

## The Split Profession

The legal profession of England and Wales is split between the solicitors' and barristers' professions. The origins of the English legal professions are common to both barristers and solicitors and when Bar and solicitors permanently split is not easy to date. The black books of Lincolns Inn are the oldest records of any Inn of Court and place the origin of the Bar at least as early as 1422, and indeed it is known that the actual origin is even earlier. In the early days of the professions students would have lived and worked in the Inns of Court. Today there are only four Inns remaining; Lincolns Inn, the Inner Temple, the Middle Temple, and Gray's Inn. These make up the Inns of the Court which are the exclusive home of the Bar of England and Wales. In earlier times there were other Inns, commonly known as the Inns of Chancery, such as Sergeants and Clifford's Inns and solicitors made use of them.

The Inns as the name suggests were at one time very much like the Inns of old in which people took rooms for their accommodation. The concept of taking rooms in an Inn from which you practiced law, and also lived; is why even today, Barristers do not work in offices but in rooms. The room is the Barristers' personal space and by tradition forms part of Chambers. The Chambers are the collection of rooms in which barristers today work from, but their origin is from the time when a senior barrister would rent a suite of rooms termed chambers, and then permit fellow barristers to take rooms within them. Hence the term 'Head of Chambers' and why barristers do not work in firms but practice from chambers.

The would be lawyer attended an Inn and learnt the law by observing lawyers in their day to day practice and dining in hall in the evening. It was at dining events that the student lawyers would discuss what they learnt and be assessed by those in practice. The learning and assessment process included listening to talks upon the law and the staging of moots. The process of becoming a lawyer was a long one and took the form of stages. After an initial period as what by today's standard is a student (known at one time as an utter barrister<sup>1</sup>), they could progress to undertaking some level of legal work on behalf of clients and this level became the solicitor. For those who persevered further, the now defunct position of attorney could be attained, a sort of quasi position for those almost a barrister. Finally the student, or, as it was once called, an 'outer' or 'utter' barrister could become an 'inner' barrister; 'inner' and 'outer' probably referred to the positions occupied on the benches in Hall and in Court, it is well known that the term barrister comes from the right to be within the bar of the court and therefore exercising the right of audience before the judiciary. American courts still separate the public from the lawyers by a bar.

The Inns of Court in the past included, as mentioned earlier, other now defunct Inns such as the Inns of Chancery. It is thought they take their names from the bodies which served the needs of the clerks in the Chancery, the Lord Chancellor's Office from which all writs

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<sup>1</sup> Historical accounts vary in both the spelling and term.

had to be obtained. Later these Inns also included attorneys, who practised in the courts of common law, and as the Court of Chancery gradually evolved in the 15<sup>th</sup> and 16<sup>th</sup> centuries, solicitors, who performed corresponding functions there. In addition, these Inns provided some sort of initial training for those who would later join one of the present Inns of Court and be called to the Bar. In about 1470, when there were ten Inns of Chancery, Sir John Fortescue C. J. referred to them in effect as being preparatory schools for the Inns of Court. By the end of the 16th century attorneys and solicitors had been excluded from the Inns of Court, though the exclusion did not become complete until the end of the 18<sup>th</sup> century. Those intending to become barristers increasingly tended to join an Inn of Court without first passing through an Inn of Chancery; as the Inns of Chancery become social associations of attorneys and solicitors. The Law Society developed in the 19<sup>th</sup> century and came to serve the professional needs of attorneys and solicitors; and eventually the Inns of Chancery ceased to exist.<sup>2</sup>

### The Old Order of Lawyers

In the earliest times lawyers were usually clergy, and many clergy read law not theology at university. These clerics eventually gave way to lay lawyers and England embarked upon the segregating of the system between advocates and non- advocates.

The early order:

- Sergeant/Serjeants of Law
- King's Counsel
- Barrister
- Attorney
- Solicitor
- Student

The ancient order of serjeants-at-law, which, like Serjeants' Inn, is now defunct. The Serjeants, or *servintes ad legem*, were of an older institution and enjoyed rights of audience in the King's Courts, but there was a need to supplement that small group with other lawyers of recognised qualifications. This old order of senior lawyers gave way to the modern system of senior and junior barristers known as Silks or King's/Queens Counsel and barristers.

The position of attorney no longer survives in England but the American Bar continues to refer to their fused profession in this manner as all their lawyers practice as our solicitor advocates. The solicitor remains and is now long established as a separate profession

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<sup>2</sup> Megarry's Inns Ancient and Modern, published by the Selden Society in 1972.

with distinct training and practice methods from the Bar. The student remains as ever those beginning on the path to one of the honourable professions.

### Solicitors

The role of the solicitor is to give advice on the law and act on behalf of their clients. The solicitor will have fulfilled their legal training requirements of; core subject knowledge, normally through an LLB or in the alternative a CPE conversation course; their LPC (Law School) followed by a two year training contract (articles). This entitles the solicitor to be enrolled by the Master of the Rolls as a solicitor and to be issued with a practising certificate. Solicitors are subject to discipline by their governing body the Law Society; those powers are granted by the Solicitors Act 1974.

