THE ENGLISH BARRISTER SYSTEM AND THE AMERICAN CRIMINAL LAW: A PROPOSAL FOR EXPERIMENTATION

James Duke Cameron*

Most American lawyers are aware of the English practice of dividing professional responsibility in the practice of law between solicitors and barristers. Oversimplified, the solicitor is the office practitioner and the barrister is the trial attorney.[1] Whenever it becomes necessary for a solicitor's client to go to trial, the solicitor investigates the facts of the case and researches the law. Then the solicitor selects the barrister he will ask to try the case. The relevant facts and law of the case are contained in a brief which the solicitor presents to the barrister. The barrister "takes the case" by accepting the brief.[2]

In the criminal bar, the Office of the Solicitor for the Metropolitan Police in London and the Director of Public Prosecutions outside London act as solicitors for the Crown.[3] Criminal cases are first investigated and researched by solicitors, but when trial is necessary, briefs are given to the barristers.[4] Two unique aspects of the British criminal system are noteworthy here. First, the barrister is independent of the solicitor's office and is not prevented from taking a brief to defend a person accused of a crime at the same time he is taking a brief from the

* Justice, Arizona Supreme Court. A.B., University of California; J.D., University of Arizona.

1. B. HOLLANDER, THE ENGLISH BAR: A PRIESTHOOD 18, 22 (1964); R. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 422 (7th ed. 1977). The solicitor may try cases in the county courts and other lower criminal courts, but not in the Central Criminal Courts (Old Bailey) or the civil courts. B. HOLLAND, *supra*, at 18.

2. D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS 109 (1973). An exception to this method of engagement is the dock brief. A dock brief is given to a barrister by the defendant personally in open court, and the barrister must take it unless there is a good reason to refuse. B. HOLLANDER, *supra* note 1, at 37-38, 51.

3. R. JACKSON, *supra* note 1, at 218-19.

4. *See id.* at 220.

police solicitor.[5] As a career trial lawyer, the English barrister undertakes prosecutorial and defense advocacy with equal ease and professional dedication, without doubts concerning conflict of interest. A second distinctive aspect of this system is the separation of trial and investigative functions. The English barrister does not investigate the facts of a case, though it is common for the barrister to interview a client in the presence of his solicitor.[6]

The complete independence of the English barrister from the day-to-day operation of the prosecutor's office, his non-involvement in the decision to prosecute, and his lack of responsibility for the initial or continuing investigation of the crime are in sharp contrast to the American prosecutor, who is often involved from the investigation stage[7] through the decision to prosecute and the trial of the case. The American prosecutor is likely to become emotionally involved in a case and have a personal interest in the outcome of the trial that is inconsistent with a detached and professional view of the proceeding. Equally, the American defense attorney, in representing a criminal defendant, frequently shares with the defendant strong emotions regarding the impending prosecution. Because of his role in the system, the English barrister is an independent, able, and ethical advocate, bringing to the trial a detached,[8] unemotional dedication to justice that is the hallmark of a professional.

Advantages of the English System of Criminal Trial Advocacy

The English barrister system as applied to criminal trials has certain advantages over the American system. Because the advocates it employs are trial specialists, only the most qualified advocates represent each side in a criminal case.[9] The use of specialists by both prosecution and defense gives the adversary system a better opportunity to

5. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION, at 20 (1971). Moreover, as barristers are sole practitioners and not members of firms, there is no potential intra-firm conflict of interest. *See* R. JACKSON, *supra* note 1, at 428.

6. *See* B. HOLLANDER, *supra* note 1, at 22, 33.

7. The American Bar Association Standards, while recognizing that it is proper if not desirable in some instances for a prosecutor to perform investigative functions, recommends that the prosecutor should have "a regular staff of professional investigative personnel. . . ." ABA STANDARDS, *supra* note 5, §§ 2.4, 3.1.

