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SOME THOUGHTS ON THE ENGLISH BAR

John May†

The purpose of this Article is to discuss the English advocate, the English trial lawyer—how he is trained, how he is organised, how he works. I write it avowedly from the premise that the general standard of advocacy in England is high, in both absolute and comparative terms. If at the outset this seems partisan, then I accept the charge. In mitigation, however, or perhaps at the risk of sounding even more partisan, I must state my firm belief in the truth of my premise which is based upon 25 years' experience and practice as an advocate at the Bar in England and three years' experience on the High Court Bench.

I shall first refer briefly to the organisation of the legal profession in England. It is well known that whereas in the United States every practising lawyer, whether he be a trial lawyer or not, is a member of the Bar of one or more States, in England the two branches of the legal profession, that of barrister on the one hand and of solicitor on the other, are separate. What is perhaps not fully realised is how separate these two branches are. They are in truth members of different callings within the law. A barrister is not merely that member of a law firm who specialises in trial work. The training and examinations for the two branches are different. Their professional governing bodies are different. The work that they do and the circumstances and offices in which they do it are different.

From time to time the suggestion is made that the two branches of the legal profession in England should be fused. To maintain the separation, it is argued, is artificial, inefficient and unnecessarily costly. A substantial majority of each branch, how-

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ever, led by the Bar Council\(^1\) on the one hand and the Law Society\(^2\) for the solicitors on the other, is opposed to fusion. To maintain the separation, and thus the inherent specialisation by the barrister on trial work, is considered essential, and whilst the argument based on cost-effectiveness might be thought to have more substance, when it is examined closely it too fails. Litigation in England, be it civil or criminal, is no more costly than anywhere else.

That advocacy is specialist work, and in the English system the work of the barrister, is recognised also in the extent to which the latter alone is accorded the right of audience in our Courts. In criminal matters, except in very limited geographical areas, the barrister has the sole right of audience in all trials by jury. This is also true where there would have been a jury trial had the accused not pleaded guilty upon arraignment. In summary criminal cases, relatively minor matters where the trial is by the lay justices of the peace or stipendiary magistrates, barristers and solicitors have a joint right of audience. In civil matters, barristers and solicitors again have a joint right of audience in the County Courts, local Courts which in general have a jurisdiction limited to cases in which the value of the property in dispute or the amount of the damages sought does not exceed £1,000 ($2,400). In the High Court, however, where the jurisdiction is unlimited, the barrister once more has sole right of audience. In both criminal and civil causes the barrister alone has the right of audience before the Court of Appeal and the House of Lords. Before the many other types of tribunal that exist in our modern society the position varies; before some again the barrister alone can be heard; before others he has the joint right of audience with his solicitor colleagues; in yet others lawyers and non-lawyers have an equal right to be heard. Nevertheless, in any case of substance before a tribunal which permits representation by barristers, one may expect the latter to be instructed to appear.

This leads me on to one other fundamental difference between the barrister and the solicitor in the English system, which is that a barrister can only be retained by a solicitor. A layman

\(^1\) Until 1974 The General Council of the Bar was the central professional organisation of the Bar. In 1974 a new central governing body was established for the profession, known as the Senate of the Inns of Court and the Bar. Within the framework of its new constitution the Bar Council is an autonomous body whose main functions are to maintain the standards, honour and independence of the Bar, to provide, preserve and improve the services of the Bar, and to represent it in its relations with other organisations and in all matters affecting the administration of justice.

\(^2\) The Law Society is the central governing body of the solicitors' profession.
confronted with a problem which may or does involve litigation, be it civil or criminal, cannot consult a barrister directly without the intervention of a solicitor. The stage at which the solicitor first consults the barrister will depend upon the nature of the case, its complexity, and that particular solicitor's litigation experience. In the normal case a solicitor will see his client, take his instructions and perhaps interview one or two of the important witnesses before formally taking the advice of the barrister as to the lay client's chances of success. Provided that the barrister advises that there are reasonable chances of success, the solicitor will then proceed with the preparation of the case, interviewing all the witnesses and corresponding as may be necessary and in accordance with the Rules of Court with the opposing party. During this process he will formally consult the barrister from time to time on this or that interlocutory step, perhaps instructing him to draft necessary formal documents, such as a Pleading or Interrogatories. The day to day preparation of the case, however, remains in the hands of the solicitor. As the date of trial approaches, the solicitor will draw the brief to Counsel (the barrister), upon which the latter will fight the case at trial. This brief will contain the solicitor's résumé of the case, the issues involved, the difficulties likely to be met and his comments on the reliability or unreliability of the witnesses. Formal statements of the evidence which it is hoped they will give at trial will also be included in the brief, as will all relevant documents, usually arranged in discussions and by agreement with the solicitors for the opposing parties. This in essence is all that Counsel receives. The merits of this system as we see them and the way in which it helps to maintain English standards of advocacy I will discuss hereafter.

