Organized Bar: Self-Serving or Serving the Public?

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PUBLIC HEARING
on
U. S. SENATE JUDICIARY SUBCOMMITTEE
REPRESENTATION of CITIZEN INTERESTS

MEMBERS: SEN. TUNNEY, CHAIRMAN,
SEN. ERVIN, SEN. BAYH, SEN. COOK, SEN. MATHIAS

Sunday, February 3, 2:30-5:00 PM
Regency Hyatt Hotel
Imperial Ballroom

PUBLIC INVITED

The Organized Bar: Self-Serving or Serving the Public?

- Under this provocative title the Senate Subcommittee on Representation of Citizen Interests conducted a hearing at the American Bar Association midyear meeting in Houston on February 3. John V. Tunney, Democrat of California, presided, along with Charles McC. Mathias, Republican of Maryland. Appearing as witnesses were:
  - Chesterfield Smith, president of the American Bar Association;
  - Stuart L. Kadison of Los Angeles, chairman of the Association's Committee on Delivery of Legal Services;
  - Christopher Edley of New York City, chairman of the Association's Consortium on Legal Services;
  - John F. Sutton, professor of law at the University of Texas, reporter for the committee that produced the Code of Professional Responsibility and now a member of the Association's Committee on Ethics and Professional Responsibility;
  - Leroy Jeffers of Houston, president of the State Bar of Texas;
  - Orville H. Schell, Jr., president of the Association of the Bar of the City of New York;
  - Thomas Ehrlich, dean of the School of Law of Stanford University;
  - Mark Green, director of the Center for Corporate Accountability Research; and
  - Revis O. Ortique, Jr., of New Orleans, president of the National Legal Aid and Defender Association.

Following are excerpts from their statements:

Senator Tunney:

OF THE NATION'S more than three hundred fifty-five thousand lawyers, over half belong to the American Bar Association. The Association's House of Delegates claims to speak for 94 per cent of the lawyers in the country. The Association's Code of Professional Responsibility has been adopted by forty-seven of fifty states and sets forth rules of conduct for lawyers. The Association and its committees and sections have a profound influence on standards for accreditation of law schools, admission to practice, disciplinary procedures, and on activities of state and local bar associations. In its own rhetoric and rules, the American Bar Association (Continued on page 436)
FOR PROFESSIONAL SERVICES RENDERED

in connection with general corporate matters from September 1973 through December 1973, involving the services of Messrs. Johnson, Murphy, Cohen, Cohen and Dagler.

General
Preparation and filing of various SEC Forms, Employee Pension, Profit-Sharing and Stock Bonus Plans, MMDC problems, and preparation and attendance of Annual Stockholders Meeting.

Brazilian Subsidiary
Correspondence and conferences with local agents and Brazilian agents regarding filing of information pursuant to recent legislation; preparation and filing of this material.

Disbursements
Travel and business expenses to and from Rio de Janeiro and other expenses.

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TOTAL $18,303.00
tion claims to be the "legal conscience" of the profession and to have a "duty" to make legal counsel available to those who need it. . . . Because of its size, prestige, and pervasive influence over lawyers' conduct, the Association has a decisive impact on the quantity and quality of legal representation available to all Americans.

Given these facts, it is hard to understand why the Congress began only last May to assess the impact of the organized bar on our system of representation. It was this Subcommittee on Representation of Citizen Interests that began the inquiry. We convene this hearing in Houston today, in order to ask a very important question: Is the organized bar self-serving or serving the public?

I don't expect that the answer to this question will be clear cut. . . . The answers require scrutiny of American Bar Association policies with respect to pricing of legal services (especially minimum fees), dissemination of information about lawyers, delivery of legal services, and maintenance of professional and ethical standards. . . .

Let me expound a bit on the types of issues that will be addressed here and that are often cited by critics of the organized bar as reasons why it fails to meet adequately its public responsibilities.

First, its organization. The bureaucracy, the inbred and clubbish atmosphere of its meetings, and the built-in conflicts of interests in the membership of its committees, all tend to give advantage to special interests over the public interest. . . .

Second, we must consider the rules the Association imposes on lawyers' conduct. To many, the restrictions on advertising, solicitation, and use of nonlicensed personnel in the Code of Professional Responsibility prevent dissemination of needed information about lawyers, restrict competition, and thereby inflate fees. . . .

