

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Lectures

John F. Sonnett Memorial Lecture Series

1-7-1975

John F. Sonnett Memorial Lecture Series: The Compleat Advocate: Continuing the Dialogue on the Making of the Trial Lawyer

John Widgery
House of Lords

Follow this and additional works at: https://ir.lawnet.fordham.edu/events_programs_sonnet_lectures



Part of the [Law Commons](#)

Recommended Citation

Widgery, John, "John F. Sonnett Memorial Lecture Series: The Compleat Advocate: Continuing the Dialogue on the Making of the Trial Lawyer" (1975). *Lectures*. 11.
https://ir.lawnet.fordham.edu/events_programs_sonnet_lectures/11

This Book is brought to you for free and open access by the John F. Sonnett Memorial Lecture Series at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Lectures by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Widgery Introduction

A doctor and a lawyer each were driving home late one stormy night when their cars collided. Both were shaken from the accident and the doctor gratefully took a drink from the flask offered by the lawyer. The doctor's hands still shook as he handed the flask back to the lawyer, who put it back in his pocket. "Don't you want a drink to calm your nerves?", the doctor asked. The lawyer replied, "Oh, I'm going to have a stiff one, as soon as the cop has made out his report."

The distrust that exists between attorneys and doctors has many causes, one of which is certainly the many medical malpractice cases filed in American courts. Doctors blame attorneys for the problem and of course, the attorneys blame the doctors. Despite bad feelings that may exist between the professions, attorneys can learn a great deal from the traditions and practices of the medical profession. Lord Chief Justice Widgery emphasizes this point in his lecture by highlighting the "residency" system used to train new doctors. Widgery presents the medical apprenticeship as a model solution to the problem of advocate competence.

In a time of multi-million dollar medical malpractice judgments, attorneys should also focus on the beneficial aspects

of medical training. Attorneys can learn from the positive experiences of the medical profession. As currently configured, the legal profession has been slow to change. Widgery points to the crowded dockets to show that the current legal system will not cull out the bad advocates. A legal darwinism will not leave only the superior advocates to practice in the courts. The legal profession must learn to train its advocates as the medical profession trains its newcomers. While this will not prevent advocacy mishaps, it will strengthen the quality of advocacy to produce more attorneys with the qualities of John Sonnett.

THE COMPLEAT ADVOCATE

RT. HON. LORD WIDGERY*

* (Lord Chief Justice of England. This article was delivered as the Fifth Annual John F. Sonnett Memorial Lecture on Jan. 7, 1975, at Fordham Law School in New York. The text remains substantially as it was delivered.)

In our adversary system of justice the judge is at the mercy of the advocate. A captive audience of one (more, of course, in appellate courts), he is required to sit patiently day by day whilst advocates pass in a constant stream before him. Some speak at length, some are limited by the rules to a merciful fifteen to twenty minutes, some come with the flush of youthful exuberance, some with the disillusion of middle age. Some are helpful, some time-consuming. All must be heard.

Small wonder that the judges are the first to praise or criticize the quality of the advocacy which is served up before

them. The last Sonnett Memorial Lecture¹ was delivered by Chief Justice Warren Burger,² who devoted much of his address to a consideration of the quality of the present generation of trial lawyers in America, and found that quality was wanting. In particular, he attacked the assumption (not peculiar to America) that the obtaining of a diploma from law school should qualify the recipient to argue his client's case in court, and in a particularly telling phrase he described the result as " 'Piper Cub' advocates trying to handle . . . 'Boeing 747' litigation."³

A few weeks after the Chief Justice had delivered this lecture, his motion received a seconder as it were, from no less an authority than Judge Kaufman.⁴ Speaking at a dinner of the New

¹ Address by Chief Justice Warren Burger, Fourth Annual John F. Sonnett Memorial Lecture, Fordham University Law School, Nov 26, 1973.

² Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227 (1973).

³ Id. at 232.

⁴ See 170 N.Y.L.J. Dec. 7, 1973, at 5, col. 1. See also Kaufman. Advocacy as Craft-- There is More to Law School than a "Paper Chase." 28 Sw. L.J. 495 (1974).

