"THE ENGLISH BAR" A PRIESTHOOD

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BOWES AND BOWES
LONDON

Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Court of Criminal Appeal, the several Civil Courts of Appeal and the numerous court rooms presided over by the Judges of the Supreme Court of Judicature in the three great Divisions: Common Law, Chancery, and Probate, Admiralty and Divorce. There is also the new and novel court, the Restrictive Practices Court (Anti-Trust). There are the four Inns of Court, each with its splendid Hall, and Law Library, and three more law libraries in close proximity. The gardens of the Inns are ancient and accordingly lusciously green and flowered. All is open to you. A short ride will take you to Parliament and the seat of the Law Lords, and adjacent is the Privy Council's Committee of Judges; but nearer still is the Central Criminal Court (the Old Bailey) for serious crimes. You can enjoy all the ceremony and pomp centuries old, and you may observe the administration of British Justice, in this variety of court rooms totalling at least fifty, and nearly all in the one building.

When exhausted, the inner man is catered for; you take your lunch among barristers and solicitors. Yes! there are two open long bars serving quality and every variety under judicial supervision if not control. Yes! In this court house. Where can you duplicate these advantages?

SOLICITORS

THE TITLE the writer has given to this monograph hardly indicates that a preliminary chapter would be devoted to the *solicitor* and the ambit and nature of his professional activities, his license under statute, his powers and restrictions under the rules and regulations of (under Royal Charter) the Law Society, and the etiquette of his profession, all of which control his every movement.

It is very strange that throughout the United States there is much incomplete understanding of what the name "solicitor" connotes—many American lawyers do not think of a solicitor as a lawyer. They do not equate him with their "attorney at law". Frequently, and especially so, on his office stationery, the American lawyer will engrave "Counselor-at-law", and in conversation refer to "Counselor-at-law".

Historically, "attorney" was the earlier name by which the solicitor was known. But, as at that time so many attorneys had acquired a bad reputation because of lack of professional controls, the attorneys of better standing and standards obtained a Royal Charter for "The Law Society"; to perfect their house-cleaning as a primary procedure they substituted "solicitor" for "attorney". It is a fair assumption that the former "attorneys" were permitted, not being subject to visitorial control, to roam far afield in lawyer functions short of audience in the superior courts.[1] However, in the United States he is generally known as "attorney",

[1] It is a surprise to many English-speaking lawyers to observe that in France in these times any person may hold himself out and advertise widely he is an "avocat". He does sin if he styles himself "Avocat-a-la-Cour".

though occasionally, in some courts, in Equity cases, subscribes himself as "solicitor". This writer's certificate of admission to practise in the United States District Court for the Southern District of New York, in the last year of the last century, admitted him as an "Attorney, Solicitor, Counsel, Proctor, and Advocate" —the "Proctor" in Admiralty, and "Advocate" in Ecclesiastic matters.

Solicitors have "offices", but a barrister has "chambers". (The latter will be mentioned more fully under "Barristers".) It is one of those *quaint* inconsistencies so frequent in England that a solicitor may "do" the whole case from "A" to "Z" in the County Courts and some of the lower courts, and even, in one instance, in a High Court, but when he does he must be partially naked, for though robed he must go wigless. County Courts have, principally, jurisdiction in cases up to £400 and landlord and tenant actions for possession. The solicitor can appear in all criminal court business up to the time the prisoner is held for trial, at the Central Criminal Court ("Old Bailey") in London, or the Assize Court in the proper Assize town, in both venues before a High Court Judge or a Commissioner appointed by the Sovereign to act as a judge.

All court papers must carry the name and address of the solicitors and not the name of a barrister, because papers may not be served on barristers engaged in a case. But the solicitor is in control of his litigation throughout. Of course, despite liberal legal aid to *either* party, litigants to a remarkable extent act throughout, even to the House of Lords, without any professional representation.

As the great bulk of litigation is conducted in the courts in London, and all Chancery business and appeals exclusively, it is usual for solicitors outside London to retain experienced London solicitors to act as their *ad hoc* London Agents, as necessary, on the basis of an

apportionment of fees. As an address for the service of papers must be within a certain distance from the Royal Courts of Justice, it is an advantageous arrangement both for convenience and vastly so because so much greater is the on-the-spot knowledge of the best barristers for the particular piece-work job at hand.

This seems a satisfactory place to mention that "costs" and "fees" are used in entirely different senses. The writer was asked to advise London solicitors in respect of a serious misunderstanding that had arisen from the use of the word "costs" between them and New York lawyers. The litigation ended, the solicitors received a bill to their great surprise for a very large sum from the New York lawyers, which from an American viewpoint was entirely reasonable. But solicitors, characteristically careful, wrote the New York lawyers before retaining them to enquire what the "costs" would be. The reply was satisfactory, and, undoubtedly, clients were very pleased. But the American lawyers had, responsively, answered that the "costs" would be a named modest amount. They had not been asked what their "fees" would be and they interpreted "costs" taxable against the loser in the manner known to all American lawyers. "Costs" are used in a generic sense in England.[1]

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[1] The importance of "costs" is sharply exemplified in *The Times*, London, of May 7, 1964: costs taxed and recovered reimburse to a great extent the entire expense of the successful party on the trial, or even on an issue to either party to the litigation. The reported trial extended through eighteen days with a jury—the Press coverage was almost total.

The plaintiff, Dr Alexander Dering, was a Polish Aryan surgeon, a former prisoner in the notorious internment camp of the Nazis at Auschwitz. After the war, the plaintiff qualified, and became a registered medical practitioner in London. He brought action for damages for an alleged libel by Leon Uris, the author of *Exodus*, and also the publishers of that best-seller. The passage in question reads, "Here in Block X Dr Wirth used women as guinea pigs and Dr Schumann sterilized by castration and X-ray and Clausberg removed ovaries and Dr Dehring (the plaintiff) performed 17,000 experiments in surgery without

Qualifying as a solicitor. A solicitor must be a citizen of the United Kingdom. Obviously, if for no other reason than that he is an officer of the Court. Barristers need not be citizens—the reason will be made clear under the chapter on barristers.

The aspirant must have passed preliminary examination in general educational subjects. He must then enter into Articles of Clerkship (apprenticeship) with a practising solicitor and not with any *firm* of which such solicitor may be a partner. The term will be five years, reduced to three for university graduates. There are intermediate law examinations in London and in a few convenient cities, but the aspirant must come to London for his "Finals". The subjects include Accounts and Revenue law.

The expense is substantial—tuition, licensing, and so on—the largest item could be that of the solicitor for Articles, charges up to £500;[1] and he is limited to two articled clerks at the one time. The solicitor is expected to teach his articled clerk the workings of a solicitor's office in all its departments, take him with him to court and to barristers' chambers—he trails his solicitor-

anaesthetics." The defence was the words were *substantially* true; so large a number was obviously difficult of strict proof, so that proof was adduced of 130 cases. The defence asked the jury to award "the lowest coin in the currency" to avoid the possible *impropriety* of mentioning a *sum* to the jury. The jury found damages—a halfpenny. The farthing is no longer current.

The matter of costs then became of paramount importance, complicated as it was by payment into court of £2 by the publisher in March 1964. *The Times* states "the case was estimated in legal circles to have cost between £50,000 and £60,000. Dr Dering's liability is likely to be about £20,000."

Incidentally, it might be interesting to mention that for quite a few years jury trials have been general only in actions for libel, slander, malicious prosecution and seduction.

[1] Staff shortages, now so general, make difficulties for solicitors, with the result that the charge for Articles is generally reduced, or even waived.

tutor, usually memo-book in hand, taking notes. The length of the articled period is so long that many aspirants forgo any university education (three years in England), which is the explanation for the paucity of solicitors who have university degrees. In passing it may be observed that the legal education at the time of admission as a solicitor is broader than the barrister's when he is called (qualified) to the Bar.