How then is the English barrister trained? Having acquired a basic educational qualification approximately the same as that required for entrance to a university, he starts his career at the Bar by joining one of the four Inns of Court—Lincoln's Inn, Inner Temple, Middle Temple or Gray's Inn. These are ancient unincorporated legal societies occupying substantial properties near one another and near also to the main Law Courts in London. The Inns of Court were, however, in their present situations centuries before the Law Courts arrived. Until the present Royal Courts of

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3 The Rules of Court are embodied in a Statutory Instrument made by a Rule Committee, appointed by the Lord Chancellor, under powers vested in it by statute. They have the force of statute in matters of procedure, though they cannot confer any new jurisdiction or create or alter substantive rights.

4 See p. 709 infra.
Justice were built, the Courts were held either in ancient Westminster Hall or from time to time in what is now the Old Hall of Lincoln's Inn. Precisely when the lawyers came to this area of London is not known. Sufficient is known, however, to say that they came to the Temple at some time between 1314 and 1347 and to the other two Inns at least not much later, and quite possibly earlier. It was, nevertheless, in about the 14th century that the Judges granted to the Inns the sole right to Call persons to the English Bar, and so entitle them to practise in the Courts, and also the right to discipline them in the event of misconduct. With this right went the responsibility for ensuring that only those suitable in character and training were Called to the Bar. Consequently, since that time the four Inns of Court, originally with their associated Inns of Chancery (which have now ceased to exist), have been responsible for a barrister's education and training.

Over the centuries the Inns developed an elaborate system of legal education within themselves and became truly a university of law, of which they and the Inns of Chancery were the colleges. Moots, discussions and readings all played their part, and it was from this system that the practice of dining in the hall of one's Inn, which is still required of every student, grew. In the old days, when a student dined in hall, he ate and drank and listened to readings by a senior member of the Inn, still known as the Reader, and when the cloth was cleared he listened and learned from the Moots and from the discussions between the already qualified members of his Inn about the cases in which they were engaged and about difficult points of law, both actual and potential. As the centuries passed, however, the increasing social aspect of the activities of the Inns displaced the educational and, for a century or more prior to 1852, the educational function of the Inns of Court was more apparent than real. In that year, the four Inns of Court set up the Council of Legal Education which has ever since been responsible for the professional education and examination of intending members of the Bar. Although nowadays there is no formal educational content in the requirement that a student shall eat a limited number of dinners per term in the Hall of the Inn of which he is a member, he does thereby obtain the feel of the institution; he begins his association with his contemporaries within the Inn whom he will know both socially and professionally for the rest of his life; he starts to feel a part of the profession, and he has the opportunity of

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5 The Temple is a particular and identifiable area of London which comprises both the Inner and the Middle Temple.
meeting and talking to already qualified members of the Bar dining in Hall that same night.

In so far as the formal teaching and examinations for the Bar are concerned, it is only within the last five years that Bar students have been given any practical tuition in advocacy itself, as distinct from tuition in mere substantive law and procedure. The general high standard of advocacy at the practising English Bar today cannot therefore be attributed to any formal instruction in the skills of advocacy before graduation and Call to the Bar. It is, I think, possible to teach a student a few of the basic principles of his intended calling, and also how to conduct himself in Court, perhaps more by warning him what to avoid doing rather than by seeking to give him any blueprint for a devastating cross-examination or a telling speech to a jury. I do not think that it is possible to go further than this in classroom or lecture hall. Advocates are made, not born, though some are made more easily than others. In my opinion they can only be made by some form of apprenticeship to an experienced advocate, preferably after the book-learning has been done and the essential examinations have been passed.

Before a student can be called to the English Bar, he must pass or be exempted from two examinations. The first, Part I, is academic and is the equivalent of a university law degree. Those who go to a university and obtain such a degree are usually exempted from sitting Part I. Those who go to a university and obtain a degree in a discipline other than Law, or those who do not go to a university at all, can read for the Part I examination at the Inns of Court School of Law, which is run by the Council of Legal Education in London.