York County Lawyers Association, Judge Kaufman referred to the vast increase in case loads which had occurred in recent years, and said that as a result "it will be tempting for lawyers to expend less effort and do their jobs less skillfully than before, relying on judges to put in the extra finishing touches necessary to get the result as perfect as it formerly was. In short, there is a natural inclination to have judges do lawyer's [sic] work."⁵

In that last remark Judge Kaufman surely puts his finger on one of the root causes of disquiet about the conduct of litigation at the present day. Trial lawyers (including for present purposes those who assist the advocate in preparing his case) are invariably overworked. Some are nevertheless able, by taxing their own strength, to maintain their standards and do so. Others lack the ability or the dedication to do this, and insufficiently prepared cases are the inevitable result.

Where this occurs the judge himself is in a dilemma. Many of my predecessors in England would have found no difficulty. They

⁵ 170 N.Y.L.J Dec 7, 1973, at 5, col. 2.

would have thrown the case back at the advocate and told him to go away and do better. Judges do not do that today; they have too much concern for the lay client who is in danger of being let down by his lawyer, and too much concern for the image of justice to have an open confrontation of this kind. Instead, as Judge Kaufman claims, the judge will do his best to make good the deficiencies of the advocates presentation.⁶

We all suffer from this. In England in the last few years, we have built up somewhat complex rules governing the admission for settlement in England of citizens from the old Commonwealth, for example, from India and Pakistan.⁷ The resulting litigation normally comes to my Court, and I have had no choice but to learn these rules. This is not so for lawyers who have not been concerned with this type of business. The other day a charming young man arose in my Court to move for habeas corpus on behalf of

⁶ Id. at 5, cols. 2-3. Judge Kaufman points out, however, that judicial assumption of the advocate's role "will be at the expense of practicing [the] craft of judging." Id. at 5, col. 3.

⁷ See Immigration Act 1971, c. 77.

an Indian who had been refused admission to England and had been detained at Heathrow Airport With commendable frankness the young man said, "My Lord, I have been endeavouring since my client's arrest yesterday, to discover the relevant statutes and decisions which govern his case. I have not succeeded in doing this in the time available but I know that Your Lordship is expert in this subject and will not require assistance on the law from me." What can we do? I told him the answer and disposed of the case, but only a few years ago, no counsel would have dared to make such an approach, and would literally have stayed up all night to find the answer for himself. That the bench should have to help out occasionally may not be too serious a matter, but the quality of the product is bound to suffer if there is any general tendency to rely on the judge to make good counsel's deficiencies.

I recollect another example of this kind of thing which may entertain you. When in 1898, an accused man was first allowed to give evidence on his own behalf, the statute provided that if he took advantage of that right, he could not be asked questions

tending to show that he was of bad character, unless he had attacked the character of a witness for the prosecution.⁸ It follows that where a defendant has a bad record his counsel is inhibited from suggesting that a police witness has been fraudulent, or planted evidence, lest this will let in a boomerang in the shape of evidence of the defendant's own bad character.

At the particular trial to which I refer a young woman barrister was defending a man with a criminal record as long as your arm. He had, nevertheless, instructed his counsel that on the present occasion he had n the victim of a wicked plant by the police witness. Convinced of her client's innocence, and warming to her work, Miss X was cross-examining the first police witness. The trial judge was soon alerted to what was taking place. He could see that the allegation of a plant was a few questions away, and, knowing the prisoner's record, he realized that a tactical disaster was imminent. He cleared his throat: Miss. X, do you

⁸ Criminal Evidence Act of 1898, 61 & 62 Vict. 35, c. 36, § 1(f)(ii).

really want to pursue this line of questioning?" "Of course, My Lord, ' said Miss X. "Don't you think you have gone as far as you can usefully go?" "Not at all, My Lord," said Miss X. The Judge leaned forward in his seat. "Miss X, be so good as to look at Paragraph 1529 of Archbold⁹ (this is our standard text book on criminal procedure) and read it quietly to yourself," said the judge. With ill-concealed impatience Miss X looked at the paragraph in question. And then her face lit up, a dazzling smile for the judge, and a simple summation of it all: "Oh, silly me." said Miss X.