After admission, solicitors come under discipline for their conduct by a statutory committee composed of senior members of the Law Society, subject to review by appeal to the courts. They are amenable to being struck off the Roll (of Solicitors) or to suspension from practice for a period, and their certificate to practise is renewable annually. The Master of the Rolls, the top-ranking judge of the Court of Appeal, has the duty of taking special charge of the solicitor branch. He ranks after the Lord Chancellor and the Lord Chief Justice.

As there has developed a necessary practice for solicitors to have, in trust, large sums for clients, their books must be audited yearly, and each must contribute to a fund from which reimbursement is made to the victimized client[1] in the event (happily rare) of dishonesty on the part of a solicitor or one of his staff. Incidentally, the more active solicitors' offices effect insurance to protect them from claims for damages for negligence on their part or that of their staff. Here it may be noted that neither barristers nor their chambers ever have any

[1] Under statutory compulsion, the Law Society has the duty of setting up and maintaining the Compensation Fund raised by annual compulsory contributions from the practising solicitors, and augmenting it otherwise. Statutes also confer powers on the Council of the Law Society, if it has reasonable cause to believe a solicitor, his clerk or servant has been guilty of dishonesty in connection with his practice or any trust of which he is a trustee, to require the solicitor to make delivery of all documents, account-books and all papers to the order of the Council, and also to stop his bank account, infraction is an offence and the Courts are given complete jurisdiction in the premises.

moneys under their control to the credit of clients, solicitors or lay.

As distinguished from the barrister, the solicitor deals over-all with his professional work, the barrister piecemeal. The solicitor may be a good ship's captain but a poor engineer; the barrister develops or rather is developed with experience, and as work from solicitors increases he becomes an expert specialist. The solicitor usually gives more of his time to the work of his office and developing his business, whereas the barrister looks forward to the interlocutory or final litigation at hand and its event. The solicitor has, at call, a comparatively large number of barristers, who are specialists and experts. (One of the very sound reasons for "going to *counsel*", the generic name for barristers, whether "stuff" or "silks", will be reserved for the chapter on barristers.)

There is an advantage to the solicitor in this solicitor-barrister relationship, even though the solicitor is quite competent to do the particular and special work for which he has retained counsel—he cannot lose his client to the barrister, for the lay client is in his solicitor's pocket and etiquette forbids, moreover, that the twain meet except in the presence of the solicitor or one of his staff. The barrister must never tout.[1]

All conferences must be held at the barrister's chambers—the barrister in very special and limited instances may go to the solicitor's office.

A solicitor may go to the Bar, but he must refrain absolutely from all professional relationship with his office, and his former clients, and all business activities. He must give at least six months' notice to each Inn in writing (excluding August and September) and to the General Council of the Bar, and must request to be

[1] The writer has known very profitable clients to be lost to a specialist who had been retained for his expertness or "entrees". This was in the U.S.A., where there is not cleavage but merger of the branches.

stricken from the Roll of Solicitors. He needs all the time at his disposal to "bone up" for the very stiff Bar examinations for which he must sit at the same time and of the same type as those for the general run of Bar applicants.

Solicitors, as they are piece-workers, have their remuneration fixed in detail by Statute or by the Lord Chancellor under specific warrant. In practice, the solicitor will send his client a generalized bill much more detailed than the American bill. But it is open to the client, if so minded, to request a detailed scale bill, which he can resist and ask for taxation before Masters *ad hoc*—"Taxing Masters". At the completion of a litigation the parties prepare their bills of costs for "taxation" as between party and party.

The successful party, *generally*, is out-of-pocket approximately twenty-five per cent of his *entire* expenses. So "costs" become a very important matter for every lay client and the solicitors on both sides. The barrister has had his "fees" taken care of by his very competent clerk to chambers before retained, and does not attend on any taxation of his own fees, which are included in the solicitor's bill of costs.

Speculative and contingent fees are prohibited under Champerty or Maintenance Statutes as well as by professional rules. As fiduciaries in England cannot make a profit *vis-à-vis* their cestuis, it follows that a solicitor who is appointed an executor or trustee must execute his trust without any remuneration. Very frequently the will or trust instrument specifically provides that he may make his usual charge, or a lump sum is substituted.

The income of the most successful solicitors tops that of their opposites at the Bar. There are some of large means because they are permitted to engage in sidelines, finance, commerce and so on. They may become directors and officers of companies, Members of Parliament, Cabinet members, hold office under the Crown;

but the judiciary and many offices associated with the judiciary are exclusively open to barristers.

An outgrowth of this involvement in scale and costs is a lay specialist who engages and advertises that he is available to be employed to prepare the very detailed accounts to be rendered to clients and bills of costs. The solicitors' office records (time sheets or registers) together with the papers are submitted to him for such purpose. A great deal of goodwill develops over the years and is attached to the address of the solicitors as well as to names, individual or firm. It is not usual for staff to become partners solely on merit. The partnership is usually a matter of price, frequently dependent on length of establishment, an old firm, and standing. Consequently, the American lawyer would be surprised to see advertisements of brokers or agents who engage in the business of buying or selling solicitors' established practices or partnerships. The writer is informed that this kind of advertisement is now less frequent.

BARRISTERS

THERE IS nothing schematic in this chapter. As stated in the opening words of this small book, "this is not a conventional law book". However, the picture would be incomplete unless it covered the canvas by outlining those persons who have fashioned and administered the law, forming themselves into groups for convenience. The writer's main theme, to vindicate the title chosen for this book, is the barrister branch of the profession. In the idiom of the day, it is the image of that branch the writer hopes to represent to American lawyers, warts and all.

A GUILD. In the Middle Ages, in the larger European countries, there was a proliferation of Guilds. In common they were self-regulatory bodies covering all activities from trade apprenticeships to charity; the members were elected to the "club" and club law has been their rule of law to this day. Without the title "Guild", to the American mind there will come the New York Stock Exchange (its importance in American business life is paramount) and innumerable trade associations.

Functioning in London are eighty-four guilds, some of them centuries old, housed in the square mile, the hub of London, known as the City of London. There is a literature of "Guilds". Their beautiful Halls are in daily use, some survived the Great Fire (1666) and both World Wars, others have been restored and even rebuilt. Examples of the twelve prominent ones are the Fishmongers Company[1] and the Goldsmiths Company.[2]

[1] Incorporated by Royal Charter in the reign of Edward I (1272–1307). It appoints "fishmeters", who are the officers that attend Billingsgate, mark and seize unsound (stinking) fish, and control

The writer has unduly extended in respect of Guilds to draw an analogy between them and the Barristers' Inns, the Inns of Court. This writer desires to demonstrate that the aim of the barristers is that justice shall not only be done, but shall be seen to be done. Their rules, regulations and etiquette are fashioned to do justice, to protect the public, and not least the solicitor branch, but also of their own ranks, the juniors.

In the light of context, much that appears to be arbitrary, superfluous, queer, or quaint will dissolve, demonstrating the desire to be fair to all.

INNS OF COURT. There are four: Lincoln's Inn, the oldest; Inner Temple; Middle Temple, and Gray's Inn —all of the fourteenth century. There were several more of which the last to survive was Serjeants' Inn to 1877. As the name indicates, they were Inns in the neighbourhood of the Courts.[1] They are voluntary unincorporated societies of equal rank and status, each Inn has a similar constitution and each is bound by the same rules.

