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John Flood

Indiana University School of Law

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Barristers' Clerks*

John Flood**

"In this world there are three 'We's'. The Royal 'We'. The Editorial 'We'. And the Barrister and his Clerk 'We'. And the greatest of these is the Barrister and his Clerk 'We'."¹

Introduction

Historical records on the role of the barristers' clerks are extremely scarce. The best known reference is Charles Lamb's description of his father who was a barrister's clerk.

He was at once [Mr. Salt, K. C.s'] clerk, his good servant dresser, his friend, his 'flapper', his guide, stop watch, auditor, treasurer. [Mr. Salt, K. C.] did nothing without consulting [him], or failed in anything without expecting and fearing his admonishing. He put himself almost too much in his hands, had they not been the purest in the world. He resigned his title almost to respect as a master, if [his clerk] could ever have forgotten for a moment that he was his servant.²

Has the clerk's role changed since then? In 1976 a senior clerk, described his tasks: "A barrister's clerk does everything for his governor, even sewing on his fly-buttons because the typist couldn't do it, as there was no time to take his trousers off."

Despite the expansion of legal work since 1823, the essence of the counsel's clerk's job has not changed drastically. The official reason for employing barrister's clerks is that a barrister's chambers includes the provision of "the services of the clerk who is the clerk of the chambers . . ."³ The *modus operandi* of the clerk and the character of his relations with counsel, however, have changed dra-

* This paper is based on a participant-observational study of barrister's clerks conducted in 1976. The results of the study are reported in the author's thesis entitled *Barrister's Clerks*.

** Professor of Law, University of Warwick, England.

1. Podium, 74 *GUARDIAN GAZETTE* (No. 15), 89 (1977)(quoting Norman Birckett).

2. C. LAMB, *The Old Benchers of the Inner Temple*, *LAST ESSAYS OF ELIA* (1823), reprinted in C. LAMB, *THE OLD BENCHERS OF THE INNER TEMPLE*, at xiv (F. Mackinnon, ann. 1927).

3. W. BOULTON, *CONDUCT AND ETIQUETTE AT THE BAR* 58 (6th ed. 1975) [hereinafter cited as *BOULTON*].

matically in the intervening years. S. E. Thorne, in describing the genesis of the Inns of Court, suggests that legal work was transacted between the main religious and harvest festivals of the year because lawyers were also ecclesiastics and farmers and fulfilled both roles. These parttime lawyers established themselves in the Inns of Court and maintained a permanent staff to tend to their needs and to look after their chambers during their absences. Gradually the Inns changed from being used as temporary hostels to occupational residences.⁴

It appears that the work of the servants who were the caretaker staff of the Inns gradually evolved to include the duties which are now performed by the barrister's clerk. In the nineteenth century it became necessary for barristers to be instructed by solicitors instead of dealing directly with the client.⁵ These changes altered status relations between barristers, attorneys, and solicitors.⁶ The clerk increasingly became a mediator between principal and client, the client now being the solicitor as opposed to the lay-client.

Although there were enormous status differences between the counsel and his clerk in Charles Lamb's father's period, his description shows that the relationship was highly personal and complex compared with those of the present day; today, clerks work for several barristers and relationships are fairly impersonal. This has promoted the development of a separate occupational identity and a distinctive area of work within the legal profession which is the clerk's domain. In fact, throughout the period since 1945 clerks have increasingly been making a claim for a separate professional identity. The Barristers' Clerks' Association, formed in 1922, has been attempting to introduce formal statements of ethical codes for clerks, emphasizing education and standardized apprenticeships. More importantly, the Association has been trying to restrict the filling of vacant senior clerks' posts to its own members.⁷

Until the change to decimal coinage in 1971, barristers' clerks

4. Thorne, *The Early History of the Inns of Court with Special Reference to Gray's Inn*, 50 *GRAYA* 79 (1959).

5. Forbes, *Division of the Profession: ancient or scientific*, 74 *GUARDIAN GAZETTE* ____ (1977).

6. See R. ROBSON, *THE ATTORNEY IN EIGHTEENTH CENTURY ENGLAND* (1959); B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS* (1967).