It was after having had this kind of experience himself, and having heard the views expressed by the Chief Justice, that Judge Kaufman suggested that there should be a continuing dialogue within the legal profession to see in what ways, and by what means, the standard of advocacy could be improved.¹⁰ I hope that which I say tonight may help that dialogue along.

⁹ J. Archbold, Pleading, Evidence & Practice in Criminal Cases (38th ed. 1973).

¹⁰ 170 N.Y.L.J., Dec. 7, 1973, at 5, col. 1.

But there is already another contestant in the list. Chief Justice Burger had mentioned certain respects in which he thought that the British system produced a better trial lawyer than did the American¹¹ and this has inspired Dean Monroe H. Freedman to publish a paper in the New York Law Journal under the heading of "The Myth of British Superiority."¹² I have been generously, told that I may comment on his paper either as advocate or arbitrator, but I am going to resist that temptation. The dialogue which I wish to join is that which is concerned with improving the standard of the trial lawyer. It would be strange if, at this stage in our respective developments, the British system were not superior to the American in certain respects, and vice versa. It is where we can learn from each other that a useful dialogue begins.

I would like to turn now to consider what are the essential characteristics which the trial lawyer should display, and how far

¹¹ Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev 227, 228 (1973).

¹² Freedman, The Myth of British Superiority, 172 N.Y.L.J., Aug. 28, 1974, at 1, col. 1.

we can encourage and develop these characteristics.

I suggest that there are four of these characteristics. First, like any other attorney, the trial lawyer must be learned in the law. Secondly, he must know the ground rules which govern the litigation game-- that is to say, he must know the rules of evidence and procedure, and use them with the craftsman's touch which only experience can give. Thirdly, he must be independent in mind and in fact-- he must be able to do what his conscience tells him is right without fear of antagonizing the court or being overborne by his client. Finally, he must have integrity in the pursuit of justice, recognizing his responsibility to the court and his opponent, and rejecting alike the desire to win at all costs and the temptation to take an unfair advantage of such pieces of forensic luck which come his way.

That an advocate must be learned in the law is obvious, but it is idle to suppose that he can have the accumulated learning of a university professor, or that such knowledge would be of practical value if he possessed it. The practitioner in the law needs a

sound knowledge of first principles. With this he can go anywhere, using the books to amplify his knowledge of the particular subject in the particular case. I believe that in America the method of implanting this basic knowledge is a three years' course at a law school, and this is a method now widely adopted in England as well.

But in England we have had for many years a traditional alternative in the form of apprenticeship. Until recently, the majority of those wishing to become solicitors in England have entered into a five years' apprenticeship with a practicing solicitor. They have worked in the office of the principal, picking up law and practical experience as they go along.¹³ It has, of course long been recognized that this is too haphazard a method for providing the new entrant with a balanced knowledge of the substantive law, and apprenticeship has always been coupled with a system of written examinations for which the entrant could prepare himself in his own way, with or without professional

¹³ See T. Daniell, *Inns of Court* (1972). See also A. Green, *Bibliography on British Legal Education* (West Chester State College, Dep't of Business and Economics, Research Paper No. 1, 1973).

teaching. It is common enough in England today to find solicitors of distinction who have had virtually no formal teaching in the law, but have qualified by serving their apprenticeship and studying the books in their spare time so as to be able to pass the written professional examinations.

But tonight we are concerned with trial lawyers which, in English terms, means that we are thinking of English barristers rather than English solicitors. Most barristers do attend a full three-years' university course, but the obtaining of a degree is not an automatic license to practice because for this purpose a further examination, set by the authorities controlling the practising bar, must also be passed. It is as though a graduate from Fordham were required to take a further examination set by the American Bar Association. The reason for this is that the university graduate may have read law for two years, or only for one, or, indeed, may have read no law at all. The purpose of the professional examination is to ensure that either by formal teaching or private study he has acquired the necessary basic knowledge of the

substantive law.

