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Team 1 Presentation – September 30, 2014

Belly Up To The Bar –

**A Comparison of British and American Advocacy**

Team 1

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**A Comparison of British and American Advocacy**

**July 2014 Amity Visit to the Inner Temple**

Organized by the American Inns of court upon the invitation of the Honourable Society of the Inner Temple, July 7 – 11, 2014

22 participants + guests representing the AIC Foundation Executive Board and 22 AICs across the USA; incl 3 Federal Judges, 3 State Court Judges, 1 mayor and various other federal attorneys, and one former Temple Bar Scholar now a Deputy Solicitor General in DC

Headed by Fifth Circuit Judge Hon Carl E. Stewart

2 Reps from Houston Inns, NLH + William R. Peterson (BeckRedden LLP) Garland R. Walker AIC

Based upon a Declaration of Friendship between the IOCs and the AICs signed in 1988 by Chief Justice Warren E. Burger; regular organized visits between the organizations; At least the second visit of the AIC to the London Inns (previously the Middle Temple hosting)

The doors of the 4 IOCs for lunch dinner and the use of the libraries is open to all members of an accredited AIC

Avenue for exchange of ethical and professional questions of mutual interest – in that the AIC and IOC share a goal of scholarship and mentoring of legal advocates; but differ in their relationship to economic life, professional policing in a global age;

USA being much larger a landscape with a written Constitution and at many different legal jurisdictions and bar associations; the UK operating with an unwritten constitution, a historical solicitor/barrister practice distinction, and little day to day contact between the London Inns and the circuit Bars in “the provinces”

### **English Inns of Court**

**Inn concept -**

Cross between a professional club or “guild” and a training organization

For barristers in London, the Inns are also the physical setting in which their law world is centered, specifically their bar group, their chambers, their apartments, and their recreational and socializing activities are based.

**The Four Inns of Court – The Honourable Societies of . . .**

Inner Temple Inn of Court

Middle Temple Inn of Court

Lincoln Inn

Gray’s Inn

**Inn History**

Precursors to legal universities for training in the law and legal skills

Inner and Middle Temples were in the area of the London base of the Knights of the Military Order of the Temple of Solomon in Jerusalem (the Knights Templar); when the King became the head of the Anglican church, the Temple area and the church was given to the law societies to keep and protect.

Lincoln ‘s Inn and Gray’s Inn seem to have been named for the noble benefactors that established their London locations

Each Inn has its own chapel with a pastor who, in addition to presiding over church services, has pastoral responsibilities for Inn members of all religions or none!

**Inn Organization**

Organization:  Treasurer/sub-treasurer, Reader /sub-reader line of leadership v. President, Vice-President, Treasurer, etc.

Physically composed of a Hall for dining, Church or chapel, administrative offices, library, gardens, and multiple “chambers”; often including residences, pubs, legal bookstores, legal clothing stores and hotel facilities

Connection to church - Each Inn has its own chapel with a pastor who, in addition to presiding over church services, has pastoral responsibilities for Inn members of all religions or none!

**Legal Education**

##### **LAW AT UNIVERSITY (law school)**

There are two different ways of getting the necessary qualifications to enter the field of law in the UK. One route is to study any subject at University other than law (science, engineering, history, economics, etc.), then do a one-year Law conversion course and finally complete the relevant vocational course to become a solicitor or a barrister. The other route is to study “Law at University,” typically for three years, and then take the relevant vocational course.

Since a degree in other subjects usually take three years to receive, the conversion route takes an extra year due to the extra “one-year Law conversion course.” It is a hotly debated topic as to which route future employers prefer, but statistics indicate that about half the successful applicants to the legal profession have taken the conversion course and the other half has studied “Law at University.” It is clear that studying a subject other than law and then taking the conversion course is a perfectly legitimate route to become a lawyer.

Another interesting fact is that a significant number of people who study Law at University do not become practicing lawyers. It is extremely common for students to attend Law at University for the sole purpose of aiding in their pursuit of other professions. Also, if you are interested in studying a subject other than Law at University, you can often change to Law at the end of your first or second year and study Law at university for two years, during which you study 10 papers (written exams), seven of which are the foundation subjects.