Third, we must consider the way the organized bar disciplines lawyers who have violated the law or the canons. . . .

Fourth, we must consider the organized bar's traditional insulation from government regulation. With the exception of the medical profession, no other profession so clearly affected with public responsibility has been allowed this same privilege. . . .

It is our hope that through voluntary co-operation, if possible, and mandatory requirements, if necessary, the enormous talent of the organized bar can, in the words of Justice Brandeis, "stand again . . . ready to protect . . . the interests of the people."

Senator Mathias:

LAWYERS are today under fire. Many people feel that Watergate is not only a failure of government but is in some sense a failure of our profession, many of whose members have been destroyed in its scandals and so many of whom have played fast and loose with the law, let alone professional ethics. . . .

But the issue before us today is set forth in the name of this Subcommittee, representation of citizens' interests. Representation is a lawyer's calling, just as it is the calling of a legislator. But while reams and reams of materials and studies, scholarly and otherwise, have been devoted to the theory and practice of the role as representative of a congressman or senator, the representative duties of attorneys have, in my view, not been the subject of such attention outside of the bar itself.

These hearings are an attempt to get at the meaning and reality of such representation, just as were the earlier hearings held by the Subcommittee on fee schedules.

In addressing ourselves today to the role and activities of the American Bar Association, we are acknowledging the tremendous, almost unprecedented influence of that body on the legal profession and upon our national life. This institution lies at the center of the entire legal profession and, as with all institutions in our society today—churches, government, universities, business—the American Bar Association is undergoing the scrutiny of public inspection and re-evaluation. . . .

Ours is a society that has become increasingly complicated. The purchase of homes, the purchase of automobiles, the use of short-term credit arrangements, the protection of warranties, the role of insurance in personal protection and estates—all of these and many more pressing problems generally yield minor legal fees but can be of major importance to the individual involved. Not to be forgotten is the accused criminal offender or juvenile offender whose needs for legal representation can run afoul not only of difficulties of cost but also even of finding adequate representation in a case that has the potential for shaping his life.

The problem is a difficult one. Hard-pressed private practitioners are dependent upon a finite resource for their livelihood—time. What may appear to an individual with a legal problem as a callous or mercenary indifference to that problem may in fact be merely a reflection of the economic realities of the time squeeze.

The problem of delivery of legal services to the middle class is one of the problems that I hope will be successfully addressed by the Subcommittee on Representation of Citizen Interests and by the Congress.

Mr. Smith:

I WISH to commend the Subcommittee for undertaking this hearing on the role of the organized bar in the area of delivery of legal services. The American Bar Association, which, with one hundred eighty thousand members, is the world's largest professional organization, has considered the delivery of legal services one of its foremost areas of public service concern over the past decade. . . .

The Association currently has eleven committees, appointed by me as president, that have a major emphasis
and interest in the delivery area. . . . I have made every effort in making appointments to these committees to ensure that they are diversified and balanced so that the fullest consideration may be given to the issues facing these committees. I have also established a policy of not appointing one individual to more than one committee so as to ensure new faces and ideas on these committees.

Our twenty-one sections and two divisions, on the other hand, are not appointed bodies but membership groups open to any member of the Association who wishes to participate. They range in size from the 1,073-member Section of Bar Activities to the 74,299-member Young Lawyers Section. Each section raises its own funds through membership dues, elects its own officers and governing board, and conducts its own programs. Each, of course, is represented in the House of Delegates, and each is bound by policy determination of the Association as a whole.

It has been charged that in some instances actions have been taken by committees and sections of the Association that appear to reflect the interests of the clientele of the lawyers on a particular committee or section than the public interest. Another of your witnesses this afternoon, Mark Green, and I have corresponded on this subject over the past few months, and I should like to address myself briefly to this issue. We are not in basic dispute as to either facts or goals, and while I respect his opinion, we have simply reached differing conclusions. I believe that our policy-making procedures are fair.