In recent years our thinking on this subject has been moving markedly towards your own, and it is now generally accepted that the right place to read law is in a law school, and that satisfactory completion of the prescribed course should suffice to qualify the candidate so far as his basic, theoretical knowledge is concerned.¹⁴ We have been slow to come to this view because until thirty years ago entry to the universities was largely restricted to the comparatively well-to-do, and the bar would have been the loser if we had excluded those who studied in a garret with a candle, and meanwhile washed dishes as a means of livelihood. The first requisite, then, for an effective corps of trial lawyers is that our law schools and universities should be open to suitable entrants without prohibitive economic obstacles.

What sort of syllabus is required for this basic legal training? As I have already said, the object, in my opinion, must be to instill

¹⁴ See Sweet & Maxwell's Guide to a Career in the Law 69-81 (7th ed. 1971). See also A. Green, *Supra* note 13.

a really sound knowledge of first principles, and it is a waste of time to do more. In my experience those principles will provide the answer in nine cases out of ten, and we must give the student confidence that this is so, and not allow him to think that a simple dispute arising out of the sale of goods really requires a week's research into the opinions handed down by the Supreme Court of the United States.

Herein lies a danger touched upon by Judge Kaufman when he describes the three-year students as spending their time reading appellate decisions.¹⁵ Given a small chance, this is exactly what they will do. Arguing abstruse points of law is as good a mental exercise as you will find, but if a young man can spare three years of his time to attend a university, he can surely find time for other disciplines as well.

The story is told of a distinguished lawyer whose bookshelves in his chambers were full of works of history and English literature. Asked why this should be so, he replied that these

¹⁵ 170 N.Y.L.J., Dec. 7, 1973, at 5, cols. 4-5.

were the text books to the study of life, and that no lawyer could meet the requirements of his profession without consulting these sources. Without history and literature, said the sage, a lawyer is a mere mechanic. Only by a study of these works can he become a craftsman. In planning the education of our embryo trial lawyer, should we not see that he learns something about the people whom the law is to serve, and that he does not forget that in dedicating himself to a life in the law he is also dedicating himself to the people who depend upon him?

When our potential trial lawyer emerges from his university or law school, the next requirement is that he should be taught the practical skills upon which his livelihood will depend. In other words, he must gain experience. This is, perhaps, the most difficult operation of all.

I think that we can begin by taking a close look at the profession of medicine to see how the doctors deal with this sort of problem. The transition from student to practitioner is certainly as great in medicine as it is in advocacy, and we must

admire the medical profession for the way in which it introduces the young man or woman to real patients with a minimum of disaster.

How is it done?

First, the overall period of training is much longer than ours. This is inevitable because the doctor, unlike the lawyer, cannot rely on a knowledge of first principles, supplemented by reference to books from time to time. All too often the doctor has to act at once, and he must have a wider and deeper knowledge of his subject than we achieve. We have to accept the fact that three years' study is now a maximum.

Secondly, medical schools tend to be closely integrated with the hospitals themselves, and are often contained in the same ring fence. The students have a sense of belonging to the hospital from the beginning, and they see the famous consultants and leaders of the profession walking about in their midst. More important still, from a comparatively early stage the student walks the wards in company of the great men to watch them at work, and either at the bedside or on leaving the ward the consultant requires the student

to make a diagnosis and suggest treatment, and he is roundly corrected if he gets it wrong. This is practical training at its optimum because it is the real thing done with real people by a teacher who is acknowledged to be the top class as a practitioner, and, not least, there is a sense of fraternity which links all together as part of "our hospital." Actual contact with sick people creates a sense of urgency and reality which is lacking in the law library.

Thirdly, when the advanced student is fit to begin to treat patients, there will always be other doctors about who can keep an eye on him and to whom he can turn. He will not find himself standing alone in the middle of a courtroom like a matador facing his first bull and probably profoundly wishing that he had taken his father's advice to become an automobile salesman.

There is much here for us to learn if we set our minds to it.