Priests were the earliest advocates—that title survives in the Ecclesiastic Courts, and this explains the token tonsure in the barrister's wig (solicitors have no wig) and also in the vestigial purse, which is a strip of material hanging from the shoulder at the back of the *junior* barrister's gown—as the priestly calling precluded payment for service, there was adopted the bit of pantomime of dropping into this long purse thrown over the shoulder of the priest the "gift" of coin.

lobster and crab catching. Among other public interests are their maintenance of an important school, a hospital and almshouses.

[2] Incorporated in 1327. It has the statutory authority of assaying and stamping (hall-marking) gold and silver plate.

[1] An ancient hall in Lincoln's Inn, in close proximity to the Chapel, bearing the date 1487, was the Court of Chancery. It is used daily for lectures and examinations. It is significant that even today the Chancery barristers have their Chambers in Lincoln's Inn.

The Inns of Court are separated from the pile of the Royal Courts of Justice by the Strand to the south and Carey Street to the north. The Inner Temple and the Middle Temple, together known as the Temple, extend to the Thames from the Strand; and north of the Law Courts are Lincoln's Inn and Gray's Inn. All buildings are of approximately the same height, four storeys. Each Inn has its own Chapel, Dining Hall, Library and "Parliament" buildings of accommodation, but the Inner and Middle Inns worship in that twelfth-century renowned Temple Church. Each Inn has beautiful gardens, flower-beds and centuries-old trees, open spaces, together an ensemble, in an enclave, so unique, incomparable elsewhere in the whole world, and serving the sole purpose, "Justice under the Rule of Law".[1]

Students of the law lived or led a scholastic life in the hostels or Inns. As part of their courses, moots were held. Senior members of the Inn presided at the moots. They followed the procedure in the early courts, the "Common Bench", and so derives "Bencher", and "Master of the Bench", the all-powerfuls of today; at the moots the students grouped within or without a notional "bar"—and finally came the judges who accorded the privilege of audience only to students who were seated in senior grouping, within the Bar. Thus the right of audience became the privilege solely of the barristers in the courts presided over by a judge. The student began his "moots" within three years of his admission to an Inn, and after seven years of moots and exercises he could be called, and after another three

[1] The writer, at this moment looking out on the Mediterranean, where wintering, cannot refrain from picturing his years in the completest harmony and picturesqueness of his own Chambers—from 1925 for twenty years—his room was level with the Temple gardens, looked out on them and an easy step on to them, trees to sit under and contemplate; later in Lincoln's Inn, 1945 to 1960, a large bay window looking on to the garden of the ancient Court of Chancery and the open crypt of Lincoln's Inn Chapel.

years he could make himself heard in a court and sign pleadings, with still another five years of exercises and on probation.

Life in the Inns was not as dreary and uninspiring as the reader may infer, for Masks, Routs, Revels and Plays were held in the Hall of the Inn—presumably, the ancestors of "College Dances" and "Proms".[1]

For examples of erudition at the Bar the reader would be rewarded by examining "The Case of James Sommersett, a Negro", 20 State Trials 1 (1772), in which that great magistrate, Lord Mansfield, declared the Common Law of England that a slave became free the moment he touched the soil of England, and also the Hope Diamond cases, beginning 2 Ch. 691 (1893).

These cases add up to a lot of study in depth and have much in explanation of the profundity and learning shown by the Bench and Bar in the early reports.

The Inns are subject to visitorial jurisdiction, while at the same time outside jurisdiction of the Courts. Such is the force of custom that it became imbedded in the Common Law of England, and thus the Benchers of the Inn derived their exclusive authority from the judges. The Benchers have absolute control over all members of the Inn, subject only to the appellate jurisdiction of the Lord Chancellor and the judges sitting as a domestic tribunal.

The earliest known use of the name "barrister" is in the Black Books of Lincoln's Inn, in 1455.[2] It was nearly a hundred years later (1531) when it was next

[1] American visitors are guided to Middle Temple Hall, an original masterpiece of great inspiration. They will be told by the silk-hatted and gold-braided "porter" that in that very Hall Shakespeare's *Twelfth Night* was first performed on February 2, 1601 (and this year is the fourth centenary of his birth and *Twelfth Night* is again part of the program there). The visitor should avoid the lunch period.

[2] When the writer was notified that his name was entered in these same "Black Books" it was the first time he had seen those words used other than by way of reprobation.

used, and, in the *Statute of Sewers* (23 Henry VIII, c.5, s.10), which enacted the qualification for a commissioner of sewers as one who was "learned in the laws of the realm, that is to say, admitted in one of the four principal Inns of Court for an utter barrister".

Each Inn is a sovereignty in itself and the Benchers its rulers. Benchers are elected by the Benches from among the Queen's Counsel and from seniors of the junior members of the Bar, and the number of Benchers can be increased or decreased and vacancies filled by the Masters of the Bench.[1]

No person can be called to the Bar unless he is a student of an Inn.[2]

The Benchers have the power to discipline its own members, to admit (call) to the Bar, to suspend and disbar.

GENERAL COUNCIL OF THE BAR. Each Inn, being sovereign in its own estate, naturally could speak only for itself. Obviously, there was a gap to be filled—a group who could speak for the whole Bar. Thus a general committee out of the Inns was formed in 1883, called the "Bar Committee", succeeded, in 1894, by the "General Council of the Bar of England and Wales". It

[1] Somewhat anomalously Benchers who become judges remain Benchers and non-Benchers who are appointed High Court Judges are elected forthwith as Benchers. But non-Benchers who become County Court (or lesser) judges cannot be elected unless they are elevated to the High Court Bench. Only non-judicial Benchers sit in judgment on barristers or members of the Inn accused of unprofessional conduct.

[2] But King Edward VII and Queen Elizabeth, the Queen Mother, have both been Treasurers of the Middle Temple, the highest officer in an Inn. The latter enjoys the gaiety of Grand Night which she attends. In addition to Royalty, distinguished public personages and professors of law are elected "Honorary Benchers". American lawyers will be gratified to learn that so recently as April 1964 Lincoln's Inn elected as a Bencher a New York lawyer, Whitney North Seymour, President of the Association of the Bar of the City of New York (1950–2) and of the American Bar Association (1960–1).

is the "General Council of the Bar" that is the voice of the whole Bar, but its findings are etiquette, not law, binding only on members of the Bar.

BAR STUDENTS. A Bar student must be completely disassociated from any financial connection or interest in the business, if any, which he had formerly and so declare in writing. He must keep twelve terms, four in each year, and these terms are kept by taking his dinner in the Hall of the Inn of which he has become a student on three days in each term. These dining terms fall within the Law (or Court) Terms, namely Michaelmas, Hilary, Easter, and Trinity. (Coincidence with religious days will be noted.)

PUPILLAGE. As the term indicates, the student who intends to practise must, like the solicitor students, serve an apprenticeship to a practising barrister. But this can only commence after he has successfully passed his Bar Finals, and after a year's pupillage he *must* set up in practice as a "barrister-at-law", *solo*, for he can never have a partner. There are no partnerships or like associations of barristers. He is an individualist and in time will become a specialist, by the simple process of selectivity—as only solicitors are his clients, obviously they serve their own clients by picking and choosing according to talents. The pupil must pay 100 guineas (£105) to the barrister for his one year's pupillage and 10 guineas to his clerk. A student not domiciled in the United Kingdom must first obtain a clearance from the Benchers of his Inn permitting such pupillage.

A GLOSSARY. As the same word is used in different senses, a glossary of some such words will be helpful but the context will make the problem clearer:

Counsel: Used as a generic term for a barrister or barristers including

Queen's Counsel: The higher echelon to which the barrister is appointed, abbreviated to Q.C., which initials are always added to his name. Naturally, a "K.C." when the sovereign is a king.[1]

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[1] The Law List for 1964 names 340 Queen's Counsel. Of these 100 no longer practise either because they became County Court Judges (who, unlike the High Court Judges, retain the "Q.C." after appointment) or holders of other office, or because they have retired from practice. Thus some 10 per cent of the entire Bar are available as Queen's Counsel or Silks.