7. This should not be taken as an attempt to prove that clerks have achieved professional status, but merely as an illustration of some of the *claims* that are made by the Barristers' Clerks' Association.

received a clerk's fee for their work. The amount was based on a proportion of the gross fee payable to the clerk's principal. Megarry attributes the origin of the clerk's fee to the purchase of candles needed for client conferences held after the day's proceedings in court.⁸ It is difficult to say whether the story is apocryphal or not. Until 1919 clerks received the clerk's fee only. As a result of post-war inflation, it thereafter became increasingly common practice for the barrister to pass on the shillings on the guineas to their clerks. In 1971 the disappearance of guineas led to a reformulation of the clerk's fee. It was no longer to be a separate item on the counsel's fee note but was to be incorporated in the total fee, of which the clerk would be entitled to receive five percent. The agreement between the Bar Council and the Barristers' Clerks' Association left a gray area of negotiation between clerk and principal to allow for additions to the basic five percent fee.⁹

For many clerks the description "ten percent man" has acquired enormous importance and, to accept less than ten percent is to lose esteem. To put it another way, one clerk stated that, "the barrister earns 90 percent of the clerk's fee." Remuneration by percentage commission is a strongly held principle signifying separation from the humdrum world of normal secure salaried employment; barristers' clerks value the risk and independence that is inherent in the notion of the fee.

The Clerk's Duties

A set of chambers is ostensibly a collection of independent individuals who cluster together in order to facilitate the business practice, yet each retains his own identity. The clerk plays an integral role in maintaining this structure, and paradoxically, it is necessary for him to conceive of the chambers as a collectivity. By so doing the clerk takes measures to ensure the continuity of the chambers. This requires that the chambers represent "a good ladder," that is, a range of counsel from pupil to Queen's Counsel. Therefore, he must generate work for all the members which ultimately benefits himself both materially and through raising his prestige among his peers.¹⁰ The tasks of the barrister's clerk fall into three main catego-

8. R. MEGARRY, *LAWYER AND LITIGANT IN ENGLAND* 61 (1962).

9. *ANNUAL STATEMENT OF THE BAR* 33-36 (1970).

10. For such a small occupational group, the incidence of civil honors is quite high. This may be evidence of lawyers' influence in politics.

ries: First, the building up and maintenance of his principals' practices; secondly, acting as an intermediary between the solicitor-client and counsel; and finally, the scheduling of cases in conjunction with court officials.

When acting as an intermediary the clerk is exercising his selling and brokerage skills. He uses his knowledge of the Bar to provide the solicitor with the most suitable type of counsel for his problem, "horses for courses" as one clerk phrased it, translating the skills of his barristers into monetary terms. In such a way the barrister is able to remove himself from such status-lowering activities. Today, however, many barristers are concerned with their economic value, but still depend on the clerk to articulate it for them. Despite criticisms of this fee-fixing mechanism, it appears that the clerk's personal interest in the amount of the fee does not really play a significant role in his deliberations over the amount set.¹¹ His most important concern is to regulate fees to maintain a consistent supply of work from the solicitor-clients and lay-clients. Clerks often generate work by actively selling counsel to solicitors to prevent briefs being placed with other sets of chambers.

A clerk from a common law set, for example, had received a request from a solicitor for a junior counsel of some seniority which the clerk could not immediately provide, but he managed to persuade the solicitor to take someone more junior than his original request, who was immediately available: "He is a strong cross-examiner, a good lawyer. Does most of his work in the Crown Courts, you know, difficult drug cases. He was in the R . . . enquiry, junior to Mr. X., and junior to Mr. S. in the W . . . enquiry." The solicitor bought that barrister. In another similar situation a civil law clerk persuaded a solicitor to accept a barrister he had never used before, using the following argument:

He's a very able man, sir, very conscientious. He was a pupil here a couple of years ago. You remember him, blond hair, glasses, . . . that's right. . . . Oh yes, sir, he studies the papers well beforehand and by the time the case comes round he knows all about it. I can certainly recommend him, sir.

Again the clerk's persuasion was effective, and as the clerk told me, "that was my little bit of salesmanship. It helps."