8. By detachment is meant an objective, unemotional attitude toward the client and the case, an attitude which is not inconsistent with the adversary role of the advocate. Counsel in his own mind and in the minds of others is not emotionally identified with his client. He is not representing a 'cause' nor engaged in ideological combat. Counsel is a professional retained to present the defendant's case as an advocate in the most persuasive and effective way he can. Detachment does not mean that the case is presented any less forcefully or persuasively than it would otherwise be. It does mean that the presentation is free of histrionics, irrelevant verbiage, and misplaced emotionalism. The style is in fact quite effective.
D. MEADOR, *supra* note 2, at 112.

9. See note 1, text & notes 4-5 *supra*.

achieve a just result based upon all the relevant evidence.[10] Specifically, the English system brings to the prosecution of criminal cases, particularly the difficult cases, seasoned and mature lawyers who are best able to prosecute. Since the police solicitor selects the barrister who will try the case, the appropriate advocate can be selected: The junior barristers can be briefed for the easier cases and experienced barristers can be preserved for the more difficult cases. Just the opposite occurs in the American system, which tends to rely entirely upon inexperienced lawyers, fresh from law school, to prosecute criminal cases. While these prosecutors have enthusiasm, they too often lack trial skills and maturity. Unfortunately, excessive zeal or unreasoned partisanship does not always serve the interests of justice.[11]

To overcome the imbalance of inexperienced criminal attorneys, some American jurisdictions, especially in the large metropolitan areas, have used salary incentives and civil service job protection in an attempt to attract career prosecutors and public defenders. The results are the advocate's narrow, one-sided approach to criminal justice and burn-out experienced by lawyers practicing for significant lengths of time as prosecutors or defenders. Public pressure on the prosecutor contributes to his exhaustion, and the failure to obtain dismissals and acquittals contributes to the weariness and dissatisfaction of the public defender.[12] By contrast, because of his varied exposure to criminal prosecution and defense work as well as civil work, the English barrister experiences a professional fluidity that prevents the burn-out of which both public defenders and prosecutors complain in our country.

The English system also gives the barrister a higher standing in the community. Americans tend to associate lawyers with their clients, ascribing the same moral standards to the defense lawyer as to his criminal client.[13] The barrister in England, on the other hand, is es-

10. In the introduction to the American Bar Association Standards Relating to The Prosecution Function it was noted:

> Many qualified observers of our system of criminal justice who have also studied the British system have commented on the importance of the professional independence enjoyed by the barrister assigned on an ad hoc basis to represent the prosecution. Since he is also likely to appear for the defense, and this system of interchange of roles has long prevailed, traditions have grown which blunt excessive zeal without impairing, and which indeed improve, the quality of advocacy.

ABA STANDARDS, *supra* note 5, at 20.

11. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 1.2, at 171, 174-75 (1971).

12. This failure to "win" by the public defender is understandable where the criminal justice system is functioning properly and the defendant is in fact guilty. There, the most the public defender can hope for is to negotiate a lenient sentence or lesser charge.

13. ABA STANDARDS, *supra* note 11, at 141, which states:

> News media and editorials sometimes have wrongly criticized lawyers who were performing their professional duties properly; more often, however, both editorial treatment and news stories reflect confused ideas about the role and function of the lawyer for an accused. Yet the press is not the only culprit in this confusion; some lawyers exhibit a

teemed in his capacity as trial specialist whether defending[14] or prosecuting. This favorable perception of the barrister carries over into the public's perspective of the English criminal justice system, which is held in much higher regard than is our own. It may well be that the reasoned, mature approach of the English barrister to the criminal trial leads to British confidence in the criminal trial process.

What makes the English system acceptable to the public is as much the appearance as the fact that justice is done. On the other hand, the American system's bifurcated approach to representation in criminal trials does not give the impression of working toward the end of justice. With prosecutors and defense counsel appealing to emotion, with the rigidity of moral position and purpose that makes a calm, rational presentation of the facts impossible, the opposite view is likely. The systems are, however, sufficiently alike so that in any particular case the courts of both countries probably would reach the same result. Public approval of the systems engendering the results is the point of dissimilarity.