There has been much reference in the preceding pages to the "Q.C." (or "K.C.") and therefore appropriate to inform the reader of the process of such preferment, honor and privilege, and also the ceremonial of induction. It is observed by visitors to England that there is a pronounced amount of ceremonial. That is so, and when one thinks of it, so is any parade—a form of propaganda, and so is "Changing of the Guard", which delights all visitors. Uniforms and Court dress is meaningful, and the reasons for much of the British ceremonial is historical, or lost in the mists of history, and therefore the greater reason, for the preservation. It also serves a purpose, else why the universal, or practically so, of robing our judges. (The writer recalls that in New York, judges did not wear a gown or robe except the Court of Appeals judges, and later those sitting in intermediate appeal courts.)

The Junior Barrister applies to the Lord Chancellor for the appointment, but it is the Sovereign, on her Lord Chancellor's recommendation, who confers the rank as the Sovereign's (Queen's) Counsel, by Letters Patent under the Great Seal of the Realm. The recommendation is far from *pro forma* for a large majority of the applications are denied. Numbers must be limited. The appointees are selected in March or April of each year. The new Q.C.s in Court dress and *silk* robe, with full-bottomed wigs, dress bands and wrist frills (or weepers) and medals and decorations, attend at the House of Lords, and before the Lord Chancellor, make a declaration that each will "well and truly" serve the Queen "as one of her Counsel learned in the Law" and be "attendant to the Queen's matters". Afterwards, they proceed to the Royal Courts of Justice (in the Strand) and there are called "within the Bar" of every court which is sitting, beginning with the Lord Chief Justice's Court, passing to the Master of the Rolls and two Lords Justices (sitting as one Division of the Court of Appeal) and then to the President of the Probate, Divorce and Admiralty Division. And so on to every other court. In each the judge, or the presiding judge, speaks these words, to each new silk, who stands until his turn comes to take his place in the first row of benches (reserved for silks only) "Mr. X., Her Majesty having been pleased to appoint you as one of her Counsel

Junior: A barrister who is not a "Q.C." He is a "stuff gownsman" because of the quality of his robe.

Silk: A Q.C. because his robe is made of silk—a neat, short word in general use, not a nickname.

Women barristers have no different designations than "Mrs" or "Miss" or her *title*. (There are none titled presently practising at the Bar.) A married woman may continue the use of her unmarried name.

Chambers: A barrister's office, usually shared between several, without partnerships existing between them.

Back Sheet: It is a folder or back paper to which papers are affixed by the solicitor. It is analogous to the American lawyer's "covers". It is headed with the title of the action or subject, if not or not yet litigious, and the space below states the immediate matter for which the barrister is instructed, and there is a notation of the fee proposed and also the name of any barrister who has been retained or is being instructed in association.

Thereon, in the space left available, the greater part, the barrister will note in very few words the event and memos of matters disposed of in court. These memos made by every barrister in the matter are referred to as

learned in the Law, will you please take your seat within the Bar accordingly." The Q.C. then enters *within the Bar*, and at the centre seat bows to the Court, then to the left where the next silk to be called waits, at the end of the row, and to the right where the one who preceded him waits, and then turns to the Juniors in their places behind, all of whom bow in unison, rising for the purpose. He then takes his seat, and is asked by the Court "Mr. X. do you move?" Mr. X. rises and merely bows—a negative response to the question of his putting a motion—and leaves the Court.

The writer has been himself moved by the solemnity of this ceremoney, as it takes place at the first sitting in the new term in a court room crowded with relatives and friends, sightseers, litigants and witnesses. A friend, recently made a Silk, told me he had gone through the ceremony, always alike, in fourteen different court rooms. As a ceremony it leaves a vivid impression and reminder on all who witness it, and, of course, on the new Silks, as well as the judges.

they establish the judge's directions; in effect they are orders. The judge makes notes of his rulings which may not even ripen into a formal order. If a formal order is required it will be drawn by the Associate (a court clerk), and if a formal order is to be drawn up counsel may join in the exercise. However, the judge's notes, the court minutes, and counsel's notes can all become relevant to the purpose.

Brief: Generally, the most important document in court. It may be tangible as a document or intangible to denote that the barrister represents a client. It is a noun and a verb, and as an adjective or adverb made much of. *It is not the American "brief"*. There are none in the practice in England, and other names, used alternatively in America, memorandum of law, argument, or points, are quite foreign.

The brief consists of the proofs (statement) of the evidence to be given for the party, statement of the matters at issue, the solicitor's views and suggestions, and such authorities he may advise he finds in point, and any other matter he may think useful to the barrister. Only when the brief is delivered is the barrister "retained", unless previously he has been paid a special fee by way of retainer—which may be "general" with a view to obtaining advice or advocacy if need should arise.

Chambers: A barrister must not practise unless he has professional chambers, or is a member (in effect co-tenant) of a set of professional chambers. In London, he will almost invariably have chambers in any of the properties of the Inns. This cloistering evidently is a matter of obvious convenience. He must have the services of a clerk who must not be a member of either profession, but he is of prime importance in the working of the entire Bar. The barrister's name must also be painted at the entrance of the premises and nothing

more than his or her name and prefix of social title.

Though the upper floors of the various buildings of the Inns are let for solicitor's offices, and more often residence to judges,[1] barristers and professional people of standing, a barrister resident may not use his residence as professional chambers, though he may take and do homework there. He must not be a member of more than one set of chambers in London. He may not covenant not to practise near a former set of chambers. A barrister may not have his chambers in a set where his wife or husband is a clerk. A barrister should not sublet rooms in his chambers to an accountant. It is against etiquette for a barrister to permit a foreign lawyer to have his name on the door, or deskroom, unless the foreign lawyer is subject to rules of etiquette of his own Bar similar to those of the English Bar.

Nor may a barrister have a seat in the office of a solicitor, even if the barrister does not intend to practise in England and though he is enrolled as a barrister and solicitor in a country where there is fusion of the branches.[2]

Robes and Fraternizing: Consists of the gown and wig —stuff for the juniors, and silk for Queen's Counsel— except when the Royal Court is in mourning. Both wear "bands" below a winged collar normally, and when in Court mourning the Q.C.s add white cuffs called "weepers". The bands are similar to those worn by clergymen when robed—a neckpiece of two white strips of lawn, said to signify the Tablets of the Commandments given to Moses on the Mount.

[1] About ten judges of the High Court are residents, including the Rt Hon. Lord Goddard, former Lord Chief Justice.

[2] In 1962 the number of barristers' chambers was 182, and in the provinces (large towns outside of London) the number was 81. Of London sets only 9 were let to a single barrister to a set, 26 were occupied by 7 barristers to each and 3 sets were occupied by 18.

The Times of November 26, 1963, contained the following news item:

"Queen's counsel appearing in the High Court today wore 'weepers'—white lawn cuffs on their black coats—in mourning for the late President Kennedy—['Weepers' are so named because in bygone days a man who wept would wipe his eyes on the broad cuffs of his coat or jacket]. Judges and counsel wore the special mourning neckbands."

Women barristers are told to wear ordinary gowns, and wigs which conceal the hair, and bands, plain black, neck high dress, with long sleeves, not shorter than the gown, with plain white shirts and high collars.[1] When the Courts are sitting barristers both in court and in chambers dress black, striped trousers, grey or black neckwear and white collars.

A barrister should not wear robes in the witness box.