**Seven Foundation Subjects**

These are the required courses which must be taken prior to taking the vocational class for either a Barrister or a Solicitor. If you take the conversion course route, you take all of these in one year. If you take Law at University, these courses are split into three years.

* Public Law (including Constitutional Law, Administrative Law and Human Rights)
* Law of the European Union
* Criminal Law
* Obligations (including Contract, Restitution and Tort)
* Property Law, and
* Equity and the Law of Trusts

**Mature Students**

If a law school applicant is over the age of 21, they are classified as a “mature student.” For mature students, some of the usual formal requirements are waived and applicants will be evaluated on their past experiences in life, both educational and otherwise.

**Interesting statistics for Cambridge Law**

* 220 Graduates per year
* 75% will go on with the legal profession
* Only 10% will become barristers

##### **AFTER LAW AT UNIVERSITY**

After a law degree is received, the future solicitors and the future barristers split into different paths:

**Solicitor Training:**

After a degree is received, one then needs to complete the Legal Practice Course (LPC) to obtain the required set of legal skills needed to work as a solicitor.

After the LPC, a training contract must be completed, lasting two years if done full time or four years (on the basis of two and a half days per week) part time. Members of the Training Contract Advisory Service (TCAS), a specialist team of LPC tutors, will help students with the process of identifying suitable firms and applying to them, as well as providing help and advice on interview skills.

The training contract is a period of practice-based training to obtain practical experience and learn how to apply the skills developed in the Legal Practice Course. It is most often undertaken in a solicitors’ firm although other options are available such as in the in-house legal department of a local authority or company. At least three areas of law will be covered during this time, with the trainee spending a sustained period (usually known as a “seat”) on each. Trainees will deal with clients and learn how to handle their own cases but will be closely supervised.

During the training contract, the Professional Skills Course (as specified by the Solicitors Regulation Authority) must also be successfully completed. This requires the equivalent of 12 days of full-time attendance plus some assessment, and covers advocacy and communication skills, financial and business skills, and client care and professional standards. It will build on material already covered in the LPC.

Once these requirements have been fulfilled and certified, you can apply to the Master of the Rolls to be “admitted to the Roll” (i.e. join the list of all solicitors of the Supreme Court). This will then allow you to apply for a practicing certificate as a solicitor.

**Barrister Training:**

After a degree is received, one then needs to complete the Bar Professional Course (BPTC), one year full-time or two years part-time.

Before a future barrister begins their Bar Professional Training Course (BPTC), they must join one of the four historic “honourable societies,” known as the **Inns of Court**. They must apply to join an Inn in the same year that you begin the BPTC. The four Inns are: Lincoln’s Inn, Inner Temple, Middle Temple and Gray’s Inn.

The Inns continue to hold exclusive rights of admission to the Bar. This process, known as “Call to the Bar” or “Call,” occurs after you have successfully completed the Bar Professional Training Course (BPTC) and have undertaken a number of professional exercises in the form of twelve “Qualifying Sessions” at your Inn. The Inns provide a great deal of valuable financial assistance for the various stages along the route to becoming a barrister.

After a student has completed their Vocational study requirements, a pupillage is necessary. One year spent in an authorized pupillage training organization (either barristers’ chambers or another approved legal environment).

Selection to a pupilage position often requires mandatory attendance at twelve (12) “qualifying dinners”.

**Employment Relationships/Conflicts Among Barristers and Solicitors**

Lawyers took over the Inner and Middle Temples from the Order of Knights Templar. Lincoln's and Gray's Inns grew from association with Henry de Lacy, Earl of Lincoln, and the de Gray family. From the 17th century, the right to practice as an advocate in the Royal Courts was restricted to members of the Inns. *See* History of the Bar, http://www.barcouncil.org.uk.

Barristers were subcontracted by solicitors to act as oral advocates in court. They have been predominantly self-employed, and hold no fiduciary duty to their chambers other than to pay monthly rent. *See* Steven C. Bennett and Pia Dutton, *Modern Distinctions Between the U.K. and U.S. Commercial Legal Systems*, The Practical Lawyer, April, 2014, at 35.