Our organization is a voluntary membership group, composed of a broad cross-section of members of the profession. They come from a wide variety of types of practice and a wide variety of experiences. Their collective viewpoints may be more conservative, or more liberal, than those of the critics. The presidents of the Association in making appointments to committees and the chairmen of sections in making similar appointments seek to achieve balance and diversity in making these appointments. Sections, however, are composed of lawyers with an avowed interest in a particular field—and that field may be, and often is, dominated numerically by lawyers who, for the most part, represent a particular group of clients. There may well be, therefore, a natural bias within the group for a particular point of view.

It is unfair, however, to claim that such lawyers are in a position of conflicting interest, torn between representing their clients’ best interests and arguing for that which they as private citizens believe to be correct. I have represented many clients in my day to the fullest of my ability whose viewpoints about policy matters I do not share in the least. I participate in bar association activities as an individual lawyer with my own views and my own beliefs, and all actions I have taken as a participant in bar association activities have been in furtherance of those personal views and beliefs. The lawyers with whom I have worked in the Association have likewise done only what they individually thought best for the public, the legal profession, and the system of justice in our country, without regard to the partisan interest of a past or present client.

The tradition of the practicing lawyer’s maintaining an independent and informed point of view is central to our present discussion because the primary responsibility for avoiding the kind of conflict we are talking about must rest in the first instance, and perhaps even ultimately, with the individual lawyer. Rules cannot magically transform those lawyers who are not doing Association work out of a sense of public responsibility.

Nonetheless, the Association’s Board of Governors in 1964 did adopt guidelines with respect to conflict of interests matters. The guidelines, which were reaffirmed by the Board in August, 1972, are as follows:

1. In making appointments to Association or section committees every effort should be made to obtain representation of differing views.
2. When a recommendation is proposed to the Board of Governors or House of Delegates the report in support of the recommendation should include the following: (a) the background as to how the subject was brought to the attention of the section or committee proposing the recommendation; (b) any material interest of any member of the committee or section council by virtue of a specific employment or representation of clients; and (c) a statement of the reasons the proponents believe the subject of the recommendation to be within the special competence of the legal profession.

Mr. Kadison:

LET ME TURN now to another unproved hypothesis that has had wide acceptance. This is that somewhere out there, between the poverty level and affluence, there exist countless millions of citizens with a need and a demand for legal services and with the perceived or actual inability to obtain them. This may be true. Having in mind that the legal population is likely to double in the next eleven years and that, from our parochial perspective if from none other, some way must be found to utilize the services of so many lawyers in economically gratifying and socially useful ways, for their sakes and that of the nation, I hope the hypothesis is true. As of February 3, 1974, however, its truth is still to be demonstrated.

It is anticipated that within the next few months, the American Bar Association will have tested the hypothesis. The Special Committee to Survey Legal Needs, of which Randolph W. Thrower of Atlanta is chairman, has formulated and is in the process of obtaining responses to a thoughtful and comprehensive questionnaire looking to the ascertainment and, if possible, some quantification of need. The preliminary report of the Thrower committee will, we understand, be presented to the House of Delegates in August of this year. I have no doubt that there will be much to be learned from it.
Nonetheless, you, as well as those of us working in the field of delivery of legal services, should understand that there is a substantial difference between widespread demand for legal services and widespread need for them. When need is absent, demand cannot exist except where it has been artificially stimulated, and the organized bar has never done that; but demand does not necessarily follow from the existence of need. Demand can be said to be a function of perceived need, and when there is a gap between the one and the other, the gap should be bridged by education, not by artifice.

Recognizing the importance of the work of the survey committee, the Board of Governors included in its mandate to the Special Committee on the Delivery of Legal Services the directive that it prepare to go forward with recommendations for the implementation of the Thrower report promptly upon its receipt and approval.

Other areas into which the special committee is inquiring include all of the manifestations of the group legal services concept, lawyer reference services, prepaid legal services, law clinics, the use of paraprofessional personnel, the ombudsman notion, legal education, the possible adaptation of some aspects of the British legal aid and advice scheme, and the formation of an interdisciplinary study group under the auspices of the American Bar Association, the function of which would be to identify other areas of study.

The charge of the Special Committee on the Delivery of Legal Services generally, as we perceive it, is to plan for such a redesign of the delivery mechanisms as a complex, dynamic, and changing society require, if the legal profession is to continue to function effectively in the public interest, while still serving its own. The American Bar Association does not regard the two concepts embodied in the topic of this hearing as mutually exclusive.