It is evident that the original six or more Inns, in the much smaller population of those remote centuries accommodated comfortably the correspondingly small number of students in lodgings. Moreover there were few, if any, from British possessions. They attended lectures, moots, dined in Hall, and observed the Courts dispensing justice—in short their formative and maturing years were spent in a small enclave. This naturally developed a brotherhood. So that after the years of studentship, upon call they were equals, all barristers. Thus, the reference in court to "My Learned Friend". Thus, too, the happy custom, that from the moment of call to the Bar, every barrister, irrespective of youth,

[1] For women Q.C.s, full dress: "Coats—made up of black superfine cloth in the same style as a man's coat except that it should not be skirted, but instead be short as in a lady's ordinary suit—black flexible buttons—plain white blouses—lace 'frill' and ruffles at wrist—plain black skirt of superfine cloth, black silk stockings—black patent ladies' court shoes—cut steel buckles—black silk gown—full-bottomed wig—bag, white gloves."

addresses every other barrister, irrespective of *age* or *eminence*, by his surname alone, unless on first-name intimacy. So also handshaking is the exception, somewhat akin to blood brothers. There are no enmities between barristers despite contentious practice and the heat of combat.

There is now less formality in the dress of both judges and barristers. Top hats and morning coats have gone, except for weddings and funerals or memorial services—the conventional dress is black jackets, striped trousers, grey or black neckties and homburgs or "bowlers" (derbies).

The Inns of Court are not totally devoted to study, preparation for the Bar, and practising the profession, which include, necessarily, lecture rooms, committee rooms and offices for the General Council of the Bar and its staff. There are a number of social groups, formed of members of the Bar—Bar Musical Society, Bar Theatrical Society, the Pegasus Club (riding and point-to-point racing), the O.T.C. (Officers Training Corps), a sailing club, a Bar golf club, and tennis.

The Inns also hold a private night (dinner) in most terms, a garden party or champagne party in the summer (marquees and band music), and a ladies' night (dinner) once a year, additional to the Grand Nights, social amenities (receptions, private dances and coming-out parties, weddings and christenings in the Temple Church and chapels, as well as Memorial Services). The learned societies, the British Institute of International and Comparative Law, and the Grotius Society, have meeting rooms and hold evening receptions and dinners, and the Hardwick and other Debating Societies their debates. The *ample* space for carriages has fortunately provided for the motor cars of today. The Masters of the Bench are in complete control of the Inns respectively and of all their activities and functioning. Where else is so much communal life and spirit to be found?

THE PRACTISING BARRISTER

THE GENERAL COUNCIL of the Bar prior to its Annual General Meeting publishes an *Annual Statement*. For 1962 (at p. 34) it states that the current edition of the Law List contains the names of 10,700 members of the Bar, of whom only 1,950 are practising, including 97 women.

Permission has been given for any practising barrister to include[1] after his name his university degrees, other professional qualifications, including (an innovation in the 1964 Law List) reference to previous qualification as a solicitor, legal appointments currently held, membership in other bars, including foreign.

A barrister is bound to accept any brief in the courts in which he professes to practise at a proper professional fee dependent on the length and difficulty of the case, except in special circumstances he may refuse a particular brief.[2]

[1] In *The Law List*, a quasi-official volume, a directory published annually.

[2] *The Times* of London, February 19, 1953, and the Annual Statement, 1952, p. 28, according to Boulton, *Conduct and Etiquette at the Bar*, 3rd ed., p. 17, quoted the Rt Hon. Lord Shawcross, Q.C., former Attorney-General, and Chairman of the General Council of the Bar, in a lecture (the final paragraph demands the reader's closest attention) as saying:

"I have recently heard it said that certain members of the Bar in one of Her Majesty's Colonies refused to accept a brief to defend an African accused of offences of a quasi-political nature against public order. The suggestion is that those barristers made excuses and declined to act, their true reason being that they thought that their popularity or reputation might be detrimentally affected by appearing for the defence in such a case. For the prosecution they might appear, but not for the defence.

Instances justifying rejection of these shackles are: Possession of confidential information imparted by those whom he had theretofore advised; personal relationship to one of the parties, or a witness, or if he would have to attack a personal friend; or if he is to be called as a witness, and if in a trial he is called he should retire from the case unless he deemed to do so would be to his client's prejudice.

"If this report were true, it would disclose a wholly deplorable departure from the great traditions of our law and one which, if substantiated, both the Attorney-General and the Bar Council would have to deal in the severest possible way.

"Among laymen on both sides of politics there are some foolish and shortsighted enough to think that a barrister may and should pick and choose the cases in which he is prepared to appear.

"It would be well if those people remembered how the present rule —that a barrister must accept a brief on behalf of any client who wishes to retain him to appear before any court in which he holds himself out to practise—was finally established. It arose in 1792 over the prosecution of Tom Paine for publishing the second part of the Rights of Man. The great advocate, Erskine, who accepted the retainer to defend Paine, and was deprived of his office as Attorney-General to the Prince of Wales for doing so, said—and said truly—in a famous speech: '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'."

In a very recent review of *The Rule of Law in the United States: A Survey*, a report in book form entitled as above, an *ad hoc* committee of the American Bar Association appointed to co-operate with the International Commission of Jurists, the reviewer, one of New York's leading "silks", quotes the question put by the committee, in respect of the position in America, which reads:

"Have there been any cases in your country when a member of the legal profession has in any way been victimized as a result of his undertaking a case in which an unpopular person or cause was involved."

And, the comment of this "silk", Mr Harris B. Steinberg, reads:

"As a general matter, there probably have not been many such instances in the United States, but it is impossible to make any universal or dogmatic statement, for knowledge of such occurrences would tend to be narrowly confined. Fear of loss of status and of client does persuade many white lawyers in Southern States communities to refuse to represent Negroes in matters involving civil liberties." *The Record of the Association of the Bar of the City of New York*, December 1963 (Vol. 18, No. 9, p. 729).

A barrister never makes or swears an affidavit for use in Court—not even an "affidavit of regularity", or, no prior application has been made for the relief sought.

A practising barrister must not be a promoter or finder, nor *also* a doctor, dentist, officer of the Regular Army, whole-time Civil Servant, member of a Chamber of Commerce, legal adviser to a company at a salary, secretary or legal adviser to a trade association, secretary of a master's association (shipmasters), secretary to an incorporated society of professional persons at a salary, partner in or a salaried employee of a legal firm in the Commonwealth or elsewhere abroad where the professions are fused, nor insurance agent, nor work in a solicitor's office, or otherwise do work normally done by a solicitor in England, nor may he have a partner. He may be a Lloyd's underwriter, but must not act professionally in respect of any policy underwritten by him (conflict of interest).

A barrister should not buy tickets for dinners given by a local Law Society, or an association of local solicitors' managing clerks.

A barrister who was formerly a solicitor should not be a member of the City of London Solicitors' Company (one of the—modern—Livery Companies, or Guilds, already referred to).

He must not give any commission to anyone introducing business to him, nor share profits or costs with a solicitor.

He must not lunch or dine any solicitors in his Inn.

He must not seek the company of or *unduly* associate with persons (other than his personal friends), solicitors and their clerks or accountants, tax consultants, land agents, surveyors, consulting engineers, or insurance people who are in a position to influence professional work to come to him.[1]

[1] Disciplinary action has been taken against a barrister who lent a solicitor money to finance his practice.

accept any additional remuneration for legal advice given at board meetings. He must not advise or act for a company to which he is secretary.

He may write reviews and edit legal textbooks, examine newspapers, periodicals, scripts and other publications for libels, breaches of copyright, contempt of court, legal solecisms and the like, and may advise producers of plays and films in like matters, engage in journalism, including the writing for legal and technical periodicals and lecturing. He can coach pupils for an examination and have an interest in a private law school as a partner, provided no other partner is a solicitor.