About 80 percent of barristers are self-employed. The rest are employed in industry, commerce, or central or local government. Self-employed barristers work in offices called "chambers." Permanent barristers' positions in their chambers are described as "tenancy." *See* What do Barristers Do, http://www.barcouncil.org.uk.

Barristers employ clerks to organize their bookings and provide messaging, telephone, and accounting services. Clerks schedule barristers' time, build relationships between solicitors, clients, and barristers, market and promote the chambers and the individual barristers, keep accounts, post invoices, and collect fees. *See* Barristers' Clerk, http://growingambitions.tes.co.uk/printpdf/2294

The distinctions between barristers and solicitors have begun to erode. In 1994, solicitors were granted the right to conduct basic advocacy in the court. *See* Julia Llewellyn Smith, *Are Britain's barristers living on borrowed time?*, The Telegraph, August 20, 2013.

In 2004, the rules governing access to the bar were relaxed to allow a greater degree of public access to barristers (i.e. without engaging a solicitor). However, there are limits on the work a barrister can do. *See* Public Access, http://www.barcouncil.org.uk.

Barristers cannot conduct litigation, which means that they cannot issue proceedings, applications, or notices of appeal; acknowledge service; sign a statement of truth on behalf of a client; receive or handle client money, including paying court fees; instruct an expert witness; or find witnesses. *See* Direct Public Access-A Chance For Barristers and Solicitors to Work Together, Not Against Each Other, [http://www.legalfutures.co.uk/latest‑news/direct‑public‑access‑a‑chance‑for‑barristers‑and‑solicitors‑to‑work‑together‑not‑against‑each‑other](http://www.legalfutures.co.uk/latestnews/directpublicaccessachanceforbarristersandsolicitorstoworktogethernotagainsteachother).

### **Trial and Discovery Differences**

# Jury trial

No jury trial in civil matters.

Criminal trials - jurors picked at random-first 12 in the box.

# Scope of Discovery and Admissibility of Evidence

The English system has a broad process for introduction of documents and a narrow process for inspection of documents.

# Hearsay

In England hearsay evidence of any degree is admissible in civil proceedings.

Only requirements: (i) statement made by a competent witness, (ii) leave of court granted, and (iii) notice given.

In England, the judge is trier of fact so motions in limine not used.

# Discovery and Depositions

England uses witness statements instead of depositions.

Depositions are rarely used in England. Court permission and 21 days notice are required.

Instead of depositions, witness statements drafted by attorneys are exchanged. This is used instead of the oral case in chief much like proffers in bankruptcy. Much effort goes into drafting these statements in the best light possible. The live cross examination of the witness is what is key.

**Document Discovery is Limited in England - No Fishing Expeditions.**

Standard disclosure requires a party to disclose any document that helps or hinders the case of any party to the proceeding. The old test of disclosing a document that enables pursuit of a reasonable avenue of inquiry was replaced 15 years ago.

The process requires a huge amount of sifting by the disclosing party but results in significantly fewer documents being disclosed.

If a party believes that there are specific documents that have been withheld, it can apply for “Specific Disclosure.”

The primary responsibility for full disclosure rests with the lay client. The duty of disclosure however does not relate to the actual production or inspection of the relevant documents. A simple listing procedure is used for disclosure and this list details whether documents are contested for inspection, the reason for the contest and whether the documents are available or outside the client’s sphere of control. Written notice must be sent to the other side to actually see the documents.

Discovery, like all other aspects of the English system, is subject to the Overriding Objective.

**Overriding Objective**

The Overriding Objective sounds a lot like the goals of the American Inns of Court.

The 'overriding objective', contained in the Civil Procedure Rules, is designed to guide civil courts in everything they do. It states that the courts must deal with cases justly, in a way which is proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party.

Parties are expected to co-operate with one another and with the court to further the overriding objective. They are actively encouraged to settle disputes without resorting to litigation by exploring alternative dispute resolution. The courts may even suspend proceedings for a period to allow settlement discussions or ADR to take place.