Legal and Ethical Arguments Affecting Implementation of the English System in the United States

Our egalitarian tradition and colonial rejection of the English barrister system have heretofore made the adoption of even a modified barrister approach to trials of criminal and civil cases impossible in this country. The main obstacle to the fluidity of attorneys between prosecutorial and defense advocacy is our legal-ethical tradition that an attorney in criminal practice can represent only one side, state or de-

---

grave lack of understanding of this subject. In lurid autobiographical accounts, speeches and even at institutes, seminars and conventions of bar associations some of the more noisome lawyers have added to the confusion by speaking pridefully of their successes by use of tactics which at best were pettifoggery and at worst grounds for disbarment; they have recommended to their colleagues tactics and conduct which serve only to confuse the lawyer's concept of his function and to demean the entire legal profession.

Id.

14. Further, there is no perception by the British that the criminal defendant is inadequately represented in the system. The barrister is required to represent the unpopular as well as the popular cause.

> Barristers, while acting with all due courtesy to the tribunal before which they are appearing, must fearlessly uphold their client's interest regardless of unpleasant consequences to themselves or any other person. They must assert their client's rights and defend his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation that can legitimately conduce to this end—any attempt to restrict the privilege should be jealously watched.

B. HOLLANDER, *supra* note 1, at 47. It is therefore considered unethical to refuse a brief because of the unpopularity of a client. Hollander has noted that in the prosecution of Tom Paine for publishing the second part of the *Rights of Man*, Erkskine, who accepted the retainer to defend Paine and was deprived of his office as Attorney General to the Prince of Wales for doing so, said, "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end." *Id.* at 38.

fense, at any one time.[15] Though it has been held that a prosecutor in one jurisdiction could act as a defense counsel in another jurisdiction,[16] and that a city prosecutor in a rural area could defend in district court a case prosecuted by the district attorney,[17] the American Bar Association opposes the comingling of defense and prosecutorial roles.[18] In accord with this, the Arizona Supreme Court held that when a deputy public defender joined the county attorney's office after representing a defendant, the office itself was disqualified from prosecuting the defendant, and that the appointment of a special prosecutor be made.[19] By contrast, the Louisiana Supreme Court held that one of a defendant's counsel at his initial trial could join the district attorney's office before his second trial, and that it was not error for the trial court to refuse to grant defendant's motion to disqualify the district attorney and his staff.[20]

---

15. Three canons of the Code of Professional Responsibility support this view. These are Canon 4, "A lawyer should preserve the confidences and secrets of a client"; Canon 7, "A lawyer should represent a client zealously within the bounds of the law"; and Canon 9, "A lawyer should avoid even the appearance of professional impropriety." ABA CODE OF PROFESSIONAL RESPONSIBILITY(1980). Under these Canons, an attorney who prosecutes a case for the state while at the same time representing a defendant arguably violates the Model Code of Professional Responsiblity.

16. People ex rel. Colorado Bar Assoc. v. Johnson, 40 Colo. 460, 463, 90 P. 1038, 1039 (1907) (former prosecutor represented defendant whom he had charged). This case is cited in the commentary to the ABA Standards for Criminal Justice. ABA STANDARDS, *supra* note 11, § 3.5, at 215-16.

17. ABA COMM. ON PROFESSIONAL ETHICS, OPINION NO. 55 (1931). This opinion is cited in the commentary to the ABA Standards For Criminal Justice. ABA STANDARDS, *supra* note 11, § 3.5 at 216.

18. ABA STANDARDS, *supra* note 11, § 3.6, at 216.

> [T]he controlling consideration is the avoidance of any possibility of division or dilution of loyalties. Relationships between lawyers who are associated in practice are so close and the potential for conflict is so great, given the lack of any strong reason for permitting such representation, that a flat prohibition is warranted against lawyers from the same firm or office appearing as prosecutor and defense counsel. Similarly, it would not be sound to permit one who regularly serves as a prosecutor to appear as defense counsel opposing one who ordinarily is his associate in the prosecution office.

Id.; *see* United States v. Caggiano, [1981] 30 CRIM. L. REP. (BNA) 2073, 2074.