A barrister may only send notice of his change of address or his telephone number to his regular clients (solicitors), but not to every solicitor from whom he may have at some time received a set of papers.

A barrister who has retired from practice may write memoirs of his experience at the Bar, using his discretion as to the cases in which he has been engaged, his confidences, *the feelings of the persons concerned and of their relatives.*

A barrister may take a part in a radio, film or television program on a legal or quasi-legal subject, but only with the prior consent of the Council of the Bar, and he may not appear in robes, nor may he act the part of counsel, nor may he deal with any matters in which he was engaged as counsel and without giving any publicity either to his own appearance in the matter or the part he played in it.

A barrister returning to practice within seven years must use a standard form and inform the Council of the Bar of the number he intends to circularize. If more than seven years he must first obtain the Council's permission. The matter in the standard form is: a heading of address, his former chambers address and that he has returned to practice at the above address. There can be nothing additional.

Non-practising Barristers: There are rules, regulations and rulings, controlling them or guiding them in their occupations in civil life, and in their activities in respect of advertising.[1]

Briefs and Pleadings: The "brief" to counsel is in no sense conceptual to the "brief" as common in the courts of the United States. It is the written "materials" delivered to counsel, and of course the backsheet goes with it, if not earlier. As the absolute rule, already referred to

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[1] A subtle form of advertising has been growing in the United States. Six-name firms have now become useful. The individual names are now publicized sixfold, whereas in the past a couple or three names sufficed to identify the lawyers constituting the firm. It is aimed to attract business and indicate importance and size. In practice it is a *nuisance* to those writing to them or otherwise referring to them. Prominence must not be given to lawyers by heavy type in telephone books or directories, but these strung-out names pre-empt a couple of lines and thereby advertise.

A personal examination of the current professional cards of the Borough of Manhattan (City of N.Y.), Chicago and Los Angeles in the advertising sections of "Martindale Hubbell" Lawyers Listings, shows 39 firms of five names each in Manhattan, 3 in Los Angeles, and 15 in Chicago (including 3 of six names). With biographies of partners and "Associates" these "cards" spread in most instances to several pages.

In England names are not followed by "Jr". There is development along dynastic lines in U.S. now—the writer has noted "John Doe V". What is intended? Was he christened all that? Lawyers should avoid this kind of publicity—in any case, it is and can be carried to bad taste, fatuousness and snobbishness.

Lord Russell of Killowen was Lord Chief Justice (1894–1900), and has been succeeded by a son and grandson as Lord Justices, who, necessarily, were active practising barristers before their several appointments. Anything to indicate their distinguished professional and judicial ancestry would be deemed cheap, improper, as self-advertising.

In the current number of the *A.B.A.J.*, Vol. 50, p. 82 (1964), a complete example of this puerility will be noted. In an appeal before the U.S. Supreme Court, Mr —— III, and Mr —— III, were opposed by Mr —— III. Query, is such a title within the spirit of Article I, Section 9, last para. of the Constitution: "No Title of Nobility shall be granted by the United States." Obviously, the spirit was intended to prevent the growth of an aristocracy and to foster democracy. And at what number will it stop?

Advertising: A barrister must not do or permit anything to be done with the motive of personal advertising, or in the nature of touting.

Advertising is prohibited whether in the United Kingdom or abroad.

It is made the "duty of a barrister who writes for the Press or a periodical or any other matter for publication to take reasonable steps to secure that no description of him as a barrister or of his legal work appears in connection with his article or other written matter". There are exceptions in the public interest, but the vice appears to be in the use of the professional designation or otherwise to attract attention which may bring him work as a barrister.

A barrister is permitted to lecture or broadcast, but care must be taken that his name, though announced, is *not* coupled with his profession or work, and likewise, in respect of any lecture or broadcast.

A barrister may not have the words "barrister-at-law" outside his residence or his chambers.

A barrister and likewise his clerk must not use stationery bearing "Mr ——, Barrister-at-law" or "Mr ——'s Chambers" or a member of a particular Inn or circuit, or any legal appointment which he holds, or his qualification as a lawyer of a foreign country.

A barrister may not have visiting cards on which appear the words "barrister-at-law".

He must not permit "barrister-at-law" after his name, nor "counsel", to be printed on the stationery of any business of which he is an employee, and that applies even to a non-practising barrister.

Nor may he send out notices stating he is moving to or joining chambers of another named barrister.

A barrister may not appear at any non-legal function at which he is required to wear a label with his name and the description of barrister-at-law or be a member of any body which requires him to do so. He must use the

utmost discretion on the occasions when he describe himself or permits himself to be described in conjunc tion with his name as "attorney-at-law", "standin counsel", "legal adviser", or any other phrase descrip tive of his status as a member of the Bar. He may no write for publication or cause or permit to be publishe any particulars of his life, practice, or earnings at th Bar, or any matters in which he has been engaged pro fessionally, and must not give publicity either to his ow appearance in the matter or the part he played in it.

A barrister may not give an interview, or supply to th Press any information concerning any current or pend ing case in which he has been instructed, nor write to, o for the Press or any periodical, other than a lega periodical, an article in conjunction with which h causes or allows to appear both his name and qualifica tion as a barrister-at-law. He should not permit his nam to be included in international law lists published ir Great Britain. A barrister should not permit the pub lication of the words barrister-at-law after his privat address and his name should not appear in trade direc tories.

He must not accept an invitation from a professiona photographer to sit for his photo, without a written ack nowledgement that the copyright is owned by himself

He may not take steps to procure the publication o his photo as a member of the Bar in the Press or an periodical.

A barrister may not take part in a mock trial except a moot held at an Inn of Court or a university.

A barrister can become an ordinary director, but not a managing director, in companies of good standing. The distinction is made because the usual work of a director consists of attendance in the privacy of a board room, as contrasted with the active carrying on or the manage ment of a business.

A barrister who is a director of a company may not

(p. 37), that a barrister must accept *any* brief, none the less the rule having definite exceptions, a *reasonable* opportunity must be allowed him to determine whether to accept the brief and whether the fee marked is proper or not.

A barrister may not accept a junior brief to another barrister, junior in time of call. There is in this rule an analogy to a "cab rank", and so it is known in the profession—taking a place in the cab rank and moving out according to time of hailing, not seniority. As the backsheet of the brief is open, more or less, to strange eyes, to an extent progress at the Bar becomes an open secret.

For good reason, since briefs are delivered on the understanding that counsel may not be able to attend court, *and actual engagement of counsel in another court is unavailing for an adjournment*, it is the duty of counsel to give his client due notice and time enough to brief another counsel to take over. Deference is made to the great dignity of the House of Lords in that an engagement in that court is made an exception to the rule that Counsel's convenience is ignored. Thus, there is the opportunity frequently for the ever-present junior to take over, and shine.[1]

The pleadings must be signed by a barrister. Neither the solicitor nor his client ever swear the pleadings, with the exception of a petition in a matrimonial cause to the truth of which the petitioning (or complainant) spouse swears. Such signature is taken by the Court as proof of

[1] The climate in which the parties and their lawyers litigate, and the courts' insistence that there should be no lassitude is apparent from a current Law Report in *The Times* (London), March 19, 1964, *Watkin Ltd v. Watkin*. Application had been made to the Court of Appeal "to stand the appeal out" for two months. The Master of the Rolls is quoted as follows: "This case has been decided as long ago as October 18, 1963. . . . The Court was able to deal with all cases within three to six months of the decision of the Courts below, and the profession must be ready. . . . It was also added that the appeal involved extremely complex points of law. The Court was not deterred by complexity, nor should the lawyer be." The Court granted two weeks.

bona fides at its highest—any animadversion made by the judge, in or out of court, would be taken by counsel as humiliating, of the greatest concern, and deplorable. The barrister must make no allegation not supported by the facts put forth by the solicitor in the brief; and if, by the brief, he is instructed to allege fraud he must have clear instructions that the lay client wishes to make that allegation and will support it on the witness stand.[1] And even this is not enough—he must have before him material which, as it stands, establishes a *prima facie* case of fraud, or he must inform his client accordingly and that he cannot sign the pleading.