Dealing with a case justly includes, so far as practicable:

Ensuring that the parties are on an equal footing; saving expense; dealing with the case in ways which are proportionate to the:

amount of money involved;

importance of the case;

complexity of the issues; and

financial position of each party;

Ensuring that it is dealt with expeditiously and fairly.

An example of this is where one party has instructed a big firm of expensive solicitors and the other party could only afford to instruct a small firm. In order to ensure that a level playing field is achieved, the court may allow the smaller firm more time for disclosure or direct that the larger firm prepares the trial bundles.

Solicitors and their clients have a positive duty to help the court to further the overriding objective. Parties and their solicitors must fulfill their duty by:

Co-operating and assisting the court to get to the crux of the dispute. Any party who obstructs the overriding objective will be penalized.

Dealing with the dispute in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of the parties.

Taking a reasonable approach to the dispute -- don't go "over the top". (Although the U.K. has a loser pays, fees may be discounted if the court finds a disproportionate amount of work was done.)

Clients need to take an active part in their case and give their solicitor immediate assistance when asked. Many procedural steps must be completed within tight timescales, e.g., 48 hours. Failure to adhere to the strict timelines results in costs penalties.

# Statement of Truth

Signing off on documents with a 'Statement of Truth'. Failure to sign will result in the claim or defense being struck out. If it is later deemed that the party lied on a document, they may be imprisoned for contempt of court.

Source:

Steven Bennett and Pia Duncan, *Modern Distinctions Between the U.K. and U.S. Commercial Legal Systems*, The Practical Lawyer, August, 2014, p. 33.

In April, 2013, rules regarding electronic discovery were issued. This requires the client to complete an Electronic Documents Questionnaire with a Statement of Truth. The goal is to get an agreed electronic discovery plan consistent with the overriding objective. Source: *Practice Directive 31B – Disclosure of Electronic Documents*.

### **Advocacy**

Courtroom orientation + procedure

            Opponent tables not separated; Support staff located behind primaries; observers in             galleries

            Appellate bench is not elevated

            Juries seated w/o *Voir Dire*; paid more money to serve

            Less objection

            CCTV photos and phone logs common

Appellate procedure

        Skeleton brief v. full briefing; oral tradition

            Long arguments and rebuttals

            Television coverage of Supreme Court arguments

**Legal Court Dress**

**Traditional Court Dress in England and Wales**

Until 2008, traditional court dress in England and Wales consisted of wigs, robes, waistcoats and barrister bands. Traditional court dress was worn in all hearings in open court in all Senior Courts of England and Wales and in county courts. The judge could dispense with court dress when the weather was hot or when the dress could intimidate children. Court dress was not required in hearings in chambers and in the magistrates’ courts. In the Supreme Court of the United Kingdom and in the Judicial Committee of the Privy Council, the judges have always worn conventional business attire, and the advocates could dispense with the traditional court dress if they all agreed.

**Brief History of Wigs**

In the early 16th century, the use of wigs by men was made popular again by Louis XIII of France, who started wearing wigs in his early twenties when he began to bald prematurely. The fashion served a practical purpose, because it was much easier to delouse a wig than your natural hair. When King Charles II was restored to the English throne in 1660, after being exiled in France, he brought with him French fashion, including the perukes or periwigs, which are wigs for men. Periwigs were shoulder length or longer and quickly became popular in the English court and became virtually obligatory for men with social rank.

In the 18th century, periwigs were powdered to give them an off-white color. The naturally white horsehair wig eventually negated the need for powder and made the periwig’s use in court dress practical. Periwigs became smaller and more formal, and several professions adopted them. In 1795, a tax was levied on hair powder of one guinea per year. This was the beginning of the end of the fashion for wigs and hair powder. However, the tradition of periwigs in a few legal systems survived.

**Wigs in Court Dress**

Wigs worn by barristers favor the style of the 18th century, specifically short horsehair wigs with curls on the side and ties down the back. Judges generally wore bench wigs, which are short like barristers’ wigs but in a slightly different style. For ceremonial occasions, judges and senior barristers who have been appointed Queen’s Counsel (called QCs) wear full-bottomed wigs. Wigs are very expensive and occasionally stolen and sold in the black market. There is a market for used wigs, particularly those used by renowned barristers. As a result, some wigs are very old and stink.