Neither a monopoly nor a public utility, the legal profession cannot be constructively self-serving without also serving the public.

Mr. Edley:

I SHOULD LIKE to speak briefly about what the organized bar has done during the past decade to improve the delivery of legal services. The present availability of legal services to people of low and moderate income is far from sufficient, and the need for increased services is a compelling one. But the American Bar Association's volunteers have actively participated in past and present efforts to implement legal services programs, and this co-operation by the organized bar has always been vital to the growth of legal services . . .

As the Association during the past ten years began to concentrate more of its efforts on the availability of legal services, it became apparent that the organized bar was confronted with a tremendous challenge. As more legal services became available, the public's and the profession's recognition of need and the consequential increase in demand for legal services seemed to grow at a faster rate than services could be provided under the existing system. New approaches were needed for
the delivery of legal services, and much study and preparation were required to develop and test these approaches. The new projects undertaken by the Association, the new committees established, and the new life recently infused into established programs during this period will provide the foundation for meeting the needs of the public for legal services in the future. . . .

[Mr. Edley then outlined the American Bar Association programs in lawyer referral services, prepaid legal services, specialization, the use of paraprofessionals, and increased law office efficiency.]

As American Bar Association committees delve deeper into possible solutions for the country's legal needs, we have become increasingly aware that they are all interrelated; that we must think more broadly in terms of many-faceted systems to provide legal services. The Association has taken one step in this direction by creating a Consortium on Legal Services and the Public, of which I am the chairman. The consortium is composed of the chairmen of seven committees dealing with delivery of legal services and six additional members. It co-ordinates the work of its constituent committees, serves as a forum for the exchange of information and ideas, and relates various Association activities to the common objective of making legal services available to more people at less cost. Another important function of the consortium is to identify areas that may not be receiving adequate attention from the organized bar. . . .

During the past decade we have ridden the crest of the nation's unprecedented concern with individual rights and witnessed the most dramatic progress ever made in the democratizing of our legal system. The work remaining to be done, it is hoped with the assistance of this
subcommittee, should dwarf those accomplishments. The American Bar Association will be at the forefront of these changes.

Professor Sutton:

MY DISCUSSION centers on the role of the Code of Professional Responsibility in the delivery of legal services. . . . The American Bar Association’s leadership in promulgating the new code has been followed by the states. Virtually all states—perhaps all but one—have adopted the code by some device or another. Sometimes the adoption has been by the state bar association, sometimes by court rules, sometimes by a combination of action by court and legislature, and sometimes by other methods. In any event, the new code has become the statement of the profession’s professional standards throughout the country. . . .

The new code contains no mention of minimum fees or minimum fee schedules. Any claim that the professional rules require a lawyer to observe minimum fee schedules is refuted by a study of the code. The disciplinary rules of the code constitute a complete body of regulations, and insofar as disciplinary action is concerned a lawyer is not to be disciplined for any conduct that does not violate one or more rules. The disciplinary rule regulating fees is D.R. 2-106(A), which simply provides: “A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.” Not only does this rule not mention minimum fee schedules, but it does not prohibit charging less than a reasonable fee. A lawyer is free to charge as little as he wishes, or no fee at all. . . .

The problem of the unauthorized practice of law is more complex. [But] whether a person or organization is engaged in the unauthorized practice of law is a question of state law and not a question of professional responsibility. . . .

Under the old Canons of Professional Ethics several canons dealt with aspects of advertising and solicitation, and for the most part in sweeping pronouncements. Neither advertising nor solicitation was defined. . . . In lieu of a vague condemnation of solicitation, the code contains two more specific proscriptions: first, the seeking, by payment or request, of a recommendation of one’s own employment; and second, the acceptance of employment—except in certain equitable situations—by one to whom the lawyer has volunteered advice to obtain counsel or to take legal action. These are found in D.R. 2-103 and D.R. 2-104. . . .