In addition to negotiations before the case, a considerable

11. B. ABEL-SMITH & R. STEVENS, *IN SEARCH OF JUSTICE* 280-91 (1968); M. ZANDER, *LAWYERS AND THE PUBLIC INTEREST* 83-114 (1968).

amount of fee-fixing is done at the conclusion of the case, such as marking the fees for opinions or legal aid work.¹²

Each court has its own list which is, in part, made up daily. A copy of all the lists of the High Court and Crown Courts are displayed in the List Publication Room at the Royal Courts of Justice in London. Both solicitor and counsel require the clerk to keep track of the progress of cases through the lists. Failure to do so disturbs everyone connected with the case. Efficient listing demands the exercise of the clerk's interpersonal skills in order to increase the turnover of the chambers' work. The litigation process is uncertain. Some cases are never intended to come to court at all, while others may take six months or even two years to reach the judge, only to be settled at the doors of the court. The solicitor depends on the clerk to keep a record of the pace of the case through the list for him. If it seems probable that a case will be prematurely listed, the clerk should immediately tell the solicitor to submit a consent to the list officer for the removal of the case from that position in the list.¹³ The agreement of both sides in the dispute is required for the list officer to take this action.

The language of the list office reflects the uncertainty inherent in the system. Two lists are prepared. There is a central core of cases that are referred to as "fixtures," which, as their name implies, are cases to be heard at a definite time. Next, are the cases known as "after fixtures." "After fixture" cases are heard if a space occurs at the end of a judge's initial list of "fixtures." Finally, there are the "floaters," cases which are heard whenever possible. In the criminal courts the categories of "after fixture" and "floater" are not used. Only Problematic cases which are serious or are expected to last a long time are fixed.

The Crown Court is composed of three tiers each staffed by a particular rank of judge. Lists are constructed according to the availability of the type of judges.¹⁴ A common complaint made of

12. The fixing of fees may be split into two operations. All paperwork is priced by the clerk when finished. Prosecution and legal aid fees are calculated by the taxing authorities at the conclusion of the case. All other brief fees should be fixed by the clerk before the case is litigated. BOULTON, *supra* note 3, at 50.

13. The removal of a case from the lists is known as "standing out." The daily session with the Clerk of the Lists seems to be more of a mass attempt by clerks to have cases stood out than be kept in for hearing.

14. On one day a list officer in a London Crown Court had to find cases for a "Red Judge" (*i.e.* a High Court judge). He noticed a rape case and listed it,

the Bar is that briefs are returned at the eleventh hour and the client does not then have the counsel of his choice.¹⁵ The main cause for returning briefs is the uncertainty of the listing procedure which results from difficulty in estimating the lengths of cases. To ensure his chambers are kept continuously busy, the clerk must keep a "contingency fund" of cases and then be prepared to sacrifice some of them as required. The underlying problem is structural, inasmuch as the Bar forbids the formation of partnerships, and this places undue pressure on the sole practitioner.

Relations and Reputations

Barristers' clerks constitute their occupational lives on the basis of relationships formed within the legal profession.¹⁶ Those that are formed with other clerks are characterized by the performance of favors, granted on the prospect of future returns of favors. This can be compared with stock market transactions. In order to deal in futures, a speculator buys in the present without using his own money, in the hope that at the end of the account, prices will have risen sufficiently to provide him with a profitable outcome. Relations between clerks are constituted along the lines of the specialism of the chambers. Thus Chancery clerks interact predominantly among themselves, criminal law clerks with each other and so on. This type of behavior leads to a "gang" mentality with severe limits placed on the social space of a clerks' work. For example, if a clerk of a common law chambers were to arrive at a High Court Chancery listing session, the majority would place obstacles in his way. The purpose of such obstruction is to reinforce the idea that the clerk of common law is an interloper and that he might be better advised to seek a Chancery clerk to mediate for him. Despite such apparent territorial definition, the degree of cooperation between clerks is high. Without such cooperation the tasks of the clerk could not be carried out successfully.

The reputations of clerks and their chambers are natural concomitants. But the question is raised: in what ways are the reputations of each measured by others? The significant others here are

ignoring the barrister's clerk's protest about the inability of his governor to defend the case at that time, and the brief had to be returned.