Regardless of where they may have acquired the knowledge to enable them to pass Part I of the Bar Examinations or its equivalent, all students intending to sit Part II of those Examinations are required to attend a course of tuition leading thereto at the Inns of Court School of Law. Some students seek the qualification of barrister without the intention of actually practising in the Courts. They may intend to return to academic work, or perhaps to become employed in the Legal Department of some large corporation. However, all those students who do intend to practise in the Courts after they have been Called to the Bar are now also required to take part in certain Practical Exercises in Advocacy and Drafting, also run by the School of Law, and to attend certain Courts. The course for Part II of the Bar Examinations starts in
October in each year and is intended to prepare students for an examination in June of the following year.

The Practical Exercises in Advocacy and Drafting are taught not by the permanent teaching staff of the Inns of Court School of Law, but by sitting Judges and practising members of the Bar. This is no sinecure. In the 1973/74 session about 540 students took part in the Practical Exercises. The Council of Legal Education maintains a list of about 100 selected barristers and from this list last year between 54 and 60 barristers took part each week. The practising barristers who help in this way are, generally speaking, of between four and eight years' standing. For the 1974/75 session, the Inns of Court School of Law is arranging such Practical Exercises for 640 students.

The Exercises are simple, but introduce the intending barrister to the type of work in which he is likely to be involved early in his professional career. They comprise a demonstration before a large class on a Monday evening in which a Judge and senior practising barrister take part. The material for the case is distributed to each student a week earlier. The Judge introduces the exercise, advises the students of the preparation which would have been required and also on the particular points about which they should be on their guard. The practising barrister then presents the case, whatever it may be, to the Judge. Thereafter there is a general discussion among the Judge, the barrister and the students to ensure, for instance, that the latter understand why certain points were emphasised and others ignored, and generally to illuminate the tactics of the presenting barrister and the reaction of the sitting Judge. The students then return the following evening and are taken in groups of ten by one of the junior practising barristers mentioned above. Each student is required to present the case again before that barrister, who then advises him and generally corrects the effort of them all. Each student is required to attend six such Exercises at fortnightly intervals in the first two terms of his three-term year.

Students for Part II of the Bar Examinations are also required to participate in Chambers Exercises in Drafting. They are supplied with a set of papers in precisely the same form as, when qualified, they will receive them from their own solicitor clients, and are asked to draft the required document or pleading. They

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6 A barrister of less than four years' standing is likely not to have a sufficiently wide experience of practice, and after six to eight years he will probably be too busy with his own practice.
then attend one of the practising barristers in his Chambers in groups of ten, where their efforts are corrected and the barrister advises them generally on the drafting side of their work.

The third type of Exercise is the Court Attendance. By arrangement with certain Judges and Court Officials, students (again in groups of ten) spend six days during their year’s course attending certain Courts. If it is possible, the Judge tries to meet them in the morning before the Court sits. He generally does meet them after the Court has recessed to discuss the points of law, evidence and procedure which have arisen during that day. Some of the Judges in County Courts taking part in this scheme send the students out of Court when giving judgment in one or more cases and then discuss with them after the Court has risen what they would have decided.

In addition to these compulsory exercises, six voluntary Drafting classes are held, again by practising barristers, on Saturdays during the students’ year.

The Part II examination itself comprises six three-hour papers. Suffice it to say that these are entirely practical. One requires a good knowledge of the rules of civil and criminal procedure and of the Law of Evidence. Two others contain questions which are in effect sets of instructions which the student might be likely to receive, when qualified, from solicitor clients as in the Chambers Exercises. A paper on Revenue Law and two others on subjects chosen at the student’s option from a limited list of those frequently involved in litigation completes the Examination.

Once our student has passed his Bar examinations and kept a sufficient number of terms by dining in the Hall of his Inn, he can be Called to the Bar. His formal learning, however, is not yet complete. Although now, by virtue of his Call, a member of the English Bar, he is not permitted to accept any instructions as such or to conduct any part of any case in any Court until he has completed at least six months of pupillage with a practising barrister of at least five years’ standing. Further, although entitled to appear in Court after six months’ pupillage, every barrister intending to practise in the Courts must complete a full pupillage of a year.7

