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ARE TWO LEGAL PROFESSIONS NECESSARY?

PETER REEVES

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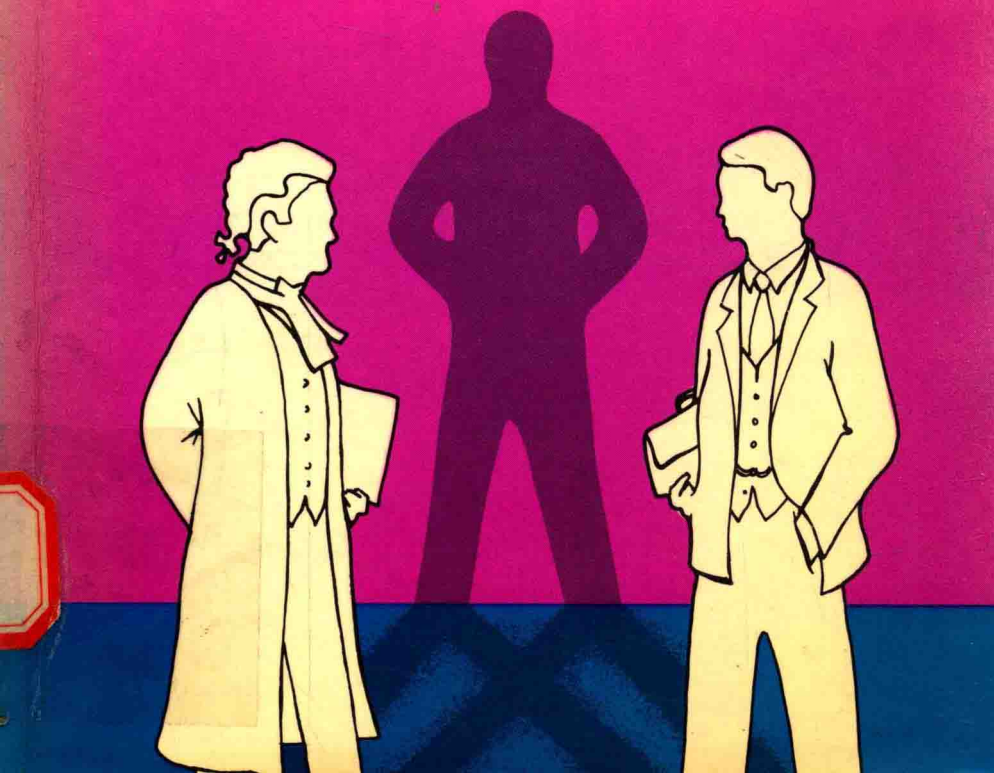

Are Two Legal Professions Necessary?

PETER REEVES, *Solicitor*

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ARE TWO LEGAL PROFESSIONS NECESSARY?

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Foreword

BY SIR DAVID NAPLEY

This book presents in a well researched, balanced, interesting and persuasive form, an argument in favour of the fusion of the two branches of the legal profession. My own view on this subject has been somewhat ambivalent. I suspect that in the long term, fusion is inevitable since public opinion favours it, believing that the present system is too expensive and in many respects unjust.

Whatever doubts one may have on the question of fusion there can be no doubt that the present system requires radical overhaul. I have been advocating for the best part of 30 years that both branches should have a common education, and be free to practise as they wish as lawyers. If they could then demonstrate, by examination or otherwise, special aptitudes and skills in particular specialisations, including advocacy, they should be free to go to the Bar which would, as a consequence, be reduced in numbers, as it should be. The Bar has over a long period sought to present itself as a band of specialists comparable to specialists in the medical profession as compared with general practitioners. It is a wholly false analogy. Doctors have common training, and consultancy or specialist status is acquired only by further examination and individual selection upon the basis that special skills, ability and experience are established to the satisfaction of their peers. The decision to become a barrister, on the other hand, is made, in almost all cases, at the undergraduate stage when the person concerned has neither knowledge nor experience of the practice of law and no basis for judging where his or her aptitudes really lie. Less than 1,000 of the 5,000 lawyers called to the Bar over a period of years become true specialists. To suggest that the remaining number either immediately upon qualification, and in some cases even later, fall into that category is insupportable.

At page 50 the author reminds us that Justice has put forward the suggestion that an Advisory Appointments Committee or a Judicial Commission should be constituted to advise and recommend upon all judicial appointments. I believe, beyond that, if meaningful reform in the public interest is to be achieved someone must take a long hard look at the Lord Chancellor's Department itself in the hope that a body might be brought into existence with a view to redressing the overwhelming

influence which the Bar brings to bear for the preservation of its entrenched position.

This book is published at a time when more meaningful public discussion of the inadequacies of the present system is being pursued than ever before in my lifetime. In crystallising the issues, marshalling the arguments from both sides, it performs a valuable service, and all those who have the interests of justice and the public weal at heart would be well advised to read it and consider with care the message which it contains.