15. A. BOTTOMS & J. McCLEAN, *DEFENDANTS IN THE CRIMINAL PROCESS* (1976).

16. See generally J. BOISSEVAIN, *FRIENDS OF FRIENDS* (1974) and J. BOISSEVAIN & J. MITCHELL, *NETWORK ANALYSIS: STUDIES IN HUMAN INTERACTION* (1973) (discussion of similar concepts and theories).

solicitors, barristers, and clerks, each taking a slightly different perspective on the problem. Solicitors are concerned primarily with the efficiency of the chambers' administration and counsel. Barristers evaluate their colleagues through observation of their performative skills, the membership of their chambers, and in extreme instances, either good or bad, consideration is given to the qualities of the clerk. Clerks take an eclectic view—eminence of counsel, the quality of the firms of solicitors that brief the chambers, and the efficiency and cooperation of the clerk. Notices of retirements and obituaries of senior clerks in the Barristers' Clerks' Association Annual Reports provide indicators of the evaluation processes of clerks. For example,

In the Annual Report of 1954 we wrote "Mr. Ernest Thompason Young, who retired at Christmas is one of the most outstanding of our colleagues and one to whom we all owe a great debt. A man of great character, his dignified bearing and the complete trust he enjoyed of Bench and Bar has done a tremendous amount to enhance the status of Barristers' Clerks. He was a founder, prime mover and adviser of this Association. It was to him that individual Clerks took their troubles knowing that their confidences were secure and that the valuable guidance they received would be sound and wise." In 1956 Ernest Young died. Thus passed one of the greatest of our colleagues by whose example and work, the status of our profession was raised to higher levels; whose passing will be deeply regretted by us all, but whose memory must never be allowed to be extinguished.¹⁷ Mr. Edward Hellman, clerk to Mr. Stanley Price, Q.C., retired in the autumn of 1967, having been some 50 years in the Temple. He commenced in the Chambers of Mr. C. F. Vachell, K.C., in 1917 on his 14th birthday. He became Senior Clerk at the age of 22 to Mr. T. Carthew and after an interlude in Civil Defence joined the chambers of Mr. G. B. H. Streatfield, K.C., and then became Senior Clerk to Mr. Harry Hylton-Foster, K.C., who later was appointed Solicitor-General and afterwards the Speaker of the House of Commons. During his long career as a Barrister's Clerk, Edward served many leading members of the Bar, including Sir Reginald Manningham-Buller, Q.C., the Attorney-General, and who later became The Lord Chancellor, Sir John Hobson, Q.C., the Attorney-General. Also Mr. R. W. Payne, Q.C., Mr. Geoffrey Veale, Q.C., and Mr. J. R.

17. ANNUAL REPORT OF THE BARRISTERS' CLERKS' ASSOCIATION 20 (1956).

Cumming-Bruce, the then Treasury Counsel, all of whom were appointed to the High Court Bench and Mr. Allistair Sharp, who is now a County Court Judge. We congratulate Edward on his outstanding career and wish him a long and happy retirement.¹⁸

Not all clerks are so highly esteemed. One clerk, who was well liked by his colleagues, ran, as a sideline, a show-business agency, which was not favorably regarded by the other clerks. Another clerk with a betting-shop business was similarly deprecated. Other means of evaluation are also brought into play, such as rumor and gossip,¹⁹ and observation as to the possible turnover of business of a set of chambers. There is considerable envy between clerks at each others success. A clerk needs to be aware of his competitors' and cooperators' business relationships because he is continually on the outlook for the "main chance," and if the possibility of improving his chambers' business or personnel, or his own position occurs, he will take it.

The Career Pattern of Clerks

Outside every set of barristers' chambers is a signboard listing the names of the barristers, the list, if ordered, being according to seniority. At the bottom of the list appears the name of the barristers' senior clerk.²⁰

There is no orderly career structure within clerking as one would expect to find in other professions.²¹ Advancement depends almost entirely on the personal ability of the clerk to perform his tasks and manipulate his network of contacts. Ideally, the basic progression in a typical clerk's career is from the "young boy" to the junior clerk, and ultimately to the position of senior clerk. Some clerks, especially in a new set of chambers, may begin their careers as senior clerks. Today, however, as part of the effort to professionalize the clerk's role, the Barristers' Clerks' Association is trying to

18. ANNUAL REPORT OF THE BARRISTERS' CLERKS' ASSOCIATION 14 (1967).

19. Cf. Paine, *What is Gossip About: an alternative hypothesis*, 2 MAN 278 (1967).

20. Although the chambers may employ as many as five or six clerks at different levels of seniority, only the senior clerk is accorded recognition to the outside world.