During his pupillage the young barrister works with, and

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7 Some barristers intend to make their careers as advocates, others do not. Those that do so intend are required to give an undertaking to their Inn that they will complete a year’s pupillage before setting out on their own. In the course of their pupillage, however, and provided that six months of it have elapsed, the fledgling advocate may begin to spread his wings and try small cases in court.
generally in the same room as, his pupil master. It is a tradition of
the Bar that barristers of sufficient standing should take newly
Called young men as pupils when they can. Normally a practising
barrister only has one pupil at any given time. A pupil will see
every set of papers received by his pupil master; he will try his
hand at the drafting and advising that each requires, and then
compare and discuss his own efforts with those of his master; he
will go with the latter to every Court where he appears, having
read the papers and frequently having prepared a Note for his
master's use; his master will discuss these cases with him and the
particular points which arise. In Court the pupil will see not only
how his master handles his case, but also how their opponent
handles his and the reactions of the Court itself; he will probably
have the opportunity on occasion of hearing his master 'led' by
Queen's Counsel, a senior barrister who has earned that position
through his talents and character, against other Queen's Counsel
appearing for other parties; he will have the opportunity of
hearing other practising barristers in those Chambers discussing
their cases and, as time passes, of joining in those discussions. It is
perhaps during this year more than any other, in the closely knit
profession of the Bar, that the young barrister learns its traditions,
sees how to behave and how not to behave in Court and begins, no
longer as a student but as a member of an honoured profession, to
acquire the practical skills and experience of his calling.

This then completes our barrister's formal training. As I have
said, the Practical Exercises attended prior to Part II of the Bar
Examination have only recently been introduced, and have thus
played no part in the training and present quality of the majority
of barristers who are practising today, nor of all those who prac-
tised in the past and whose reputation deservedly stands so high.
The fact of the matter is, I am sure, that a barrister's training
continues throughout his practising life. The effect of the Practical
Exercises may be to give the young barrister a start, to give him
some practical idea of what it is all about, and thus to make the
pupillage itself more valuable. After the average barrister has been
practising for say, fifteen years, further cases that he tries perhaps
only serve to put a polish on acquired skills. But in my judgment it

8 The rank of Queen's Counsel is discussed at p. 708 infra. It is a rule of the
profession that a Queen's Counsel should not appear as an advocate in any Court of Law
without a junior, that is, a barrister who has not been appointed Queen's Counsel. In the
normal way, a Queen's Counsel is instructed by the Solicitor at a late stage in the preparation
of a suit for trial. The Queen's Counsel will be the senior barrister thereafter trying the suit
before the court, and as such is said to "lead" his junior.
is during those first fifteen years after pupillage, when the advocate is in practice on his own account, answerable for his own mistakes, encouraged by his own triumphs, small though they may be at the outset, that the young barrister is really being trained.

The manner in which practice at the Bar is organised plays its part and refines this training process. A barrister in England is not allowed to practise otherwise than from Chambers. These are a suite of offices from which a number of barristers practise, perhaps six, perhaps twenty, sharing the overheads, sharing a library and sharing a Clerk. As the senior members of a set of Chambers leave, either by appointment to the Bench or by retirement, the remaining members move up the ladder, and young men just out of pupillage are taken in at the bottom. All the Chambers in London are within the premises occupied by the four Inns of Court, and in the provinces also sets of Chambers tend to congregate together. Every set of Chambers must have its Clerk, who is in effect the business manager for the advocates within his charge, both young and old. In outward form the members of a set of Chambers might appear to be a partnership in the usual way. It is most important, however, to realise that they are not. Any form of partnership or fee sharing is prohibited by the rules under which a barrister in England practises. One of the basic principles is that he is remunerated by a previously agreed fee for every piece of work that he does. The fee is negotiated never by him but always between his Clerk and his instructing solicitor, and the fees that he earns are his own.

Any Clerk of a set of Chambers, a man perhaps aged forty-five upwards, who has spent his life in the Temple, first as office boy, then as junior clerk and then finally as senior clerk in a set of Chambers, will have built up a personal fund of goodwill with a substantial number of firms of the solicitors by whom only, as we have seen, barristers may be instructed. Out of this fund of goodwill, the Clerk can arrange, for example, for the newly entered young man first to be briefed to apply for an adjournment—a simple enough task, but one which, because it is in the High Court, has to be undertaken by a barrister. Similarly, because cases do sometimes take longer than is expected, a member of Chambers in the middle order may find himself listed one day to be in two places at the same time. The efficient Clerk will have foreseen this possibility and will have made his dispositions accordingly. With the instructing solicitor's consent, the second case will be taken over by another middle order member of Chambers. That
barrister's work will be done by the next one down the ladder, and so on until the youngest member of Chambers may find himself holding a small brief to appear at a local Magistrates' or Coroner's Court, effectively because there is no one else to do it, but also because his more senior colleagues, and in particular the Clerk, who probably saw and heard him during his pupillage, think that he is capable of the task.