19. State v. Latigue, 108 Ariz. 521, 523, 502 P.2d 1340, 1342 (1972). The *Latigue* court stated:

> We do not rest our decision only on the fact that the attorney involved here is the County Attorney's chief deputy; even if he were not, that office would have to divorce itself from the prosecution in this case, because even the appearance of unfairness cannot be permitted. What must a defendant and his family and friends think when his attorney leaves his case and goes to work in the very office that is prosecuting him? Even though there is no revelation by the attorney to his new colleagues, the defendant will never believe that. Justice and the law must rest upon the complete confidence of the thinking public and to do so they must avoid even the appearance of impropriety. Like Caesar's wife, they must be above reproach. As the Ethics Committee Opinion No. 235 put it: "Ordinarily knowledge or information held by any one member of the County Attorney's office is tantamount to knowledge of all such members, and that public confidence in our judicial system may be undermined if the appearance of evil, as well as the evil itself, is not avoided."

Id.

20. State v. Bell, 346 So.2d 1090, 1100 (La. 1977); *see* State v. Brown, 274 So.2d 381, 382 (La. 1973). See also State v. Brazile, 231 La. 90, 94-95, 90 So.2d 789, 790 (1956). The *Bell* court stated:

> The mere fact that an assistant district attorney previously represented an accused does not *ipso facto* require disqualification of the District Attorney in the criminal proceeding.

The closest we have come to attorney fluidity between prosecution and defense functions in the United States has been in the armed services legal systems. The military provides for both prosecution and defense from a pool of judge advocates. The concurrent representation of both prosecution and defense by the same lawyer has, however, raised ethical questions. For example, the simple instance of four judge advocates sharing the same office has been condemned as a situation that might "impose a burden on individual lawyers, who must employ reasonable care to assure that disclosures are not made where the client has not consented thereto."[21]

We may have gone too far in our desire to avoid the appearance of evil, presuming ethical conflicts where none exist. If the independent English barrister finds no ethical problem in concurrently defending and prosecuting, then in this country, where partnerships are the rule, there should be no reason attorneys in the same office cannot both prosecute and defend, though not in the same case. The "inbred adversary tendencies" and "competitive instincts" of the attorney, as well as the integrity of the bar, should be sufficient safeguards against unethical practice and inadequate representation of the client.[22] The Louisiana court's approach seems more reasoned: An attorney can exchange one role for another without revealing the confidences of his former clients, and to this extent the knowledge of one member of a prosecutor's office is not necessarily the knowledge of all in that office.

Despite the ethical restraints involved, there have been suggestions that aspects of the English system be adopted in the United States.[23] In this regard, Professor Meador has proposed an experiment[24] that would

---

Especially, as here, where the Assistant District Attorney was not called upon to use against his former client any confidential knowledge gained through their former association, no prejudice could result to the accused.

346 So.2d at 1100.

21. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINION NO. 1235 (1972).

22. ABA STANDARDS, *supra* note 11, § 3.5, at 213.

23. The American Bar Association Standards For Criminal Justice note that, "[A]lthough our traditions diverge from the British in some respects, we also can profit by encouraging an exchange of roles. The idea of appointing experienced criminal defense lawyers from time to time as special prosecutors has much merit. . . ." ABA STANDARDS, *supra* note 5, § 3.5, at 216. And:

> There are advantages to the operation of the adversary system if lawyers can avoid being stereotyped in their roles. . . . Obviously, in our system of institutionalized prosecution offices, unlike England, for example, it is difficult if not impossible for prosecutors to appear in the defense role. More feasible is the interchange of roles by having experienced defense counsel appointed as special prosecutors from time to time. The long range benefits of interchange, however, are such that lawyers who have been trained in prosecution offices should be encouraged to devote some period of their professional careers in defense work, whether privately or as a public defender, after they have left prosecution offices. Correspondingly, public defender staff members should be encouraged to move into prosecution offices.

ABA STANDARDS, *supra* note 11, § 3.5, at 216.