21. Becker & Strauss, *Careers, Personality, and Adult Socialisation*, 62 AM. J. Soc. 253 (1956).

impose a structured order on the clerk's career.

The "young boy" is generally a young man who has recently left school. Usually he is a youngster who has had no specific plans for a career. His entry into the profession is made through the assistance of friends and relatives who are already connected with the legal profession. One junior clerk was introduced into the Temple by a cousin who was a solicitor's litigation clerk; another entered as a result of working in his uncle's (a senior clerk) chambers during his school holidays. As long as they remain "boys," they are assigned the least interesting job tasks, such as making tea, carrying messages and the barrister's bag and books. A characteristic morning sight in the Temple, and in the other Inns, is that of "boys" walking or rushing to the Law Courts with bundles of law reports. One junior clerk vividly recalled having to carry about eighty law reports and legal textbooks to the Royal Courts of Justice, a regular duty he hated.

A "boy" may have to endure such work for as long as eighteen months before he is advanced. During this period the senior clerk usually assumes a paternal relationship with the boy. Most clerks pointed out how important the training was they received from their first senior clerk. One stated that when he first joined a set of chambers his senior clerk gave him some money to buy a jacket, and virtually acted as a surrogate father to him. Another clerk, on joining his first set, was told by his senior clerk, "You are low in the hierarchy here, but [pointing at a pupil barrister] *he is lower than you.*" Through his relationship with the senior clerk, the boy becomes familiar with the complicated, even paradoxical, status relations which exist in the legal profession. On the one hand he sees that the barrister has a higher status than that of the solicitor. On the other hand, he sees his senior clerk exercising influence over barristers. Furthermore, despite the lower status of the solicitor, he is the one who supplies the business for the chambers.

Vertical promotion from "boy" to senior clerk within the same set of chambers is rare. In order for a clerk to advance he must move between sets. Several clerks described their reluctance in leaving their first set of chambers. Usually they moved only because their senior clerk advised them to take an opportunity for advancement.

When a boy is promoted to the position of second or first junior clerk he has an increasing amount of contact with solicitors, and his responsibilities are gradually increased. In a large, well-staffed set the difference between second and first junior may be marginal.

Senior and junior clerks generally divide the work between them according to its "outdoor" and "indoor" content, with the senior clerk deciding on work assignments. "Indoor" work involves the handling of clients over the telephone and maintaining the diary; "outdoor" work involves the listing of cases and promoting good social relations within the profession. The latter requires entertaining other clerks, having confidential chats with "governors" and maintaining good relations with solicitors and their clerks.

A few clerks qualify by taking an examination which covers court procedures and the etiquette of the legal profession, but practical experience is seen to be the best qualification. Even the president of the Barristers' Clerks' Association, the organization attempting to introduce the examination, extolled the virtues of experience in his inaugural lecture,

Those who survived and found themselves selected as senior clerks had had the additional advantage of being thrown into daily constant contact with members of the Bar, men and women of erudition and ability whose professional conduct is at the highest possible level. What better University could a barrister's clerk have or desire?²²

Successful junior clerks are generally rewarded by the addition of a commission of one or two percent of the gross fees to their salaries and other fringe benefits. For example, one clerk had a telephone system installed in his house, paid for by the chambers. Although first junior clerks do virtually the same tasks as a senior clerk does they do not carry the final responsibility. Those junior clerks who feel that they have served their apprenticeship long enough begin to search for a set of chambers where they can be appointed as senior clerk. Today, such opportunities are rare because there is a tendency for chambers to grow in size rather than in number. A prospective senior clerk may wait for an established set requiring a senior clerk or assume the risk of attaching himself to a new set, one with more "tail" (inexperienced barristers) than would be considered ideal.