It so happens that the layout of legal London gives the bar an opportunity to organize itself on the lines of a large teaching hospital. Many of you will have the scene in your own minds. In

the Strand¹⁶ we have the Royal Courts of Justice with some fifty courtrooms which house the appellate courts and provide for the judges who are trying the heavy civil work which arises in the southern half of England. A mile away we have the Old Bailey with twenty-two courtrooms which deal with the serious criminal cases from the greater London area. In between we have the four Inns of Court¹⁷ which, if I may be allowed to say so, are areas of considerable charm and which are the home of the bar. These contain both the offices (or chambers) from which the barristers carry on their practice and also the main law libraries. There are also halls in which bench and bar meet at lunch and dinner, and from which the profession is controlled.¹⁸ The analogy with medicine is clear. The two main court buildings are the hospital,

¹⁶ See F. Morrison, *Courts and the Political Process in England* 37-57 (1973). For a topographical sketch illustrating the proximity of the Law Courts, Old Bailey and the Inns of Court, see R. Megarry, *Inns Ancient and Modern*, frontispiece (1972).

¹⁷ The four Inns of Court are Lincoln's Inn, The Inner Temple, The Middle Temple and Gray's Inn. H. Hanbury, *English Courts of Law* 140-41 (4th ed. 1967).

¹⁸ See R. Jackson, *The Machinery of Justice in England* 329-35 (6th ed. 1972). See also H. Hanbury, *English Courts of Law* 140-41 (4th ed. 1967); F. Morrison, *Courts and the Political Process in England* 60-61 (1973).

and the Inns of Court are the medical school. The whole area is steeped in the law and talking lawyers' shop is a basic recreation. Nor is this dialogue confined to students talking with students, or judges with judges. In chambers, at lunch, and in the library, bench and bar, senior and junior, meet as members of one family, and teach each other the standards, the etiquette and the code of behaviour which the bar has always adopted. The groundwork for this was laid more than a century ago when the would-be barrister was first required to "eat his dinners" before he could qualify.¹⁹ The requirement is maintained to the present day, and literally obliges the student to dine in the hall of his Inn on a specified number of occasions.²⁰ Some of our friends poke fun at us for maintaining this ritual, and they may be right, but the Inns must not be dismissed as mere dining clubs. They hum with activity all through the working day, and it is beyond doubt that what Chief

¹⁹ F. Morrison, *Courts and the Political Process in England* 60 (1973); see Cowper, *The Inns of Court--Lincoln's Inn*, 1 *Anglo-Am. L. Rev.* 537, 542 (1972).

²⁰ *The Consolidated Regulations of the Honourable Societies of Lincoln's Inn, The Inner Temple, The Middle Temple and Gray's Inn* (1970).

Justice Burger describes as the ethics, manners and deportment of the English bar²¹ are produced and nurtured in the fraternal atmosphere of the Inns. I cannot put it better than in the words of a distinguished Judge (Mr. Justice Hilbery) who, when asked how one who intended coming into the profession might discover where this code of conduct was to be found, and how it was to be learnt, said:

The answer to the first question is in the traditions of the profession. The answer to second is in the Schools of the profession, its ancient craft guilds, called the Inns of Court, where all matters of professional conduct are freely and daily discussed, and where the transgressor is answerable for his misconduct.²²

²¹ See Burger, *The Specialized Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 *Fordham L. Rev.* 227, 229-30 (1973).

²² M. Hilbery, *Duty and Art in Advocacy* 7 (1946).

Although the concentration of the courts, bench and bar into an area little more than one square mile has given us great opportunities to teach advocacy, we have been slow to take advantage of them. Until the end of the Second World War the English bar merited many of Professor Freedman's strictures. It was a profession in which family and social class counted for more than they should, and above all where money mattered since a newly called barrister might have to wait for years before he acquired a practice big enough to support him. It did, however, have the advantage that, during these years of waiting the barrister would be in the courts and in chambers every day "devilling," as it is called, for other and more senior barristers. He would thus get experience in looking up the law, reading the case papers, and sitting beside the senior barrister in court while the case was conducted. Five or six years of this meant that when his own work began to flow in he was well prepared for it.