SIR DAVID NAPLEY

London
November 1985

Preface

Proposals for the reform of the structure of the legal profession have, for decades, been met with hostility within the profession and with indifference from without. The mistaken idea of the roles of the solicitor as general practitioner and the barrister as specialist, so indelibly imprinted on the mind of the public, is accepted without question.

When the extensive overlapping of the work of solicitors and barristers is considered it seems remarkable that they have remained apart for so long. For this reason detail has been included of the nature of the separate systems of training and working arrangements. Latent feelings of dissatisfaction and antagonism have also been described. I do not endorse them and admittedly, taken alone, these are not reasons for altering the organisation of the profession. They do, however, serve to indicate a misdirection of effort engendered by the system.

Paradoxically, a profession concerned with the exercise of judgement rarely approaches its own problems with impartiality. This strange intransigence, I must confess, has provided the motive for writing this book. Although by no means the first attempt to examine the many aspects of the divided profession, it comes at a time when the call for reform is more persistent and reaching a wider audience.

The bibliography is extensive and has been included for the benefit of students of the subject. The notes of each reference also serve to record the debate upon fusion over the past thirty-five years. I freely acknowledge the use made of many ideas and conclusions contained in the sources mentioned.

To those who have given help and advice in the formation of this book I express my gratitude. In particular the comments, suggestions and information given by friends belonging to both branches of the profession and officers of the professional bodies have helped immensely. To Martin Smith for preparing the bibliography and unearthing long-forgotten works I take this opportunity of recording my appreciation and thanks.

Yarnton, Oxford
November 1985

Index of Abbreviations

Code of Conduct:	Code of Conduct for the Bar of England and Wales 1981 3rd Edition incorporating amendments to 31st Dec. 1984
Consolidated Regulations:	Consolidated Regulations of the Honourable Societies of Lincoln's Inn, Inner Temple, Middle Temple and Gray's Inn.
Evidence to the Benson Commission (e.g. "Legal Action Group, Evidence to the Benson Commission")	Evidence to the Royal Commission on Legal Services
Gazette:	The Law Society's Gazette
Benson Commission:	The Royal Commission on Legal Services
Benson Commission Report:	The Royal Commission on Legal Services, Final Report Oct. 1979 (Cmnd. 7648)
Senate Evidence:	Senate of the Inns of Court and the Bar, Evidence to the Royal Commission on Legal Services

Index of periodicals cited in the bibliography (with abbreviations)

American Bar Association Journal (*A.B.A.J.*).
American Bar Foundation Research Journal (*A.B.F. Research J.*).
Australian Law Journal (*Austral. L.J.*)
Current Legal Problems
The Economist
Fordham Law Review
The International Lawyer (*Internat. Lawyer*)
Journal of Contemporary Law (*J. Contemp. L.*)
Law Society's Gazette (*Law Society's Gaz.*)
Law Journal (*L.J.*)
Law Quarterly Review (*L.Q.R.*)
Law Times (*L.T.*)
Modern Law Review (*M.L.R.*)
New Law Journal (*N.L.J.*)
New York State Bar Journal (*N.Y. State B.J.*)
New Zealand Law Journal
Osgoode Hall Law Journal (*Osgoode Hall L.J.*)
Solicitors' Journal (*Sol. Jo.*)
The Times
University of Tasmania Law Review (*Univ. of Tasmania L.R.*)

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CHAPTER 1

Historical

1. Early Times

The legal profession in England and Wales has a long and curious history. Slowly and without sudden upheavals, it evolved over a period of six centuries. The various tasks involved in the administration of justice and the general work of a lawyer were first performed by distinctive groups of practitioners. Gradually they merged, both in name and function until only the barrister[1] and solicitor remained.[2] This division reflects a basic pattern in the structure of the profession which has been discernible from early times. The barrister has an exclusive right of audience before the superior courts and is alone eligible to serve as a member of the higher judiciary and as a law officer in Parliament.[3] A solicitor, although entitled to practise as an advocate, has a restricted right of audience limited to the inferior courts and, to a lesser degree, the Crown Court. Eminent legal historians have traced the influences which led to this separation and the establishment of what Lord Gardiner has described as "the two legal professions . . ."[4] It is not the intention of these observations to give a detailed account of the manner in which the structure of the profession developed. Reference, however, is made to the period before the professional associations which exist today were founded. This is necessary to show that the separation is the result of a combination of competing sectional interests and historical accident and not by design.