Clerking a new set demands keen entrepreneurial and managerial skills. Not only must the clerk generate work for the chambers, but, inevitably, he will be faced with one or more barristers in the

22. Inaugural Address by the President of the Barristers' Clerks' Association (1971).

set who are unsuccessful. If the chambers are to progress, such barristers are encouraged to move. This poses a delicate problem for the senior clerk. Various methods are available to him. He can openly advise a barrister that a change of career would be beneficial for his welfare—advice not usually taken. The clerk can appeal to the head of chambers. Usually, however, he attacks the problem more subtly. He may delve into the barrister's background in order to find facts which might be interpreted in an unfavorable light. For example, he may try to discover some error committed by the barrister which could lead to professional disciplinary action and thus would reflect adversely on the chambers. The most common and successful method, however, is for the senior clerk to control the work supply. Most junior barristers depend on the clerk to give them work from the considerable amount which comes to the set that is not directed to any particular barrister. The strict limitation on the flow of work to a barrister generally provides a strong incentive for him to quit the set, if not the Bar.²³

The larger, more established sets of chambers demand more from the clerk in the way of administrative talents. In this type of set there is a marked tendency towards bureaucratization, characterized by an increased specialization of functions. For example, in one large commercial set with seven Queen's Counsel, the senior clerk devotes his energies to the silks and to the overall supervision of the chambers, the junior clerk oversees the junior counsel and the day to day affairs of the chambers. In addition, the first junior assumes the responsibilities of the "outdoor" clerk, delegating the "indoor" tasks to the second junior.

The financial risks involved in becoming a senior clerk are not so great as those assumed by a barrister when taking silk. Taking silk is an irrevocable step, whereas an unsuccessful senior clerk can revert to the status of junior clerk without being unduly stigmatized. The normal arrangement has been for a new senior clerk to be given a guaranteed salary until the turnover of the chambers has increased significantly. At this point, the senior clerk is transferred from a salary to a commission basis, usually ten percent of the earnings of the set. Clerks prefer, however, to begin their work in a chambers on a percentage basis and the trend today is for senior clerks to ask for this arrangement when joining a set. There are, of

23. Of those who leave the Bar for these reasons, some enter the Civil Service, business or university teaching.

course, considerable financial risks involved and junior clerks, hoping for an advancement, save their money to cover the first period of employment in a new set on a commission. Starting in a set of chambers on a percentage commission basis protects the clerk later if the finances of the chambers are not going well and the barristers try to reduce the percentage commission of the clerk. He can point out to them that he began his work with them on the basis of a commission and was willing to accept the risks involved and thus resist their efforts to reduce his percentage commission.

In the past when a clerk served only two or four barristers, it was a common feature of legal life for a respected principal on appointment to the Bench to ask his clerk to join him as his judge's clerk. Today, the relationships between principal and clerk are not so close, and the financial disincentive in taking a judge's clerkship is considerable.²⁴ In fact the only attraction of the post is its pension system. Those clerks who have not been successful enough to save for their retirement are likely to accept the opportunity to become a judge's clerk.

The career of a clerk is fairly insecure. The initiation stage is long and tedious. While the junior clerks earn a secure salary, it is modest and must be abandoned if an individual aims to reap the financial rewards of a senior clerk; such opportunities are decreasing in number. Success as a senior clerk today depends not only on personal skills, but on the abilities and reputations of the barristers in the set. If the set loses a successful barrister, the senior clerk's success suffers. Also, the clerk's percentage may be reduced. The career of the barrister's clerk, to paraphrase Crump, requires "adaption and survival."²⁵

Clerks' Relations with Barristers

The relationship of barrister to clerk is a complex amalgamation of employee and agent, the clerk often playing both roles simultaneously, but the key link is the commission form of remuneration. Boulton gives the impression that the clerk is an efficient retainer who relieves the barrister of the tiresome, ungentlemanly necessities of professional life, thus facilitating the barrister's complete concentration on the law.²⁶ The picture formed is one of a close, one-

24. The salary scale of a judge's clerk, over 33 years old, ranges from £ 3829 £ 5165.

25. S. CRUMP, *THE ENGLISH BAR: ADAPTION AND SURVIVAL* (unpub., n.d.).

26. BOULTON, *supra* note 3.

to-one relationship between clerk and barrister. This may have been true in the period before 1914, but today it is manifestly not true. There are sets of chambers with over thirty members and as many as twelve or thirteen pupils.²⁷ The clerk of one such set remarked that, "every year we export virtually a whole set of chambers because we cannot absorb all our pupils." In this type of situation the clerk is similar to a high-level administrator in a bureaucratic organization.