The relationship between a solicitor and their client is governed by the retainer. The retainer refers to the contract between the solicitor and their client and following the judgment of Lord Scott in **Groom v Crocker** [1939] 1 KB 194 it means the solicitor has a duty to protect their clients' interests, not to do anything without instruction and to keep their client informed. The full extent of their duty depends on the terms of the retainer per Oliver J in **Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp** [1978] 3 WLR 167. Solicitor – client relationships are considered to be of the highest level of fiduciary relationship and as such conflicts of interest between them can lead to the solicitor being found to be in breach of their fiduciary duty.

In day to day practice, the solicitor is the lawyer with whom all legal work begins. They handle non-contentious work, like the conveyance of property, drafting of legal contracts and other documents, and give general advice. They also begin the process of litigation by preparing the initial case before engaging the services of the Bar to conduct the trial.

### Barristers

Barristers in independent practice are principally advocates. They will give advice, often referred to as opinions, and draft documents, but their existence is owed to their specialism as advocates and their expertise in the law, they are a referral profession. Perhaps the best analogy which enables the understanding of the concept is medical provision. If you are ill you seek the advice of a general medical practitioner (solicitor) but when he suggests he cannot help or lacks the ability, he will refer you to a specialist such as a surgeon (barrister).

Barristers no longer have complete exclusivity in exercising rights of audience in the courts of England and Wales, as it is now possible for solicitors to obtain rights of audience. Barristers are regulated by a combination of their Inn of Court, of which every barrister must be a member, and the General Council of the Bar. It remains that barristers must be sole practitioners and cannot form partnerships.

The public cannot instruct a barrister direct, instruction is taken from a solicitor, and once more the medical analogy would be the General Practitioner referring you to a Specialist.

A barrister is obliged to accept any instruction in a field in which they profess to practice. This is known as the 'cab rank rule.' It means that unlike a solicitor a barrister cannot turn a client away. The origin of this as an enshrined rule in the Bar's Code of Conduct are the terrorist trials for members of the IRA, it was felt important to ensure all accused terrorists could still access the entire Bar and not only those who could deal with their conflict of conscience.

Traditionally there is no contract between a barrister and his instructing solicitor nor is there a contract with the lay client.<sup>3</sup> The engagement is an honorarium, and comes from the days when the Bar remained a profession which drew its number from those who had an independent income. A barrister appeared for the love of advocacy and to provide a service not simply to earn a living. The rule of law preventing a barrister entering into a contract of engagement has however now been abolished by section 61 of the **Courts and Legal Services Act 1990**.

A facet of the Bar which many commonwealth jurisdictions do not regularly grasp is the independent nature of the barrister and the effect this has upon conflicts of interest. There is no conflict question when a barrister appears against a fellow member of chambers as there would be as between members of the same firm. Likewise no conflict arises when appearing before a member of the same chambers. Indeed Bench and Bar are seen as one body in the eyes of the practitioners, separated only by their moral code of conduct.

The Bar retains many traditions including the need to have dined on a specific number of occasions in their Inn before they may be called. This cements the continuance of the collegiate life. Fellow members of the Bar never shake hands and indeed by tradition you should never offer your hand to a barrister. The offering of the hand dates to the times of cut throats and in shaking hands you could check for concealed weapons, as a gentleman as all barristers are, there is no need to shake hands. The tradition remains amongst some completely, but to most it is now only honoured between opponents, since many clients find it unsatisfactory to see their counsel showing too much camaraderie with the opposition.

The barrister is also the only lawyer in England or Wales who wears robes. The English legal dress has been frozen in time since the death of King William III; when in mourning the Bar took to wearing dark gowns originally with hoods. These gowns now only retain a triangular piece of cloth at the back to denote the hood, and not as many think a purse. It is often believed that the triangle was for the placing of coins in, to encourage the advocate to keep speaking. Whilst this theory may have some truth, since to discuss money with a barrister has always been a **foepa**, and money is discussed with the clerk. Ultimately though, the hood/purse is there for the purpose of mourning and not for the collecting of money. The other distinctive feature of the robes is of course the wig which remains a requirement despite ongoing debate.

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<sup>3</sup> Rondel v Worsley [1969] 1 AC 191.

## The Future

It has been debated for some time what the future is for the separate professions. It is sadly true that many believe fusion will occur and end hundreds of years of tradition and specialism. The campaign to fuse comes from two sources. The first is the emergence of the relatively new species of major law firms. London is privileged to have global giants such as Clifford Chance, Herbert Smith and Linklaters but the danger to the Bar is the opportunity they see for keeping all the fees if the Bar were part of one profession. Herbert Smith have taken the recruitment of barristers further than most with the creation of Herbert Smith Chambers, and certainly the money they can offer tempts many practitioners. The other source is the ever growing ranks of people who tried and failed to become barristers. The constant debate about access to the Bar continues, and its small size and almost total lack of financial support to those who seek it as a career leads to great resentment for those who try and fail to achieve their dream, often incurring massive debt in the process.

Yet despite these dangers the future of the Bar is not all gloom because it provides a valuable service that would be hard to replace. The often unnoticed advantage of the Bar is that no matter what size of solicitors firm you go to, every person has equal access to the Bar. Many high street solicitors benefit greatly from the Bar, for when they know nothing of the law in a given area they need not turn a client away but simply engage a barrister, generally far cheaper than hiring another solicitor, and they will thereby serve their client. The Bar therefore supplies a flexible workforce of special knowledge available as and when required. In the end the key to the Bar's survival remains its advocacy. Advocacy is a skill that requires practice simply not available in a fused profession, which is why the English Bar remains the envy of so many jurisdictions.

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