So does the young man get his opportunities. It is up to him thereafter whether he takes them. If he does, if he has learned what he should have learned up to that time, if he does the job competently, then he will be briefed again, and again, and so his practice will grow. As it grows, so will his experience. As does his experience, so will his competence. If, however, his character and talents are not suited to practice at the Bar, then he will not make a success of it. He will not receive the briefs which his contemporary, who does possess the necessary character and talents, is receiving.

As a practising barrister in England, he can never have a fixed salary to rely on, nor any proportionate part of the profits accruing to the effort and skills of his partners, because he can have none. He is truly on his own. He will have the support of his Chambers and his Clerk in the way I have outlined, but if he is not advocate material, then sooner or later, and in the present day generally sooner, financial pressures will force him to leave the Bar. He will no doubt make a great success of some other job.

The most successful of those who do continue at the Bar, gradually acquiring a substantial practice of their own, will, after 15 or 20 years, think of "applying for Silk"—so called because of the material from which the gown worn by a Queen's Counsel in Court is made, different from the stuff gown of the ordinary barrister. The application is made to the Lord Chancellor. A very real risk element is involved. Apart from actual appearances in Court on trials, a substantial part of a barrister's work consists of drafting the many procedural documents and appearing on the interlocutory applications involved in any litigation. If a barrister is granted Silk, that is to say, is appointed to the ranks of Queen's Counsel, he is no longer permitted to undertake such drafting work, nor does he appear on interlocutory applications. His practice thereafter is confined to giving formal written opinions and to trying cases in Court. It is of course only the relatively few really substantial trials that warrant the employment of Queen's Counsel, with the higher fees that they command. A Silk is truly a specialist advocate, and some of those who are successful in their application
to the Lord Chancellor do find to their cost that the competition amongst their fellow Queen's Counsel is even higher than between barristers generally. Not every successful "outer barrister" becomes an equally successful Queen's Counsel.

Applications for appointment to the rank of Queen's Counsel are made once a year. Whether they are granted or refused depends, amongst other considerations, upon the age, character and existing practice of the applicant, and whether or not there are already sufficient of the rank practising in the same particular field of law or geographical area of England as the applicant. One may well not be appointed the first year in which one applies; some applicants are never appointed; some barristers never apply. The number of practising Queen's Counsel at any one time is about one tenth of the total strength of the practising Bar.

Given a profession so trained and organised, are there any particular factors to which one can point which generate the high level of competence which obtains? I have no doubt that there are and that the most important of these factors is that the Bar in England and Wales is a specialist calling. The barrister is the Consultant in the specialty of advocacy to the General Practitioner of the main body of solicitors, just as senior partners in the large firms of solicitors in the City of London are Consultants in the specialties of heavy corporation matters, or of substantial deals in landed property, and so on.

In England this specialist status is, as I have already pointed out, inherent in the way in which barristers alone have the right of audience in almost all superior Courts. It is borne out by the relative numerical strengths of the two branches of the legal profession. Of some 30,000 practising lawyers, barristers and solicitors, only just over 3,400 are barristers. If we take the population of England and Wales at some 50 million, then these figures show that we have just over six trial lawyers for every 100,000 members of our population.

Not very long ago there was a demand in some quarters that barristers should no longer be entitled to enjoy the allegedly monopolistic right of audience which they have had for so many years. It was contended that any qualified lawyer, barrister or solicitor, should be entitled to appear as an advocate before any Court. There is also no doubt that in England barristers are the senior branch of the legal profession and there were some who saw

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9 The term "outer barrister" arises because the ordinary barrister practices at but outside the bar of a court whereas the Silk practices within that bar.
no reason why this should continue to be so. Down these paths, of course, lies fusion of the two branches of the profession, which very few barristers and only a minority of solicitors desire.

Nevertheless, interchange between the two branches of the legal profession has now been made easier than it was. A young man who qualifies as a solicitor and then comes to believe that his legal talents lie in the field of advocacy can now become a barrister without great difficulty and without the substantial waiting period that was necessary only a few years ago, and which was insisted upon as a concomitant of the clear separation of the two branches.