The delivery of legal services to the public without regard to the limited ability of the potential client to pay is a very serious problem because, as others have said, the lawyer is an independent entrepreneur, and accordingly legal services tend to be more widely available where the money is, rather than where the need is. Few ethical problems are involved, although many problems of economics are involved. The code can do little either to aid or to hinder. . . . The question to be resolved is, of course, whether those and other rules unduly restrict attempts to deliver competent legal services more economically by prepaid plans or other devices. The rules are unduly restrictive if they limit the use of such plans more than is necessary to assure that lawyers do not abuse clients or the public.

There obviously are many other specific provisions of the code that could be discussed in relationship to the delivery of legal services. Time does not permit such a development, and the law reviews contain many thoughtful studies. It appears to me that the role of the code is to protect those professional values that the profession must observe in order to protect the public, while at the same time avoiding all unnecessary roadblocks to new and proper methods of delivering legal services. This is about all we can expect of the code.

Some lawyers have suggested the addition of disciplinary rules requiring all lawyers, under threat of punishment, to handle a certain amount of pro bono publico work, of low paying work, and of work on behalf of charitable organizations and groups. Such a disciplinary rule would not lend itself to enforcement and would not be workable.

The code does now, and should continue to, recognize that each lawyer should do his part in making legal services more available and in forwarding new methods that will aid in reaching our goal. To the extent that lawyers do not carry out this moral obligation, the public will be ill served. But it is my conviction that the great majority of lawyers in this country will conscientiously assist in developing more effective methods for the delivery of legal services and in avoiding any roadblocks in the name of “ethics” that might hinder the development of more effective means of providing legal services to all who need them.

Mr. Jeffers:

ONE painful example of American Bar Association timidity in the face of attack is its course of initial retreat, ultimately followed by its apparent complete surrender, after the antitrust attack on minimum fee schedules adopted by state and local bar associations. The whole idea that the profession, which is counsel and advocate on men’s lives, liberties, and properties, is engaged in mere trade and commerce that should be controlled under the federal antitrust laws is an intellectually drouth-bitten concept that should be scorned by the lawyers and the courts, and the Association should say so. . . .

There are simply no existent empirical data that justify federal intervention in the profession and encroachment upon the states in the areas of the pricing of legal services, the dissemination of information about lawyers, the delivery of legal services to the public, or the enforcement of ethical and professional standards. I know that no such data could be objectively developed in Texas. The areas to the extent that laws are needed
should be left to the state law and to the state agency established by state law for that purpose that is closest to the situation and the attorney-client relationship and best qualified to serve it.

A clear-cut, well-defined truth that my more than forty years' close observation as a practicing lawyer has revealed is that there are many things that the federal government does not do well. These things particularly include those that are closest to the people in their homes and communities. There is little evidence that the ever billowing growth of federal power and federal control over the intimate details of the daily lives of the people can be justified by the service of the public good . . .

I have no apology to make for speaking for the legal profession in this or any other situation. I always do so with a thrill of pride. The profession is no mere trade or vocation but a high calling to the highly skilled professional service of man. It is a public service profession whose prime goal is not profit but the protection of the public interest through the law. Such is the interest it serves, whether it be the defense of human rights in life, liberty, or property by an advocate in the courtroom or a counselor representing a family in the acquisition of their home. The public interest is best served if the profession of the advocate and the counselor remains fearless and free. It is in that spirit and not in the mere promotion or protection of the selfish interest of the members of the profession that the State Bar of Texas unhesitatingly and unabashedly opposes the federal fixing of attorneys' fees or other federal regulation and control of the legal profession. We oppose these proposals because they are the first steps toward the federalization of the practice of law. With any such proposals alive, uneasy rest the heads of free men everywhere. The proposals are a real and present danger, and we earnestly urge upon this honorable subcommittee to put an end to them.

Mr. Schell:

THE QUESTION before the house—or should I say the “Senate”?—is “The Organized Bar: Self-Serving or Serving the Public?” Let me give you a straightforward lawyer's answer to both parts of the question. My answer is “Yes and No!” . . .

I am convinced, as a philosophical matter, that lawyers, unlike groups such as plumbers, manufacturers of can openers, and oil barons (unhappily) undertake an obligation to the public when they enter the bar. That obligation is to devote some portion of their professional time to the delivery of legal services at noncompensatory rates, or no fees at all . . .