Clerks and barristers have, as one clerk put it, "a love-hate relationship." This relationship is characterized by tension caused through conflicts of interests. One clerk pointed to the differences when he stated that, "I look for quantity of work, then I can worry about quality;" his aim was to secure a high turnover of business, which might be contrary to the desired choices of barristers who wished to specialize in a particular area of legal work. Clerks are able to exercise some power over their counsel because of their control over the administration of the chambers. This has been referred to as the "power to control the agenda." Clerks regulate the barrister's diary, collect his fees and refer work to him. For example, a barrister who wished to specialize in welfare law, by concentrating on paperwork rather than advocacy,²⁸ met with strong disapproval from his clerk who preferred to see his "governors" in the courtroom where advocates are more visible to other members of the legal profession. Moreover, paperwork is not as lucrative as advocacy, and to the clerk it is a necessary nuisance to be attended to at lunchtimes, weekends, and during law vacations.

Clerks justify their use of power over the barristers (which they term 'influence') in similar terms to the following remarks:

I tell you barristers need clerks because they [the barristers] have got no common sense, and that is what a clerk's got. These barristers go to university and they get pumped full of law through one ear and their common sense comes dripping out the other side. [This was spoken replete with gestures—fingers in at one ear and the others waving away from the other.]

One clerk, a junior in a busy common law set of chambers, was

27. The size of a set of chambers can be ascertained from *The Law List*, but no records are kept of the distribution of pupils.

28. A barrister's work is roughly divided into two areas: court work and paperwork. Court work consists largely of advocacy; paperwork involves the drafting of opinions, particulars of claim, etc.

annoyed that a barrister agreed to a date for a hearing with the court without referring the matter to him. The clerk explained: "Some barristers do this. They're frightened to say anything in court; they expect us to do it all. Now I've got to move it; this is the kind of thing they do to us." Also, the clerk would be concerned about his standing with the list officer as a result of this incident. The clerk's exercise of power, then, is economically motivated, and therefore, conflicts with the espoused altruistic, service orientation of the Bar.

Members of Chambers usually prefer to choose their potential members from their own stock of pupils. A major factor in such choices is the opinion of the clerk. From the clerk's standpoint the key trait for a successful barrister is the "right personality," one that is forthright, masterful, and persuades solicitors to rebrief the chambers. Clerks value this type of personality more than intelligence. In fact, academic brilliance is sometimes regarded as a positive drawback for a career at the Bar. Recognizing these potential "achievers" among the pupils is one of the skills a clerk must develop in order to succeed. Few clerks, when interviewed, admit making mistakes in this direction, preferring, instead, to state that the less successful members of the chambers had been thrust upon them by the head of chambers. Occasionally, members of a set appeal to the clerk to help them explain, advise, or persuade one of the barristers that his chances of survival at the Bar are minimal and that he [the barrister] would improve his position by taking a less rigorous job. Goffman describes this process as "cooling the mark out," that is, the clerk must redefine the barrister's aims whilst preventing any loss of his self-esteem, or, at least, minimizing it.²⁹ The clerk does not always achieve this, and one or all of the methods mentioned above may be used. An example of "cooling out" is to be found in the predicament of colonial Queen's Counsel who must revert to junior counsel status on returning to practice in England. One barrister who had failed three years in succession in his application for silk complained bitterly of the iniquities of the system to his clerk. The clerk was aware, however, that this barrister was not of the standard required for silk, but he cushioned the barrister's failure on the grounds that the Lord Chancellor always refused to nominate silks from the ex-colonial ranks because he would be inundated with applications. This rationale not only mollified the barrister's feelings, but preserved his self-esteem as well.