24. D. MEADOR, *supra* note 2, at 115. Professor Meador says,

> An experimental structure could be set up, particularly in a busy urban jurisdiction, by creating a cadre of trial lawyers—perhaps called criminal justice attorneys—whose sole

provide for the independence enjoyed by the English barrister and separate the investigative and trial functions. It would provide for a system using criminal trial attorneys somewhat in the manner followed by the military today. Yet outside the advocate corps of the armed services, Meador's proposal has never been approximated.

The Yuma County Model Barrister Program

One attempt to test the effectiveness and public acceptability of a barrister program in the United States was conducted in Yuma County, Arizona. Because of his interest in the English criminal justice system and his military experience, Charles L. Decker organized Studies in Justice, Inc.,[25] and obtained a grant from the Law Enforcement Assistance Administration to conduct studies of the interchange of counsel.[26] The grant design actually consisted of two counsel interchange experiments in Philadelphia, Pennsylvania and in Hennepin County, Minnesota, and the barrister program in Yuma County. In the interchange experiment, lawyers from the prosecutor's and defender's offices exchanged roles for a one-month period. The Philadelphia and Hennepin County projects, however, unlike the experiment in Yuma County, were not true barrister programs.

Yuma County was selected for a barrister program because of its relative isolation and its official support and cooperation, particularly that given the program by former County Attorney W. Michael Smith.[27] Yuma County had at the time approximately fifty attorneys, two judges, and 80,000 residents, with approximately 500 felony filings a year. There was no public defender's office, and indigent representation was effected by assignment of counsel.

The objectives of the project as stated in the application were,

> 1. To increase professionalism on the part of the criminal trial bar, both prosecution and defense.
>
> 2. To increase respect in the community for the criminal bar.
>
> 3. To promote better relations between criminal defense attorneys and prosecutors, resulting in a better understanding by both of the criminal justice system, which will promote a more efficient and more just system.[28]

---

function would be to appear as advocates in criminal cases in the trial and appellate courts. No individual lawyer within this group would be permanently identified as a prosecutor or as a defense attorney; he would simply be an attorney in the criminal justice office. . . .

Id. at 115.

25. He was assisted by Paul L. Woodard, Esq., and Kenneth J. Hodson, Esq., U.S.A. Ret.

26. Law Enforcement Assistance Administration (LEAA) Discretionary Grant No. 75DF-99-0054.

27. Michael Irwin later became County Attorney and continued to support the program.

28. Program Narrative, at 1. (Copy on file with the Arizona Law Review).

Because of its concern with ethical problems that might arise, the Arizona Supreme Court, after reviewing the project and giving its written approval, cautioned the county attorney that

> 1. [I]n making appointments as to special prosecutors [he] should insure that the attorney so selected is not in a position to use that appointment to gain information which would benefit clients whom he is presently defending.
>
> 2. An attorney who is employed to prosecute should make it clear to his clients as well as to the general public that because of his appointment he is in no position to gain more favorable treatment from the County Attorney's Office in other criminal matters.
>
> 3. The County Attorney should insure that law enforcement agencies in Yuma County understand that these appointments are on a case-by-case basis and that the attorney so prosecuting is not a Deputy County Attorney, and except for the particular case involved does not represent the State or the County Attorney's Office.
>
> 4. Inasmuch as the special prosecutor may be appearing before the same jury panel as both a prosecutor and a defender, it should be made clear to the jurors that the attorney is (and was) a special prosecutor and not connected permanently with the County Attorney's Office.[29]

Under the proposal, funds were given to the county attorney[30] to hire members of the criminal defense bar to prosecute cases he selected.[31] The attorneys selected were statutorily deemed special prosecutors.[32] These special prosecutors received $250 for taking a case,[33] plus $125 per half-day engaged in court. Thus, they were paid $500 for a one-day trial.

The experiment lasted from February 1, 1976, until July 20, 1977.

---

29. Letter to W. Michael Smith, Sep. 12, 1974, from Chief Justice Jack D. H. Hays, Arizona Supreme Court (on file with the Arizona Law Review).