I have no doubt, however, of two things. First, that the majority of lawyers in England accept that to be a competent trial lawyer or barrister requires specialisation, constant practice and experience. It is not enough that one may have a flair for argument, histrionics and debate. Secondly, I have no doubt that this acceptance of the necessity for specialisation is well-founded in fact. I take the view that in the ultimate analysis, trial work is the most important aspect of the lawyer's function. In our commercial, mercenary, materialistic world this may at first be disputed, but if the rule of law is to prevail, if at the end of the day the decision of a Court, fearlessly independent, is the ultimate sanction, then is it not of the utmost importance that in reaching that decision, that Court should have the help of the highest quality of advocacy possible?

Further, in England all Judges of all superior Courts are appointed from the leading ranks of the Bar. Now not every first-class advocate will make a good Judge. Nevertheless, with the increasing complexity of society, of the laws which must be enacted to regulate it, and of the problems which it daily presents, a Judge cannot readily be a good one unless he has extensive experience of the Court in which it has now become his turn to sit. I may add that the fact that our Judges are appointed from the ranks of the Bar is important in another context of my subject to which I shall come a little later.¹⁰

In my judgment, therefore, although in any system there will always be those who are first-class advocates, it is not possible to achieve overall even a satisfactory level of competence in advocacy, still less to raise the general level of skill that presently exists, without some definite element of specialisation. Not only will the unexceptional lawyer who tries a case only once in six months or a year never be an advocate, it is in truth unfair to both him and his

¹⁰ See p. 715-16 infra.
client to expect him to be so. Where, as in England, the legal profession possesses its two branches, then the necessary specialisation is built into the system. Where, as in the United States, there is a unified legal profession, it must perhaps follow that the necessary specialisation must be imposed, possibly by some form of certification and ultimately by disciplinary action within the profession itself. In England, the then Senate of the four Inns of Court, formed in 1966 to co-ordinate many of the activities of the four Inns, including discipline over members of the Bar, adopted this proposition in 1972: “Such professional incompetence on the part of a member of the Bar as would be likely to be detrimental to the proper administration of justice or otherwise to bring the profession into disrepute should attract disciplinary sanctions.”

Incompetence, therefore, which interferes with the proper administration of Justice, which prevents a man from having his case fairly and competently put before either the Jury or a Judge, is a matter of professional misconduct. I suggest that the contrary is unarguable.

The other factor in our English system which contributes fundamentally to the high level of advocacy skills in our Courts is what I describe as the barrister’s detachment from the case he is presenting. In this context detachment is not a synonym for disinterest. It is, however, closely related to self-restraint.

Politicians, social reformers and others with a cause about which they feel strongly are of course also advocates: they seek to persuade others to their way of thinking. Their appeals, however, are generally to the heart rather than to the head. The zeal with which they propound their programmes leads them into exaggeration, or to wishful thinking, or to make claims which in their less partisan moments they would know can not be fulfilled, to over-elaboration, on occasions to downright untruths—each of these faults which the barrister or trial lawyer must avoid like the plague. Once again the English barrister has an in-built disincentive, and an in-built detachment, inherent in the system within which he operates. I have already described how a barrister may only receive his instructions from a solicitor who acts as both barrier and sieve between the lay client and his cause, in which no doubt the client believes as ardently as any politician, and the barrister advocate who must present his client’s case as vigorously and yet as dispassionately as he can. If the barrister never has the opportunity of becoming personally involved with the lay client or with his wit-

nesses, he will, we think, be able to see the strengths and weaknesses of his client’s case, to emphasise the former and to protect the latter, far more easily and to a greater extent than had he personally been involved in all the minutiae of the preparation of the case for trial.

It may be of interest to know just how far this detachment is taken. The barrister will in all probability have one or more conferences with his lay client before he actually receives the brief on trial and will usually see him again upon the final material contained in that brief before the case actually gets into Court. It is, however, a strict rule of professional etiquette that apart from the litigant lay client himself, and any expert witnesses, the barrister shall not interview any of the other witnesses whom he may call to give evidence at the trial. All the preparation of a witness’ evidence, therefore, and indeed of the witness himself, will have been done by the solicitor and not by the advocate who presents the case at trial. If, during the trial, and before the witness actually gives evidence, the barrister wishes to know what he will say about a particular point which may not have been covered in his brief, the barrister must obtain this information through his instructing solicitor. In this way the almost clinical approach of a barrister to the case with which he is presently concerned is maintained.

