect the Bar, the reforms that he must demand in order to slow down the escalation of legal aid costs will bring about important changes for the profession. The expansion of written procedure will reduce the call on barristers' services, and sooner or later they will be obliged to give up the appearance in pairs – a QC and junior – and the insistence on the attendance of a solicitor.

This, in turn, is likely to lead to the end of the privileged position of silks within the Bar and give a greater chance to juniors. Greater control of the procedure by the judge will deprive solicitors of a steady income from litigations and pretrial procedures dragging over many years.

The streamlining and speeding up of court procedure is bound to be followed by a similar increase in cost effectiveness of arbitration, further accelerated by the pressure of alternative methods of dispute resolution. These are expanding, because both litigation and arbitration became too costly in terms of money and managerial time, in addition to damaging business relations through their adversarial nature.

All of this is likely to lead to a collapse of the present structures. When its own "big bang" comes, the legal profession will be forced to look across the Atlantic.

In order to survive, solicitors will have to offer a complete service, and to be able to do so will merge or associate with large firms. This will not exclude the continued existence of highly specialised small firms, which will provide services similar to those of barristers at present.

Barristers, who have already tasted the advantages of direct access (and of contingency fees) when acting for or advising for-

120. *Id.*

121. *Financial Times*, June 11, 1986, at 15.

eign clients, are likely to trade willingly their court monopoly for direct access to domestic clients.

As a result, successful solicitors will employ young barristers in their offices, and successful barristers will build up offices employing not only clerical staff but also qualified solicitors. In this way, the fusion of the profession will be brought about – and the client and the state, as the principal paymaster, will jointly determine the pace of the transition.¹²²

The English legal profession is a unique institution, and as with all things English, Americans have difficulty understanding all of the subtleties in it. Yet the longer one views the English system, it is clear that certain forces are at work to change the rigidity of the profession.

One important factor is the growing importance of larger Solicitor firms in the scheme of things.¹²³ The growth of Solicitor firms breeds more specialization and more inclination to act as advocates.¹²⁴ There is some evidence that both large and small provincial firms are merging, becoming a force which will adversely affect barrister specialist's practices.¹²⁵

122. *Id.*

123. Mr. Reeves has suggested that fusion would bring decentralization of legal services where firms would work together and convenience of the client would be uppermost. P. REEVES, *supra* note 76, at 82.

124. Present day Solicitors are not merely clerks and agents, and there is an abundance of solicitor experts who practice in all branches of the law. *Id.* at 87.

125. There is a great deal of overlapping work between the two branches and the work of the solicitors cannot be easily described and categorized in a rational manner. *Id.* at 98.

In an article in *The Times of London*, June 4, 1987, at 27 a partner in a large city of London solicitors' firm Mr. Andrew Bryce, said:

The loss of the so-called conveyancing monopoly by solicitors, the argument with the Government on the cost of legal aid, and competition between the Bar and the Law Society over rights of audience and access to barristers have recently attracted much media coverage. But these are merely symptoms of a trend as the legal profession becomes more and more exposed to the rigours of the open market.

The resulting changes will alter significantly the public perception of the profession and its role, and in particular the kind of future on offer to potential recruits.

In London, law firms have come under pressure from the City's current financial revolution, where even the large City firms have felt the wind of change, and also from the fierce competition to capture and retain work in a time of greater client mobility.

In the provinces pressure on firms has intensified because of the loss of income from conveyancing, which has in turn led to an examination of

The constant problem for Solicitors is the twin dilemma of audience in the higher courts and judicial selection. Inroads into this monopoly will be a long time in coming. However, the process has already begun, and it will slowly take place.

There is an inevitability to the slow march for Solicitors' rights in this regard and although many of us will not be here when complete fusion occurs, we shall see remnants of it fall as the pressures on the politicians continue.¹²⁶

the viability of legal aid work and other small civil and criminal litigation. There is a realization that provincial firms will have to compete in areas that have largely been the province of large London law firms. This has led to a series of provincial mergers and groupings to aid specialization and provide a wider appeal in the recruitment of graduates and other personnel.

On the one hand, provincial firms are now beginning to open London offices. On the other, the large London firms are stepping up their recruitment of qualified staff by direct action in the provincial centres.

But other factors have also altered the shape of the large City law firms, their approach to recruitment, and indeed their ability to attract high-quality personnel. The law is a rapidly changing profession.

Solicitors have, for example, been in the forefront of those embracing new technology, and Big Bang has given fresh impetus to this trend. Prospective employees expect to see in a modern solicitors' office a complete range of computerized accounting, word-processing and information systems as well as fully up-to-date computerized telecommunications. The intelligent use of such systems leads to greater efficiency and speed, fewer hours spent on a particular transaction, and thus a more competitively priced service for the client.

In another area, it is increasingly difficult for junior members of the Bar to make an adequate living and a considerable number of barristers are moving to the solicitors' branch of the profession, forming a large proportion of those replying to job advertisements.

126. Obviously complete separation of the two professions will not long continue but the question arises whether the conservative English political environment, including a barrister prime minister, will even consider change. *See id.* at 85.