30. The total amount for the first year was $26,670, with $23,645 provided by the LEAA and $3,025 by Yuma County. The proposal also noted,

> It is hoped that this project will not only give the prosecutor more flexibility, particularly during those times when cases are on the rise, but also in erasing the isolation of the prosecution and defense bar and in erasing the suspicion the prosecutors and defense counsel frequently have of each other by making better and more professional prosecutors and defenders. The system should gain in self-respect and in the esteem of the community.
>
> It is also hoped that if the project is a success the plan will be adopted by the Yuma County Board of Supervisors as a permanent program allowing the County Attorney's office to remain static and at the same time permitting adequate prosecution whenever the criminal load increases, particularly when there is a seasonable increase in criminal matters.

Program Narrative, *supra* note 27, at 13.

31. Since under Arizona law the county attorney has the sole responsibility for prosecution in the county, there could not be a random selection of cases or lawyers even if this was desirable. *See* ARIZ. REV. STAT. ANN. § 11-532 (1977); State v. Murphy, 113 Ariz. 416, 418, 556 P.2d, 1110, 1112 (1976).

32. *See* ARIZ. REV. STAT. ANN. § 11-403(B) (1977).

33. Counsel were allowed $100 for a change of plea.

It began haltingly when, in the first case that a defense attorney prosecuted, the defendant unsuccessfully challenged the program on ethical grounds. Available statistics do not indicate the number of cases actually tried. It appears, however, that of the sixteen cases assigned to special prosecutors during the first year of the experiment, two were tried, with the remainder being disposed of by plea agreement. In the two documented trials, one defendant was convicted and one acquitted. If we consider only these two trials, the fifty percent acquittal rate is high. The ratio of plea agreements and other dispositions to trials was no different from what would be expected. Given the small number of assignments, the statistics indicate little except that there were no serious defects in the procedures followed.

The reports of the participating attorneys,[34] however, are interesting and instructive reflections of professional attitudes toward the program. A practitioner of over twenty-five years with some prior prosecuting experience had these thoughts regarding the cases he was involved with:

> No problem was encountered in dealing with the law enforcement personnel in either case. This may be due in part to the fact that in each instance the officers involved were acquainted with me, and apparently had a degree of professional respect based on previous contacts and dealings. In the first case, since the case officer had been involved with me in a number of instances previously where I acted as defense counsel in his cases, a certain degree of surprise was encountered. After discussing the program with him, however, I found immediate and professional acceptance of the program, and a full range of cooperation from him and the other officers who were involved. . . . It was my conclusion . . . that the law enforcement officers involved were receptive to the program, cooperated fully, and exhibited no problems of professionally relating to me in my unusual capacity as a special prosecutor. I felt that the dealings on both sides in handling both of these cases were on a proper and professional level. . . .
>
> [Also,] [t]here was no appreciable public concern over the switching of customary roles. . . . I received several telephone calls from members of the public making comment on the trial proceedings. None exhibited any concern with my functioning in the role of prosecutor. . . . The witnesses and their families dealt with me openly and candidly, and exhibited no concern of any kind over my functioning in the role of prosecutor.
>
> . . . I personally have encountered no appreciable difficulty of any kind in the functioning in the role of a professional advocate

34. The reports were submitted in response to a request by the Yuma County Attorney to evaluate the program following its completion.

who is handling a prosecution for the State.[35]

A second practitioner with no previous prosecutorial experience reported these reactions:

> Some feel that you must have loyalty to either one side or the other. After explaining to them the reasons that this is not necessary and the philosophy of the program, they usually feel that it is something worth trying. They become interested in the results. In other words, they too are wondering if maybe this would be a better system.
>
> I have had no problems in dealing with the law enforcement officers. They seem to welcome the fact that seasoned and experienced defense lawyers are going to be working for the State.[36]

As to the feeling that persons charged with crimes will not feel comfortable with someone defending them who is also closely associated with the county attorney's office, the attorney stated,

> I have not found this to be true. The defendants seem to feel more secure that they will get 'a fair shake' if there is not such a complete separation. To date no defendants have voiced any protest or discontent about my representing both the state and defendants. . . . [Victims] . . . have expressed no concern over possible conflict of interest and in fact seem to accept this program as fair and equitable. The victims I have interviewed were not the least bit alarmed that a defense attorney would be representing their interests.[37]