**Waistcoats**

Male barristers and solicitors wear a dark double breasted suit (or a single-breasted suit with a waistcoat) and black or grey morning dress striped trousers. The coat and waistcoat can be combined *into a single piece, which is a waistcoat with sleeves, known as a bar jacket or court waistcoat. Female* barristers and solicitors wear a dark suit. The QC’s black coat, known as a court coat, is cut in the style of the 18th century and the sleeve of the QC’s court coat or bar jacket has a turned back cuff with three buttons across.

**Barrister Bands**

All male barristers and solicitors wear a stiff wing collar with bands (two strips of linen about 5” by 1” hanging down at the front of the neck). Female barristers and solicitors wear bands attached to a collarette. Judges also wore a wing collar with bands.

**Robes**

Barristers and solicitors who appeared before a robed judge had to wear robes. Moreover, barristers and solicitors who do not agree otherwise must also wear robes before the Supreme Court of the United Kingdom and in the Judicial Committee of the Privy Council (even though those judges are not robed).

Junior barristers wore an open-fronted black gown with open sleeves, gathered and decorated with buttons and ribbons and a gathered yoke. Solicitors wore gowns of a slightly different style, with a square collar and without gathered sleeves.

QCs, judges in the Family and Chancery divisions, and judges in the Court of Appeal wore a silk gown with a flap collar and long closed sleeves (the arm opening is half-way up the sleeve).

High Court judges (of the Queen’s Bench Division), when hearing *criminal* trials in the winter, wore a scarlet robe with fur facings, a black scarf and girdle (waistband) and a scarlet casting-hood or tippet. In the summer, the judge would switch robes and wear a similar scarlet robe with silk facings. High Court judges, when hearing civil cases in the winter, wore a black robe faced with fur, a black scarf and girdle and a scarlet tippet. In the summer, the judge would wear a violet robe faced with silk, with the black scarf and girdle and scarlet tippet.

Circuit judges (in the County Courts or the Crown Court) wore a violet robe with lilac facings, with a girdle, and a sash over the left shoulder (lilac for civil cases and red for criminal cases).

District judges in magistrates’ courts sit without robes.

Members of the Judicial Committee of the House of Lords (“Law Lords”) and the Judicial Committee of the Privy Council have never worn court dress (even though those appearing before them do). They wear business attire. Since the creation of the Supreme Court of the United Kingdom, the Justices of that court, who are former Law Lords, have retained their tradition of sitting unrobed.

**Belly Up to the Bar – Group 1 Resources & Citations**

**Books & Nonperiodic Materials:**

Adam Kramer, Bewigged and Bewildered, A Guide to Becoming a Barrister in England and Wales (Hart Publishing, 2nd ed. 2011).

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Legal Futures, *Direct public access – a chance for barristers and solicitors to work together, not against each other*, The Practical Lawyer, April 2014, 36–38, *available at* <http://www.legalfutures.co.uk/latest-news/direct-public-access-a-chance-for-barristers-and-solicitors-to-work-together-not-against-each-other>.

Prof. R. Lawrence Dessern, *An American Professor in London*, The Bencher, March/April 2014, 16–17, *available at* <http://home.innsofcourt.org/news/featured-bencher-article-inns-old-and-new-a-historic-yet-thoroughly-modern-connection.aspx>.

H. H. Judge Peter Murphy, *Inns Old and New: A Historic Yet Thoroughly Modern Connection*, The Bencher, March/April 2014, 14–15, *available at* <http://home.innsofcourt.org/news/featured-bencher-article-inns-old-and-new-a-historic-yet-thoroughly-modern-connection.aspx>.

Steven C. Bennett and Pia Dutton, *Modern Distinctions Between the U.K. and U.S. Commercial Legal Systems*, The Practical Lawyer, April 2014, 35, *available at* <http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/TPL1404_Bennett_thumb.pdf>.