In an appeal to the House of Lords the petition must bear the signature of two counsel to the reasonableness of the appeal.

A barrister has the right of authenticating by his name the report of any case decided in any of the superior courts and as soon as a report is so published it is accredited before any tribunal. American lawyers researching in English jurisprudence must have noticed the names of barristers subscribed at the end of a reported case.

Trials: If two or more counsel are briefed on the same side, the leader has the conduct of the case, and the junior counsel may not take up a line different from that of his leader.[2]

[1] The writer was consulted as to American propriety in that the client, an industrialist at the very pinnacle of a most important British company, in a Sherman Anti-Trust Government action in the U.S. courts, was referred to in the complaint as a member of a conspiracy (a "conspirator"). His U.K. company was a large shareholder in the American company, a defendant, and he was a nominee director of it. He was greatly concerned for his reputation and the particularly abhorrent appellation.

[2] In a biography of a lawyer renowned on *both* sides of the Atlantic it is stated that when he was called to the English Bar, until he was made a Q.C. he, of necessity, practised as a junior. During a trial he interrupted his leader, apologizing to both the Court and his leader for

For decades prior to 1958 it was the rule that no barrister should recommend another barrister as his leader or junior; since that year the rule is to the contrary.

Queen's Counsel must refuse all "paper work", i.e. all drafting and written opinions on evidence, as being more appropriate for juniors, but he may advise in *consultation* with the junior on such matters.

On the opening of the trial counsel will inform the jury, stating the facts he will adduce and their effect, and he may remark on any point of law on which the jury will be guided by the judge in his summing-up. He cannot *waive* the opening or closing "speech"—a tactic in American courts. If there is a "leader" or silk the junior has the duty of taking a note of the evidence, and such note may be used on an appeal to supplement the notes which all judges make.

It is irregular for counsel to mention the amount of general damages claimed, or any moneys paid into court *until* at the trial the question of liability has been decided and the amount of the debt or damages assessed. In a personal injuries action defendants' insurance must not be disclosed to the jury.[1]

breaking this rule, pleading his excuse in the interest of *justice*. Naturally, his course was sensational. This occurred about the late 1860s; the junior was an escaped Confederate lawyer, former U.S. Senator, Confederate Attorney-General and Secretary of War. After qualifying for the English Bar, he supported himself by writing for the Press, authored the standard textbook on the Law of Sales, now in many editions, rose to the head of the Bar, and when he retired was honored with a farewell dinner in the Inner Temple Hall on June 30, 1883, before departing to join his wife and daughter, who being French preferred life in Paris. That was Judah P. Benjamin. Their romance has been novelized, *Beloved*. Biographers write that they labor under the difficulty, so very unusual, because their hero, on his retirement, left nothing written or printed—he burned everything lest someone might unwittingly be hurt.

[1] The fortunate opportunity for uninformity in statutes and rules of procedure in England is obvious—a population within the confines of a country smaller than Florida.

Barristers, while acting with all due courtesy to the tribunal before which they are appearing, must fearlessly uphold their client's interest regardless of unpleasant consequences to themselves or any other person. They must assert their client's rights and defend his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation that can legitimately conduce to this end—any attempt to restrict the privilege should be jealously watched.

Except in a revenue case, counsel may not object to the admissibility of any document upon the ground it is not sufficiently stamped unless the defect goes to validity. (In England, in order to raise revenue, there are many measures for documentary taxes, and of varying rates.)

In a divorce the barrister should bring to the attention of the Court such matters as condonation of the matrimonial offence which, if established, would disentitle petitioner to a decree.[1] Since 1963 "collusion" is only a discretionary bar.

Affirmative evidence may not be called to contradict answers to questions asked in cross-examination which questions were directed solely to credit.

Counsel must submit to the Court any relevant binding decision whether it supports his contention or is against it, particularly in *ex parte proceedings*, or where the other party is "in person".

Counsel's authority extends to all matters incidental to the conduct of the case. His discretion as to offering no evidence may not be limited, and if a brief contains the proviso it should be returned to the client. Only

[1] There is a large divorce bar. A petitioner as part of his case must include his or her own adulteries, and the Court has the discretion to disregard recrimination as a defence. In a case reported in *The Times*, February 1964, the judge was reported to have exercised his discretion in favor of the husband petitioner despite adulteries with forty (40) women admitted in the "discretionary" statement.

with the opposing counsel's consent or of the Court, whether the client is the witness or not, may counsel communicate with a witness before evidence is concluded.

Counsel who holds a watching brief for a party, not a party to the record, may not call witnesses, nor take any part in the trial.

When the judge sums up counsel may not correct errors of law[1] (but may suggest corrections as to statements of fact or omissions). Counsel on each side should take a note of the substance of the summing-up and of the judgment for the purpose of informing the Court above in the case of an appeal. In proper cases in criminal cases the Court may assign a solicitor and counsel to represent the prisoner.

The police, or Public Prosecutor, or solicitors to prosecuting authorities, select from the Bar practising in the criminal law branch of the profession a barrister to prosecute accused persons, and may change about such counsel at various courts in which the prosecution is pressed.

Crown counsel is a "Minister of Justice". His duty is to fairly and impartially present all the facts to the jury. He should draw the attention of the Court to any mitigating circumstances if he has such instructions in the brief. Prosecuting counsel has no right to address the Court after defending counsel has addressed it *in mitigation*.

Counsel should not attend an identification parade. Nor if he has taken part in a criminal case should he take part in a movement for reprieve.

Confessions: If a confession has been made before proceedings have been commenced, the barrister to whom

[1] Only the judge "sums" up, and he alone "tries" the case—counsel "address" the jury, if any.

it has been made should not undertake the defence; if made during a proceeding, he should bear in mind that the issue is whether the client is guilty of the offence, and never whether he is innocent. He has the duty to protect his client from being convicted otherwise than by a competent tribunal and upon legal evidence to support the offence charged. He must not in the face of the confession suggest another person committed the offence.

Protection accorded a barrister is extraordinary. It results from his right to rely on his instructions, the facts stated by the solicitor in his brief, and from the strict rule that the barrister must never interview any witness other than his own client or an expert witness. He stands in his place and examines a witness with the proof (part of the brief) as to his evidence.

It follows that "no barrister is bound to withdraw any charge which is the necessary outcome of material facts sworn to by or on behalf of his client unless expressly instructed to do so by his client".

Blue Bag to Red Bag: It is a custom that a barrister carries into court his brief, "bundle" (copies of the exhibits), law books and noting-up books, in a dark blue cloth bag lined in white. When a Q.C. desires to recognize his appreciation of the assistance of his junior in the trial, the traditional gift is that of a red cloth bag. (Thereafter the junior proudly carries his robes, etc., in a red bag, only as far as the robing-room—presumably it has value if the barrister happens to be in his early years at the Bar.)

Retainer Rules: Counsel must be separately instructed and separately remunerated by fees for each piece of work done. He may not agree to act in all court work for an annual fee. Only a solicitor may deliver a retainer, but it is the retainer of the lay client.