Professor Sir W. S. Holdsworth, in *A History of English Law,* indicates that the development of a divided profession stems from the difficulty, in primitive systems of law, of recognising the idea that one

1. Barristers are first referred to in Black Books of Lincoln's Inn in Trinity Term 1455 'duo de optimis barrei'; in 1 *Lincoln's Inn Black Book* (1465) 26, 41 'utter barresters' and in Statute of Sewers 1531–23 Hen. 8 c. 5 which stipulates that a commissioner of sewers shall be 'admitted in one of the four Inns of Court for an utter barrester.' *Halsbury's Laws of England* 4th ed. Vol. 3 (1973) p. 588.
2. Solicitors who first appeared in the fifteenth century in the courts of equity are thought to have been business agents rather than lawyers. *Ibid*, vol. 44 (1983) p. 6.
3. The offices of Lord Chancellor, Attorney General and Solicitor General have by custom and for a long period been occupied by persons who are or have been barristers.
4. The Rt. Hon. Lord Gardiner, 'Two Lawyers or One', 1970 *Current Legal Problems* Vol. 23 p. 1.

man can stand in place of another. He explains that:[5]

> "It was only gradually that an attorney was allowed to take the place of his client for all purposes (he could not in early days even disclaim or admit on behalf of his client). On the other hand the idea that one man can assist another in legal proceedings is in harmony with many old ideas concerning law and law suits . . ."

The first statutory reference to a relaxation of the principle which insisted upon the personal attendance of the parties to proceedings before a court is to be found in the Statute of Merton 1235 which states:[6]

> "It is provided and granted that every Freeman which oweth suit to the County, Trything, Hundred and Wapentake, or to the Court of his Lord, may freely make his Attorney to do those suits for him . . ."

These were the inferior courts. The right to engage an attorney was progressively extended by statute to the higher courts. In 1285 the first general power of appointment of an attorney was enacted in the following terms:[7]

> "Such as have lands in divers shires . . . may make a general Attorney to sue for them in all Pleas in the Circuit of Justices moved or to be moved for them or against them during the Circuit: which Attorney or Attorneys shall have full power in all Pleas moved during the Circuit, until the Pleas be determined or that his master remove him . . ."

It has been suggested that at this stage the attorney acted as advocate. Generally this was not the case but there does not appear to be any clear rule forbidding the practice. It seems that arguments were usually conducted by countors or sergeants. There is, however, evidence in the court rolls of the period which shows that the functions of the various types of practitioner were not always distinct and separate. Professor Holdsworth comments upon this question:[8]

> "A study of the rolls makes it plain that it was not normal for those men who had become Serjeants to act as Attornies though here and there in a particular action an exception may perhaps be noticed."

This is consistent with the belief that it was not abnormal for barristers, other than sergeants, to act as attorneys. For a period, divisions within the profession might have disappeared altogether. This did not happen and during the latter part of the sixteenth century and throughout the seventeenth century the structure began to assume and resemble that of today.

5. Professor Sir W. S. Holdsworth, *A History of English Law*, 3rd. ed. 1923 Vol. II, p. 312.
6. 20 Hen. III c.10 1235.
7. 13 Edw. I St.1, c.10 1285.
8. Prof. Holdsworth, *op. cit.* Vol. II, p. 312.

Professor Holdsworth describes the development in this way:[9]

> "At the lower end we see a growing distinctness in the profession of the attorney, a growing separation between the attorneys and the barristers and the rise of three new classes in the legal profession—pleaders, conveyancers and solicitors—the first two of which approximate to the profession of barrister and the third to that of the attorney. At the upper end, the commanding position of the sergeants was modified by the growth of the pre-eminence of the law officers of the Crown and the rise of the new class of King's counsel. As the result of these changes the grouping of the legal profession begins to assume almost its modern form."

2. Emergence of Modern Structure

The close connection of attorneys with the courts and their staff became more evident at this time. A statute of 1605 imposed restrictions upon their activities and prescribed penalties for their fraudulent or negligent conduct. The widening division is evidenced by the preamble to that statute which stated that the regulation of attorneys was needed because:[10]

> ". . . the subjects grow to be overmuch burthened and the practice of the just and honest councillor at law greatly slandered."

The control of attorneys and solicitors by the courts was then well established. It has remained so and is enshrined in the modern description of "*A Solicitor of the Supreme Court of Judicature.*"

The barrister was in a different position. Never regarded as an officer of the court, he (they were all male) was not concerned with the administrative work involved in an action and had no contact with court officials. His concern was with the understanding and application of the law and the pleading of cases in the courts. Barristers were drawn from the privileged strata of society. In the main they were the sons of men who enjoyed the benefits of inherited wealth or who were successful and prosperous in trade or commerce.[11]

Throughout the seventeenth century these differences were accentuated. They affected relationships within the profession and those with the lay client. Barristers could not sue for their fees[12] although solicitors were entitled to do so.[13] In 1614 the Benchers of the four Inns of Court stated without equivocation that:[14]

> "there ought always to be preserved a difference between a counsellor at law, which is the principal person next unto sergeants and judges in

9. *Ibid.* Vol. VI, 432.
10. 3 Jas. I, c.7 An Act to Reform the Multitudes and Misdemeanours of Attornies.
11. Prof. Holdsworth, *op. cit.*, 1924 Vol. VI, p. 436.
12. *Moor v Row* (1629–1630) 1 Ch. Rep. 38.
13. *Bradford v Woodhouse* (1619) Cr. Jac. 520.
14. E. B. V. Christian, *A Short History of Solicitors*, 1896 (Reeves & Turner, London), p. 89.