Believing, then, that the profession does have such an obligation, I submit that, one way or the other, it must be made an enforceable obligation. A first step, I suggest, would be for the organized bar to amend Canon 2 of the Code of Professional Responsibility to place this obligation on members of the bar and see that it is enforced through disciplinary procedures.

I want to make it clear that I feel that the obligation requires pro bono publico work in the practice of the profession. It is not enough that lawyers serve on boards of churches, schools, and other charities, or run the local Little League. They must give of their professional time. Nor would I feel that lawyers should be permitted to “buy” themselves out of this obligation by donations of money. To be sure, contributions will be welcome. What we need, however, is the professional skill of all levels of the bar, not just the very young, those who cannot get jobs in the larger firms, or the older practitioners whose professional business has dried up for one reason or another.

Once we assume that obligation, there are numerous ways in which it can be performed . . .

In spite of the long-standing tendency toward conservatism, I do feel that there is a growing movement in the organized bar, perhaps led and supported more by the younger lawyers than the older ones, that perceives the possibility of accomplishing social and other change through the operation of the laws and having a truly equal distribution of justice. These people see, embrace, and attempt to carry out the basic and essential obligation of lawyers to society. They do so even though it may mean lower incomes during their long professional lives than were they pre-empted by the corporations.

I don't want to put all the burden, or indeed give all the credit, to the younger generation. I believe that there has been a “greening” among the leaders of the bar, old and ancient as they may be, that has started the profession well along the road towards a hard look at the problem and its possible solutions. I mention only Chesterfield Smith, president of the American Bar Association, and Bob Meserve, his predecessor, as two of the outstanding examples. And as younger men and women come in to assume positions on committees of bar associations, this kind of man will get increasingly more support. I therefore predict that while the forces of the status quo and ultraconservatism may still win their local battles, the outcome of the war is written in large characters on the wall.

Mr. Ehrlich:

VIEWED properly, law is not just a respectable way to make an honest dollar. It is a high calling, a public profession, a means to serve society. Law is our principal means to regularize and integrate social change; lawyers have the principal responsibility for the sound operation of the legal system. Yet in the eyes of many law students, a hired-gun psychosis dominates the bar . . .

Many lawyers, of course, do a great deal of important public service—for charitable organizations, and in other ways as well. On the whole, I suspect that lawyers as a group do as much charitable work as those in any

(Continued on page 444)
HONOLULU, pearl of the Pacific, capital of the fiftieth state, is the site of the American Bar Association’s 97th annual meeting to be held from August 12 to 16, 1974. This year the format of the annual meeting will concentrate all the activity within five days—from Monday through Friday—and anyone who attends the meeting will find a feast of activities from which to choose during those days.

The opening Assembly on Monday morning, August 12, will be followed by the Assembly luncheon, at which the famous writer, James Michener, author of “Hawaii” and many other books, will speak. Monday night there will be a series of district receptions based on the districts for election of members of the Board of Governors.

On Tuesday three educational programs, including a luncheon, will be staged and will be open to all persons attending the meeting.

Wednesday has been set aside as section day—a time devoted entirely to meetings of sections. An evening of Hawaiian entertainment for all will be the feature on Wednesday night.

The highlight of activities on Thursday will be the annual report on the federal judicial branch presented by Chief Justice Warren E. Burger.

The final Assembly will be held Friday afternoon, and on Friday night the meeting will conclude with President Smith’s gala at the Royal Hawaiian Hotel.

In addition to these highlights, there will be educational programs every day open to any person attending the annual meeting. On Monday and Tuesday nights Henry Fonda will appear in his new one-man production, “Clarence Darrow.”

The House of Delegates has scheduled meetings at the Sheraton-Waikiki Hotel for Tuesday morning, all day Thursday, and Friday morning.

- Registration for the 97th annual meeting is limited by hotel space. Anyone who has not registered is urged to do so without delay. For registration information and forms, write Meetings Department, American Bar Association, 1155 East Sixtieth Street, Chicago, Illinois 60637.
EITHER before or after the annual meeting many travelers will visit other places in the Pacific—perhaps some of those pictured here in Fiji, New Zealand, or Malaysia. Further information on these places may be obtained from Dailey & Associates, 574 Pacific Avenue, San Francisco, California.