A general retainer must specify the courts, tribunals

and matters to which it applies—counsel is not obliged to accept a general retainer. It may be limited in its duration otherwise it lasts during the joint lives of counsel and client; and it only applies to proceedings in which the retaining client is a party. Nevertheless a brief must be delivered in order to authorize the barrister to take any step in a proceeding, but if a proceeding has been commenced and no retainer has been delivered to the counsel within a reasonable time, or if after the retained counsel after three days of enquiring of the solicitor whether he is to receive a brief or special retainer and receiving none, the counsel may treat the general retainer as determined and accept a brief or retainer from any other party. (The above is the general rule only.)

A barrister must not give a receipt for the taxation nor hold over until taxation is completed the solicitor's check until the solicitor is able to obtain the costs from his client or the other side.

Brief fees are fixed with the barrister's clerk, but a Q.C. in a case of special difficulty may discuss the amount with the solicitor.

Refreshers (after the first day) in court are payable to the barrister in the amount agreed for such subsequent days, and a day is five court hours. It includes criminal cases.

No Queen's Counsel should accept a fee less than £3. 5*s*. 6*d*. for a consultation, nor a junior less than £2. 4*s*. 6*d*. (A conference is between a barrister and solicitor and a consultation is between a Q.C. and a junior and the solicitor.)

A barrister taking "silk" who continues in a case must take the junior's fee.

A barrister must not accept a gift of additional money to the brief fee from the lay client.

The fee on the brief covers all incidental work and the conduct of the case in court subject to the daily refreshers.

The giving of a retainer confers no authority on counsel—it is the delivery of the brief that establishes the relationship of counsel and client.

Fees are payable to the barrister as a matter of honor —accordingly his remuneration is called *honorarium*. The relation renders the parties mutually incapable of making a contract of hiring. The rule applies to services outside England. The barrister is not liable for malfeasance or nonfeasance—his immunity is absolute. On a matter where there is a reasonable doubt and no want of ordinary care on the part of the solicitor, and he acts under the advice of counsel, the solicitor is not liable in negligence to the client.

If the barrister finds a civil case clashes with a serious criminal case he must return the civil case brief.

The papers in a brief cannot be lent to any person without consent of the client.

Dock Briefs: A prisoner on trial ("in the dock") is entitled as of right to counsel of his own choice, handing two guineas to any barrister in open court, but he must make his choice in open court, male or female counsel. It is "a dock defence". Any interview before such selection and retainer is professionally improper.

Devilling: No barrister may at or during a hearing hand over his brief to another barrister, unless the solicitor consents. This must never be done in a murder trial. A barrister instructed to draw pleadings, advise, or do drafting work, must not delegate his responsibility to another, but he may obtain assistance (from a "devil"), but always making himself responsible for all contents. But he himself must be competent to do the work.

Visitation: The latest Annual Statement of the Bar Council, 1962, states that 38 complaints were considered; their general character may be measured by one of these in which the Committee took no action, involving apologizing to a County Court judge, and by

another, a prima facie breach of the rule on photographs —where the barrister was a non-practising one. As no other complaints were mentioned, it is a fair inference that they were deemed of minor importance.[1]

Demonstrably the barrister is a dedicated lawyer. For, it is generally assumed, he will bear with fortitude his years of hope[2]—he cannot become a law clerk or law assistant on a salary to any barrister or Q.C. In recent years the yearly average leaving the Bar was 113 against 98 starting in practice. Of course, the great bulk of those called elect it as an academic exercise, training for the growing Civil Service, and the bulk intending to practise in countries where English law is more or less basic, as in the Dominions and Colonies, but more so in the new sovereignties of which they are domiciliaries. The graph for the past ten years shows, by per cent, 52 per cent to 72 per cent of growth.

Relief frequently sought, even in the U.S. Supreme Court, by way re-argument of any matter adjudicated is never applied for in England. The writer has never in his many years heard of, or in the jurisprudence noted, any such application. Presumably it would be a procedural matter within the power of the courts. Is it because the Court is aided by a competent bar of specialists, counsel and juniors, one, two, or even more of each class in a great and difficult case? The judges, whether sitting alone or in their numbers in special types of litigation, and normally so in all appellate courts, give the greatest possible attention to the trial or hearing. Men-

[1] This writer takes his stand that in England, no matter how rigid and inflexible the legislation, rule, custom, and so on, room is left to move about, providing the exception is righteous everything considered —discretion is lodged in someone to exercise mercy and that justice be done.

[2] In June 1964, a highly distinguished Appeal Lord, Wright, died at the age of 94, Lord Devlin, of the same Court in an eulogy in the (London) *Observer*, in referring to his career, which included Master of the Rolls, wrote "He used to say he waited 10 years for his first brief."

tion has been made that there are no written arguments, points, memorandums of law—every thing is oral, and when a matter is opened counsel will never hear anything like "we have read (some or all of) the papers" or other written materials.[1] From the start to finish in every court everything is oral and heard. There are no submissions *pro forma* or without argument or hearing. Thus counsel will read relevant passages from documents a copy of which is before the Court. The usher hands up a report with a marker of the case to be referred to (the usher has arranged the volumes and markers from a list counsel has already given him). The judge will follow counsel word for word. Affidavits and petitions, etc., will be read out before the Court receives any in evidence. The judge will read out his judgment in open court. The reactions of all taking part in this "drama" are observable by all in interest. Under the Common Law system the judge's "speech" covers the facts fully, the issues, and contentions put forth, and his reasons for the determination. It should be remembered that if counsel fails to appear the opposing counsel will take his place and in the best of faith adduce the facts and state the law that he must meet and overcome. Here is "priesthood". Patience and thoroughness is the rule of the Bar and the Court; time is never more than a passing consideration and counsel are permitted to exhaust the argument; there are no time limits on the length of appeals, no warning light and cutting short as in the U.S. Supreme Court—"Justice is seen to be done".[2]

[1] But a recently instituted practice of the (Civil) Court of Appeal (which sits in three Divisions or groups of judges) provides that the judges will have read the documents before the sitting of the Court, thus avoiding much reading aloud "into the record".

[2] The rule established as of necessity in the State of New York, that on an *ex parte* application the affidavit or verified petition must contain a recital by the moving attorney that no previous application for the order or similar relief has been made to any court or judge, is unnecessary or non-existent in England.

In the nature of summing up, the reader, it is hoped, has been impressed by three ruling desiderata of the profession of barristers: To protect and assert the interests and rights of clients, to give a leg-up to the juniors of the Bar, and qualifying himself for his *aegis*, the judiciary.[1] It is submitted it is unnecessary to trace

[1] Observing as the writer has done in his many years the shortcomings of his own Bar, and not excepting his own earlier keeping-in-step for lack of knowledge of standards, he has wondered that the ethics of the profession are not taught in the law schools. A course of lectures should not only cover a limited number of semesters, it should be continuous.

Note: As the United States is extensively provided with Bar Associations the writer has considered that the large membership of their committees would find interest in the committees through which the English Bar Council functions:

Standing:
- Executive
- Professional Conduct
- Law Reform
- Legal Aid
- Court Buildings
- External General Relations
- Legal Education
- Fees and Remuneration
- Courts and Tribunal Business and Procedure
- Young Barristers
- Taxation and Retirement Benefits
- Public Relations

Joint Committees of Bar Council:
- The Council with the Law Society
- The Council with the Law Society's Legal Aid Committee

Special Committees:
- Legal Aid Complaints (Sifting Committee)
- Common Market
- European Patent Law
- Commercial Court Users Conference Report
- Recognition and Enforcement of Foreign Arbitral Awards
- Examination of the Circuit System
- Costs at Statutory Enquiries
- System of Transfer of Registered Securities
- Finance

the origins in the jurisprudence of the rules, etiquette and practice of the barrister-at-law of England and Wales to support their professional dedication. There are no "canons of professional ethics".