> administration of justice and attorneys and solicitors which are but ministerial persons of an inferior nature, therefore it is ordered that henceforth no common attorney or solicitor shall be admitted of any of the four Houses of Court."

By the eighteenth century the demarcation line between attorneys and solicitors on the one hand and barristers on the other was clear and definite. Attorneys and solicitors were finally excluded from membership of the four Inns of Court in 1793.[15] They were relegated to the subordinate Chancery Inns which provided the earliest system of education and acted as their professional organisation. By this time these Inns had declined in status and eventually became mere dining clubs. The last to disappear was Clifford's Inn, which was sold. The proceeds were invested and the annual income divided between the Law Society and The Council of Legal Education to be used for educational purposes.[16]

In 1739, solicitors and attorneys combined to form the Society of Gentlemen Practisers in the Courts of Law and Equity. The earliest records of the Society's proceedings stated its aims in the following minute:[17]

> "The meeting unanimously declared its utmost abhorrence of all male (fide) and unfair practice, and that it would do its utmost to detect and discountenance the same."

The need for self-discipline is shown in the protest by the Society's committee against those members of the profession who had stood in the pillory or had been convicted of highway robbery and yet continued to practise. A significant development affecting the working relationship between the two branches of the profession was the insistence by the Gentlemen Practisers Society that a brief should not be accepted by a barrister from a lay client direct. This rule, introduced to protect the professional interests of attorneys was, much later, justified by the Bar in more profound terms. Sir Richard Webster, Attorney General, maintained that it existed because a barrister:[18]

> "cannot himself make proper enquiry as to the actual facts; it is essential that he should be able to rely on the responsibility of a solicitor as to the statement of facts put before him."

This illustrates the way in which rules of professional etiquette have arisen for the purpose of protecting sectarian interests and have later been justified on the ground that they are fundamental to the public interest.

15. Halsbury, *op. cit.*, Vol. 44 (1983) p. 5, para. 1.
16. *Ibid.* p. 7 note 1.
17. E. B. V. Christian, *op. cit.*, p. 121.
18. Sir Richard Webster A. G., *Law Times*, 7 July 1888, p. 176.

3. Establishment of the Professional Associations

At this stage, it is appropriate to leave the earlier period of genesis of the profession and enter its modern phase of development. The Gentlemen Practisers Society, which was dissolved in about 1817, is recognised as the germ of The Law Society.[19] A group of attorneys and solicitors led by Bryan Holmes, who was previously a member of the Honourable Society of New Inn and the Gentlemen Practisers Society, founded The Law Institution in 1825. From this beginning, The Law Society, as it is known today, arose. A Royal Charter of 1845 gives its title as:

> "The Society of Attorneys, Solicitors, Proctors and others not being Barristers practising in the Courts of Law and Equity of the United Kingdom."

The separation was complete. At this time practitioners were almost always both attorney at law and solicitor in equity—to give them their full description. The older designation of attorney had, for some, acquired unpleasant associations and this resulted in most attorneys "taking refuge in the gentler name of solicitor."[20] By the Judicature Act 1873 the title of attorney was interred and all practitioners in this branch of the profession became solicitors. As they began to close their ranks and achieve recognition as a profession, the Bar, for the first time, became organised collectively. There had been no body representing barristers until the Bar Committee was formed in 1883. The General Council of the Bar replaced this committee in 1895 and was constituted as an elected body, deriving its authority from general meetings and empowered:[21]

> "to deal with all matters affecting the profession and to take such action as may be deemed expedient."

The four Inns of Court remained and continued to be responsible for the education and admission of students and their call to the Bar. The Bar Council, as it came to be known, ruled upon questions of professional etiquette which affected the relations of its members with solicitors. The resulting decisions were published for the guidance of barristers in an official Annual Statement. In this way, uniformity of professional conduct and etiquette was maintained.

With the existence of separate professional associations, the division between barristers and solicitors became definite and fixed. Rules and conventions were established governing the working arrangements between what had come to be known as the two branches of the profession. Strictly enforced, the pattern was set and has changed little.

19. E. B. V. Christian, *op. cit.*, p. 120.
20. *Ibid.*, p. 224–5.
21. Twelfth Annual Statement of the Bar Committee and First of the General Council of the Bar 1895, p. 3.