Apart from the belief that this detachment assists the quality of his advocacy, it is essential for another reason that the English barrister be trained to avoid personal involvement in his client’s case. A member of the English Bar is not entitled to pick and choose the cases in which he is retained as advocate. He is bound to accept any brief in the Courts in which he professes to practice, at a proper professional fee dependent upon the length and difficulty of the case. There may of course be special circumstances which may justify his refusal to accept a particular brief, but otherwise what some describe as the “cab rank principle” is strictly applied. As that great advocate, Erskine, said when he was deprived of office for accepting a retainer to defend Paine in 1792 for publishing the second part of his Rights of Man: “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.”12 A barrister in England may therefore have to accept a brief to defend activities or a philosophy of which he

personally disapproves. If this were not the rule, then, as Erskine pointed out, cases could occur in which an oppressed defendant was unable to engage the services of any advocate to speak for him. An unpopular case can only properly be tried by an advocate, to the limits of his skill and experience, if he does in truth display a truly clinical and dispassionate approach to his client and to his client’s litigation.

One rather different but equally desirable consequence of the dispassionate approach is that the advocate is the more easily able to keep on good terms with his professional opponent. Nothing is more distressing than to see an advocate interrupt or raise his voice in anger to his opponent. When an advocate loses his temper, good advocacy goes out of the window. The worse that matters are going in a trial for his client, the cooler the good advocate becomes. Personal involvement can only make matters worse and is in all respects the enemy of good trial advocacy.

Whilst I appreciate the arguments in favour of “contingency fees,” particularly where there is not, and from a practical point of view probably cannot be, a wide national legal aid system, there is clearly an inherent risk that the trial lawyer operating on a contingency fee basis will himself become too involved in the litigation, to the detriment of the quality of his advocacy, if no worse. In personal injury claims, for instance, the level of damages in the United States is substantially higher than it is in England. Where the plaintiff’s trial lawyer is conducting his client’s case on a one-third or one-quarter contingency fee basis, and that may be the only action that he will try in the year, the temptations and pressures upon him and upon his advocacy must clearly be substantial.

As I have said, detachment in the sense that I have been speaking of it is a close relation to self-restraint, to self-discipline. There is, it has been said, a showman in each of us; in the actor and advocate he is only just below the surface. All inexperienced advocates exaggerate the showmanship; they think that this is what is required by their client and will achieve the best results with the Court. For my part, where the Court is a Judge sitting alone, and particularly a Judge who is himself an experienced advocate, the less showmanship there is about the advocates before him the better. I am also convinced that nowadays juries are more put off by any slick or elaborate showmanship than they are impressed. There is nothing more impressive or effective in a courtroom than quiet self-restraint which achieves the right result.
The English barrister, therefore, learns early to eschew any melodramatic gestures or language. Indeed, he never sees or hears them used. Throughout the trial he remains in his place at the Bar and addresses the Court, the jury and the witnesses, all three, from there. I understand and sympathise with a desire to reduce formality, to avoid pomposity; but I feel that if one goes too far in that direction, one can lose dignity, one can lose the sense of the importance of the process of which one is a part.

If anything is certain about an advocate's work and conduct in Court, it is that he should know the main rules of evidence, both civil and criminal, backwards. They are not difficult and it is only in special circumstances that a really doubtful point of evidence arises in the course of a trial. In these circumstances, the competent advocate restrains himself from asking questions of a witness which he knows the rules of evidence do not permit. He does not seek to put documents in evidence without agreement when he knows that he is unable properly to prove them. He does not object when his opponent asks what may be a leading question, when the subject matter of the question is merely introductory, agreed or immaterial. By the same token he always allows his opponent to make an objection when the latter rises to do so. He stops speaking to enable his opponent to do so. And indeed his opponent always gets to his feet when he seeks to make an objection, he does not merely interrupt from his seat at the barristers' table.

In the system of trial which both our countries follow, wherein the evidence is given by question and answer, the good advocate never comments upon any answer which he obtains from the witness; he merely goes on to ask the next question, or sits down. The place for comment on the evidence is in the advocate's final speeches to the jury or to the tribunal. In addition, as the present Secretary to the Senate has written: "In all cases it is the duty of the barrister to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person, and to exercise his own judgment both as to the substance and the form of the questions put."