A third and younger attorney who defended clients in criminal matters further observed that "[t]hey did not seem concerned that he was defending them and prosecuting a case at the same time once he had explained the situation."[38]

There were, however, negative responses based upon the deeply ingrained idea that it was improper to work both sides of the street. One lawyer said, "I believe that prosecutors and defenders must have an attitude which empathizes with their clients; and I felt that I could not maintain such an attitude whether for the state or defendants while simultaneously representing both interests."[39] Another attorney felt the program favored the state:

> If the purpose of the program was to develop understanding between prosecutors and defense attorneys of the problems each side has in handling criminal cases, the purpose failed. The prosecutors should have handled defense cases, not just defense counsel handling

35. Letter from Garth Nelson, Feb. 3, 1977 (on file with the Arizona Law Review).
36. Letter from Tom Moran, April 15, 1977 (on file with the Arizona Law Review).
37. *Id.*
38. Letter from J. R. Irwin, April 15, 1977 (on file with the Arizona Law Review).
39. Letter from Stephan J. Rouff, March 23, 1977 (on file with the Arizona Law Review).

> prosecutions. . . . The program may have made things easier for the prosecutors by exposing defense counsel to the problems that a prosecutor faces, but it failed to help the defense bar on a similar basis . . . .
>
> [T]he defense counsel did little more than take some load off the criminal case load of the County Attorney's office.[40]

Concluding Observations on the Yuma County Program

One criticism of the project was that of inadequate remuneration. The sum paid per disposition was formulated to approximate the amount then being paid to attorneys assigned to represent indigent criminal defendants. Because of the small number of cases assigned, it could not be ascertained how the cost of special prosecutors compared to the cost of maintaining a full time deputy prosecutor with staff and office space. It is this writer's opinion that if the attorneys were properly compensated, although the barrister system would be slightly more expensive than maintaining a deputy prosecutor, the improved representation for the state would be worth the extra expense.

The responses by the participating attorneys, despite some negative comments, show that such a system could work. If permitted by the Model Code of Professional Responsibility, lawyers could represent both state and defendant without compromising the duty of adequate representation or creating the appearance of impropriety. If discretion were exercised by the prosecutor's office and the attorney selected to prosecute, both ethical standards and the confidence of the client could be maintained.

Proposal for a Prototype Barrister Program

It is proposed that the following model program be established to apply the basic concepts of the barrister system within the American criminal justice framework. First, under the model program, the prosecuting attorney's office will be responsible for advising the police and investigators, for determining which cases should be prosecuted, and for trying minor matters and making routine preliminary appearances. Second, the county attorney will select attorneys to try the cases from among representatives of the local bar who spend a suitable amount of time in criminal trial work. These appointees should be paid adequately. The county attorney will not lose the power to assign and supervise cases, but the appointees will be independent and in charge of the cases assigned them. It will be the responsibility of both the ap-

40. Letter from Allen J. Clark, March 24, 1977 (on file with the Arizona Law Review).

pointees and the county attorney's office to ensure that conflicts of interest do not occur. The public defender's office will function in the same manner, with the permanent staff making the initial appearances and a criminal trial specialist defending each case at trial. As Meador suggests,[41] this experiment should be conducted in a large metropolitan area so that a significant caseload can be sampled.

This framework, adjusted to accommodate local problems and procedures, can do much to enlighten the best and most experienced advocates and to raise the standing of the criminal trial bar in the eyes of the community. The American barristers would no longer be restricted to defending or prosecuting; instead, they would be trial specialists providing skilled services for whichever side employs them. This system would also reduce burn-out because the criminal trial attorney could add civil litigation to his criminal work. A state's highest court may have to suspend portions of its canons of ethics for counsel to be able to participate in such a program, as the supreme court did in Arizona. In any event, the time has come for a fair test in this nation of the English barrister approach to the criminal law. Such an experiment can be beneficial to the American criminal law system since, properly conducted, it will show what portions, if any, of the English system of criminal trial practice can be adapted to the American criminal justice system.

41. D. MEADOR, *supra* note 2, at 115.