29. Goffman, *On Cooling the Mark Out*, 15 *PSYCHIATRY* 451 (1952).

To complete this description of ambivalence which characterizes the clerk-barrister relationship, the language of the interactants deserves mention. The form of the language maintains the status differences between the actors. Barristers, regardless of rank or age, address all clerks by their first names. Conversely, clerks address barristers as "Sir." A junior clerk, describing his initiation into the Temple ten years earlier, remembered the rules laid down by his first senior clerk: "When I call someone by their name, you call them Mr. So and So; when I call someone Mr. So and So, you call them Sir; when I call someone Sir, you don't speak to them." The nomenclature of address does not, however, always indicate the true locus of power in the relationship.

Clerks' Relations with Solicitors

The barrister's clerk is the main link between barrister and solicitor. All communication between them passes through him; in a sense the clerk acts as broker for the solicitor, putting him in contact with the correct counsel. In fact, the Barristers' Clerks' Association emphasizes the clerk's role as agent/broker in order to justify the existence of the clerk's fee.

The clerk's aim is to develop a large number of solicitors that he can call the "chamber solicitors," that is, those relying almost entirely on his chambers for counsel. The large well-established sets of chambers are serviced by sufficient numbers of solicitors; lesser chambers must compete among themselves for solicitors. There is, however, an informal ethical code governing clerks' behavior in this respect; that is, the poaching of another clerk's solicitors is tantamount to touting, and clerks are only permitted to obtain business from uncommitted solicitors. Exceptions occur, as in the case of a young senior clerk who relies mainly on "returns" (surplus briefs from another set). Any infringement of these codes results in the imposition of sanctions, such as the expulsion of the offender from the general network of barristers' clerks.

In order to maintain the solicitor's commitment to the chambers, the clerk must offer efficient service, which means the performance of favors for the solicitor. One clerk told of occasions when a solicitor would telephone his home at three a.m. and expect him to find a barrister for that morning—"I always did, too." Another clerk considered it necessary to drive to the north of England from London to chat with solicitors in order to patch up relations after having failed to provide them with two Queen's Counsel from his

own chambers, having had to refer others. As one clerk expressed it, "It is *very* important to build up a good relationship with the solicitor. It takes months or even longer. It's done through mutual respect, obligation and trust."

Fees

In common law-crime sets of chambers the preponderance of legal aid work has reduced the level of fee negotiation between clerk and solicitor. These fees are fixed after the conclusion of the case when the solicitor submits his bill for taxation. The clerk is able to appeal if he believes the barrister's fee is too low, but few do so because the expenditure of time and energy on such an appeal is generally considered uneconomic in the light of the probable return. This leaves the fees of private cases to be negotiated directly with the solicitor. The clerk must set his fee at such a level that the solicitor is not deterred from rebriefing the chambers, but, at the same time, the clerk must educate solicitors in the market rates for barristers. A clerk goes all out to obtain as high a fee as possible when his silks are briefed. Then the amount of the fee becomes a matter of prestige among clerks and contributes towards raising the status of his chambers.

Collecting fees from solicitors can be a delicate task. Every set of chambers has a backlog of unpaid fees collected over several years. Those chambers with accounts' clerks regularly submit their fee notes; on the other hand, chambers in which the senior clerk alone is responsible for the collection of fees are not as efficient because the clerk does not have time to attend to the task. More important, clerks do not want to antagonize solicitors by repeated demands for payment.

Conclusion

In a general lecture to barristers' clerks, the secretary of the Barristers' Clerks' Association said, "[T]he barrister's Senior Clerk is in a sense, separately employed by each barrister, and also in a sense not employed by any." The clerk occupies the interstices of the legal system. His knowledge of listing procedures, fees, and the personnel of the legal profession is crucial to the operation of the litigation process. One can draw analogies with the secretary in business or in the administration of a university. The clerk's world is the subterranean area of the law that is invisible to most people.

Moreover, there is a strong inclination among clerks to preserve this situation, the mystique and intricacies of the legal system is the stuff of their work from which they derive their income. Their position in the legal system imposes some conflicts of interests on them, which places them in a semiautonomous position *vis-a-vis* their employers, the barristers. Such a position is maintained by the notion of the clerk's fee. The fee supplies the image of the practitioner being hired for a specific task as opposed to the constant employment of the salaried employee. The potential financial rewards of the barrister's clerk permit him to achieve many of the symbols of middle-class status despite his lack of education.