There are many other similar precepts which any experienced advocate could mention. I know that it has been suggested that breaches of these rules of good advocacy and good manners occur more frequently in the United States Courts than they do in

13 W. Boulton, Conduct and Etiquette at the Bar 76 (5th ed. 1971). I understand that Sir William Boulton will retire as Secretary of the Senate in July 1975.
English Courts. I have entirely inadequate experience to qualify me to agree or disagree with this as a proposition, and even if I had, it would be impertinent for me to do so. If, however, there is any substantial difference between the general run of courtroom ethics in England on the one hand and in the United States on the other, then I am sure that what I have called the in-built or inherent detachment or restraint in the system under which the English barrister operates, unlike his American colleague, plays a substantial part in maintaining the standards of the former. An English barrister fights his cases as hard as any man. He desires to win and tries his best to do so. If he does not, he may lose his solicitor as a client next time to his opponent. Yet I am sufficiently idealistic to think that the English system and training does breed a certain altruism in its barristers. An observer of an English trial would, I think, say that the advocates, as well as the Court itself, were playing a recognisable role in the administration of justice. Equally, if any criticism can be made of the conduct of some advocates in United States courts, then I suggest that one of the root causes may well be that they have become too personally involved in the litigation which they are conducting. An observer of their trial might perhaps go away with the idea that the real battle was between the advocates rather than between their clients.

Training and experience apart, what are the other factors and disciplines which keep the standards of the English Bar as high as they are?

In the first place, I think that there is the personal satisfaction which a barrister gets out of his work. Advocates, like actors and authors, are individualists. Those of each of these callings who are not just hacks take a very real pride in their performances. There is considerable personal satisfaction for the advocate in a case well and fairly fought, whatever the result, provided that the latter was the best that could be achieved with the material and tribunal available.

Secondly, the Bar in England is both traditionally and constitutionally the avenue to positions of high responsibility within the nation. Most young men joining the profession hope in due course to attain the rank of Queen's Counsel. Some aspire to the Bench; and as we have seen, all English Judges are appointed from the ranks of the Bar. Others may go into politics. Every holder of the office of Solicitor-General, Attorney-General and Lord Chancellor, in whatever administration, must previously have practised with success at the Bar. The attractions, therefore, of the profession are
high, but so also, remembering its very small numbers, is the competition.

Thirdly, the period in history when young men had private incomes of their own which enabled them to exist at the Bar whilst acquiring a practice is long since passed. If a young barrister today does not soon begin to earn an income upon which he can live, supplemented perhaps by permitted part-time work such as lecturing in the evenings or correcting examination papers, he must perforce seek another job. Given the universal Legal Aid which is available for those who need but cannot pay for representation by a barrister, there is enough work available to keep the really competent young man going. But be it not forgotten, as I have mentioned once or twice, that to a large extent he is on his own. His future lies in his own capacity, and in this context also the competition that exists naturally in the profession ensures that those who do make the grade have the necessary capacity.

More formal sanctions or disciplines also exist. The barrister is, of course, always subject to the authority of the Court in which he appears. Apart from lay Justices, every Judge before whom he practices will have made a substantial success of the Bar. They too will have practised within the traditions and rules of the profession. They will know at once if and when a young man breaks the rules in a case before them and they will quickly make this fact known to him. There is no easier way to lose a solicitor as a client than to irritate and provoke the Judge in the case in which one is appearing. The young barrister will also find that either the Head of his Chambers or his Clerk will quickly hear, not only of any incompetence, but also of any even minor breach of etiquette or the rules of the profession.

Ultimately, in serious cases, every barrister is subject to the disciplinary powers of the Benchers of his Inn, now delegated to the Senate. The Benchers of an Inn are those senior members or fellows who from time to time form its governing body. Complaints against a member of the Bar are first sifted by the Professional Conduct Committee of the Senate. If a prima facie case of breach of etiquette or misconduct is made out, then it may prefer formal disciplinary charges against the barrister concerned before an ad hoc Disciplinary Tribunal. If the case against the barrister is found proved, then the penalties open to the Senate, to recommend to a man’s Inn, are either that he be reprimanded, that he be suspended from practice for a given period, or finally that he be disbarred.
There are many other important aspects of the English Bar about which I could write; but this is not the place to attempt to deal with them all. Such important matters as the substantial growth of the Bar in the last ten years and the concomitant strain on physical facilities, training programs and standards, rules relating to touting and advertising, and the intricacies of courtroom procedure and etiquette would provide ample material for many an article. All that I have tried to do here has been to concentrate upon what in my view it fundamentally is which enables members of the English Bar to acquire their skills and to maintain their standards, upon which in large measure the personal liberty and security of the ordinary citizen must depend.