In the last twenty years we have seen great changes. The amount of work for the bar has increased by over 50 percent, and a

young man who is any good at all can make a living in his first year and enjoy sharply rising income thereafter.²³ Here lies the danger--it is all too easy--we can no longer rely on competition to drive out the inadequate, and we have been forced to provide organized instruction in the professional skills of the advocate.

In doing this we have again drawn upon the experience of the teaching hospitals. I feel very strongly that the duty to train entrant in the skill and traditions of our profession is a duty which falls on the profession as a whole, and, in particular, that it is one from which the judges cannot claim exemption.

Therefore, in addition to the moot and mock trials, which have a purpose limited by their lack of reality, we try to take our advanced students round the courts to take as active a part as possible in real-life litigation. They can read the pleadings, follow the argument, and, when the case is over, meet the judge in his room and discuss the points of the case as seen through the

²³ For a discussion of the increase and its effect on the legal profession see R Jackson, *The Machinery of Justice in England* 341-43 (6th ed. 1972).

judge's eyes. It is, of course, imperative that the student should hear the case from start to finish-- looking in from time to time is worse than useless.

I must come in a moment to a consideration of the remaining characteristics of the complete trial lawyer, but before I do so may I briefly return once more to the analogy of the medical profession. We have in England a legal profession which is divided into barristers and solicitors. There are 3,000-odd barristers and 25,000-odd solicitors.²⁴ The relevance of this for present purposes is merely that since all the trial lawyers properly so called are barristers, they are all part of the relatively small community based on the Inns of Court which I have endeavoured to describe. Although I am wholly committed to the view that this division of the profession is beneficial in a small and highly populated island like England, I would not like to mislead you into thinking that everybody -at home shares this view. On the contrary, no year

²⁴ Zander, English Legal Aid System at the Crossroads, 59 A. B. L.J. 368 (1973).

passes without t: someone writing to the newspapers advocating the "fusion," as it is called. of the two parts of the profession, and thus provoking others to write to extol the virtues of the status quo.²⁵ Dean Freedman has joined the "fusionists" and adopts, amongst other arguments, the contention that our system is wasteful because a barrister cannot be directly instructed by the client, who must approach him through a solicitor. "[T]wo lawyers for one . . . litigation,"²⁶ thunders the Dean but is this really so? Look back for a moment at the doctors.

Doctors are divided into general practitioners and consultants. If you are unwell you go to your general practitioner and if he cannot treat ou adequately he sends you to a consultant who specializes in your particular malady. In the end you pay two doctors, but is this wasteful? How could you have diagnosed your complaint, and selected

²⁵ See. e.g., Q. Johnstone & D. Hopson, *Lawyers and Their Work* 185-98 (1967); Lawton, *The Role of the Advocate in English Society*, 22 *Okla. L. Rev.* 396, 113-20 (1969). See also Boulton, *The Barrister: Advocate at the English Bar*, 57 *A.B.A.J.* 255, 258 (1971).

²⁶ Freedman, *The Myth of British Superiority*, 172 *Y.L.J.*, Aug. 28, 1974. at 3, col. 2.

the specialist without the assistance of the general practitioner? When applied to the English legal profession, this analog is absolute. The solicitors are the general practitioners and the barristers the specialist consultants. The principal specialty is advocacy, but there are barristers specializing in corporation law, antitrust law, family law, and land transfer, to name only a few. This means a client who has a particularly abstruse or difficult problem can take it to any solicitor in the country with the knowledge that he can thereby be put in touch with the top man practising in that line. This is not wasteful duplication, but a means of ensuring that the client has prompt access to the advice most suited to his problem, and, moreover, has all the experts in the country to choose from.

But now I really must return to the remaining qualities which are essential in the complete advocate. I can put them into two words-- independence and integrity.

These last are qualities of mind and character which cannot be taught or manufactured. Their seeds are sown in childhood and,

indeed, they may be partially hereditary, but their development can be immensely influenced by environment and example.

It is no mere coincidence that these are also qualities required of the bench. Indeed, it is idle to suppose that we can have an independent bar without an independent bench, and in our search for the ideal environment in which to produce the complete trial lawyer we must not ignore the methods of selecting and appointing judges.

I do not find it easy to contemplate the appointment of a judge who is not already an experienced trial lawyer. There are many men on both sides of the Atlantic who have a generous endowment of the necessary intellect and temperament for judicial office, but unless they have actually tried cases at the bar they cannot know the tricks of the trade. When I emerged nervously to take my seat on the bench for the first time, I was sustained by the knowledge that I would not have been considered for the appointment had I not first established myself as a trial lawyer in fair competition with those who were now to appear before me. The

advocate who loses a case is always ready to blame the judge, and there is no more stinging criticism than that the judge is not really a professional in his courtroom. No advocate will be tempted to pull a fast one if he knows that the judge is at least his equal in the craft.

If I am right in this premise, and proficiency as an advocate should be regarded as a necessary qualification for judicial office, it follows that the machinery of appointment must somehow provide for the voice of the profession to be heard.

In England this is easily arranged. Although new High Court judges nominally appointed by the Queen, the appointment is made on advice of the Lord Chancellor,²⁷ who is both a politician and a leading lawyer. Years ago, politics, family, class, or "knowing the right people" may have played an undue part in the Lord Chancellor's choice, but this is not so today. Successive Lord Chancellors have made it clear that the sole criterion is "who is

²⁷ R. Jackson *The Machinery of Justice in England* 365, 367 (6th ed. 1972).

the best man for the job", and if the Lord Chancellor wants advice on this subject he can consult senior judges and senior members of the bar. Indeed, when a vacancy occurs, informal gossip in the Inns of Court will soon narrow the likely choice down to two or three names, and the Lord Chancellor be well aware of this. It is still true that a majority of our eighty-odd High Court judges come from the middle class, and were educated at schools which you sensibly call "private," and we confusingly call "public," but they include the sons of a miner, prison officer, and a trade unionist to mention only a few.

I believe that in recent years the American Bar Association has increased its influence over the making of judicial appointments,²⁸ and if this is so I would regard it as a matter for congratulation. The bench would become hopelessly inbred if judicial appointments depended on the profession alone, but it is neither fair to the appointee, nor conducive to seeing justice done, if no regard is paid to the professional standing of the

²⁸ J. Grossman, *Lawyers and Judges* 49-81 (1965).

appointee amongst his peers.

In the matters upon which I have touched so far, I do not believe: that there is any fundamental difference between the views of an American lawyer and those of an English barrister. Each is seeking the game ends, and the differing means to those ends have been dictated by considerations of politics, history and geography. It is when we come to the attitude of the bar towards its potential clients that we find deep and significant differences. I approach this part of the subject with hesitation, and, I hope, with due humility, because it is hardly credible that in these matters either of us should be wholly right, and the other wholly wrong. If, on another occasion, an opportunity is found to continue our dialogue, these are matters suitable for a study in depth. They certainly go to the root of the independence and integrity of the bar, and in England they are expressed in rules which are treated with a reverence normally reserved for the Holy Writ.

It is a constant source of amazement to us that you manage

perfectly well without them. These are the rules:

First. The trial lawyer must be remunerated by a fee which is fixed in advance, and is entirely independent of the outcome of the litigation. His written instructions for the case must be legibly endorsed with the amount of the agreed fee, and it is a serious professional offence to go into court with papers not so marked.

Secondly. The trial lawyer cannot pick his clients. If he is invited to undertake a case within the field in which he holds himself out to practice, and he is paid an appropriate fee, he must take the case, however much he dislikes his client and whatever his revulsions to his task.

The former rule is designed to prevent the trial lawyer from being personally involved in the outcome of the case, and to give him the sense of detachment without which we think it difficult for him to recognize his duty to the court, as well as his duty to his client. Of course, every trial lawyer wants to win. His

reputation is built on success, but the temptation to win at any price must surely be increased if he has a financial stake in the result. The fact that you manage perfectly well without imposing this restriction is of great interest at the present time because it means that in this country a plaintiff with a good case should never lack a lawyer prepared to act for him on a contingency basis. In England, an indigent plaintiff who is not allowed to offer his lawyer a share of the spoils, must look to the free legal aid system to pay his lawyer's fee, and although this often provides a satisfactory answer, it does not always do so.

The rule that a lawyer cannot pick his client is sometimes called the "cab rank" rule.²⁹ A taxi-driver plying for hire must take any commission which is offered to him, and so must the trial lawyer. The purpose of the rule is, of course, to ensure that a person is not denied the advantage of legal representation merely because of his personal unpopularity or his bad reputation. It is

²⁹ R. Jackson, *The Machinery of Justice in England* 360 (6th ed. 1972).

for the court to decide the defendant's guilt, and this decision is not to be pre-empted by a refusal of the bar to act for him. The classic dictum on this point comes from Lord Erskine,³⁰ who, when at the bar, accepted the defence of the notorious Tom Paine,³¹ and was mercilessly criticized by public opinion for having done so. When the trial began Erskine put his vies beyond doubt. He said:

"I will forever, at all hazards, assert the digni y independence, and integrity of the English bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can h 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 practice, from that moment the libertieS °af 'ngland are at an end. If the

³⁰ For a biography of Thomas Erskine, see L. Stryker, *For the Defense* (1947).

³¹ Lord Erskine defended Thomas Paine in a libel action arising out of the publication of *["* Rights of Man." See *The Trial of Thomas Paine* (1,92).

advocate refuses to defend from what he may think the charge or of the defense, he assumes the character of the judge; nay, he assumes it more the hour of judgment; and in proportion to his rank and reputation, puts the weight of perhaps a mistaken opinion into the scale against the accused, in the favor of the benevolent principle of English law makes all presumptions and then commands the very judge to be his counsel.³² These are strong words and, no doubt, they contain an element of exaggeration. They represent the pent-up feelings of a man who had been severely criticized, and who was grasping an opportunity to justify himself. I would not put the case in those terms today, but the point remains a valid one, at all events, when applied to conditions prevailing in England. You will know I expect, that we have just completed, or have pending, a large number of trials in which the accused are charged with killing by explosives planted in the supposed interests of the Irish Republican Army. One may well ask what would happen to these defendants in the

³² L. Stryker, *For the Defense* 271, (1947), quoting Lord Erskine.

absence of the "cab-rank" principles. Could the bar turn its back on them because of its revulsion against such activities and allow them to go undefended? This is surely unthinkable. Nor is a solution to be found by leaving them in the hands of those members of the bar who may have sympathy with their cause, because even if sufficient counsel were to be found on that basis, they would lack the detachment which seems to us to be so important.

One interesting by-product of the "cab-rank" rule is that our trial lawyers do not associate themselves exclusively with prosecution or with defence, but tend to appear for either side according to the instructions which they receive. I think that on the whole this is a good thing, which broadens the advocate's outlook, makes him more conscious of the difficulty of the other side, and gives him a more responsible attitude to the work of the courts. I know that Professor Freedman found room for criticism here because he says that counsel appearing for defendants tend to pull their punches lest they antagonize the prosecution authorities

and get no more work from that quarter.³³ This, I confess, is a new one on me, and I am not persuaded that it is true. After all, any experienced trial lawyer knows that the best way to get a new client is to give him a good drubbing in a case where he is represented by someone else. A young man who makes his mark when defending will be the more sought after by the prosecution. It is all summed up in the adage "If you can't lick 'em, join 'em."

If I may attempt to summarize my contribution to our dialogue I would put it thusly: The quality of the trial lawyer is not primarily dependent on his basic training in law school, or on his having an exceptionally high intelligence quotient. The essential requirements are discipline and dedication. The means by which these qualities are nurtured will vary enormously with local conditions, but the one indispensable teacher is the example set by senior members of the profession. The burden upon us as senior members of the profession is enormous but so is the prize to be

³³ Freedman, *The Myth of British Superiority*, 172 N.Y.L.J., Aug. 28, 1971, at 3, col. 2.

won.

May we continue to pursue it together.