(All photographs on these pages from Hawaii Visitors Bureau, Fiji Visitors Bureau, New Zealand Government Tourist Office, and Department of Tourism of Malaysia.)
other occupation. But the issue here is whether there ought to be an obligation on each individual lawyer.

Assuming such an obligation, how should it be met? Different approaches might be adopted in different communities. A number of local bar organizations are already financing nonprofit law firms to provide legal services to the poor. In some cities, large firms are supporting neighborhood legal offices in poverty areas. These and other arrangements—perhaps even including voucher systems operated by local bar groups—could provide alternative means to meet a public obligation along the line suggested.

Another approach would be to require each individual lawyer in a community to provide, without cost, some of his or her legal services to the poor.

There would be problems in implementing such an obligation. Let me illustrate with a list that is by no means exhaustive. First, how would the obligation be defined? By hours per year? By a percentage of time worked? By other standards? Second, what would be the permissible means to fulfill the obligation? Any legal work for anyone who could not pay? Only work for nonprofit organizations that provide legal services for the poor? Other ways? Third, would only free legal services qualify? What about services at reduced fees? Fourth, would services to charitable organizations—such as the Red Cross—qualify or only services to individuals? Fifth, how would the obligation be imposed? Through state bars or courts? Through national legislation? Through other means? Sixth, what enforcement mechanisms would be involved? Existing agencies? New organizations?

It befits a law teacher to be more concerned with questions than with answers. But lest it seem that there are no answers to such questions, let me outline a scheme that seems worth exploring. An agency of a state bar would handle the matter under a state enabling statute or court order. Private lawyers as a condition to maintaining their state licenses to practice, would be required to register with bar organizations in their localities. Lists of lawyers under broad categories of specialties would be maintained in counties and municipalities within a state. Nonprofit organizations established to provide legal services to the poor would call on any private lawyer for free legal services up to a small percentage of the lawyer's total working time. Lawyers would be required to provide such services at the call of the nonprofit organizations—which would include not only legal-defender offices but other organizations devoted to providing legal services to the poor as well. All these organizations would have to meet standards established by a state bar. Individual lawyers would not be allowed to continue in practice if they failed to meet the obligation.

A variety of supplementary incentives could also be designed. One would be a tax deduction to private lawyers who provide their services to the poor at no cost or for less than marketplace prices.

I do not say that any one approach ought to be followed by all bars in all states, but only that the problem is worth extended consideration, and the organized bar has not yet provided that consideration. The legal system is a creation of society to which all citizens ought to have full access. We must pursue a number of means to ensure that access.

Mr. Green:

Lawyers may soon find out they have more in common with meatpackers and automobile manufacturers than they think. The thought will shock the legal old guard, just as it did self-confident meatpackers and automobile executives in their days of innocence, but the likelihood for federal authority over the profession increases commensurate with the bar's failure to make itself more accessible to the public. There are a number of areas for possible congressional action:

—Given the past American Bar Association self-dealings on the prepaid legal insurance issue, there is every reason for a healthy skepticism about its present and future efforts to launch prepaid programs, whether open or closed panel. Further, guaranteeing justice is very much a governmental responsibility, as the federal government has shown regarding legal services for the poor. Hence, it would be worthwhile for Congress to create a federally chartered prepaid legal insurance program to compete with other private programs. Like a T.V.A., it would not pre-empt the field but could provide a yardstick to measure the efforts of private programs and perhaps prod them into greater effectiveness.

—It is intolerable that the bar receives profits, not fines, for anticompetitive behavior that would be per se illegal in other industries. The reasons that rules involving fee schedules, advertising, and soliciting have survived are a self-interested bar and a disinterested Justice Department that has historically saber-rattled against their brothers at the bar but has not sued them. One solution is congressional action. If Congress can delineate what is partially exempt from the antitrust laws (for example, newspapers and soda bottlers), it can legislatively declare that professional canons that frustrate competition and citizens' access to the law are illegal. What if legal advertising becomes as crass as Madison Avenue huckstering, some ask? It could be dealt with by those laws and institutions that now monitor any fraudulent or deceptive advertising, or, perhaps, by a specially created body of laymen and lawyers to oversee any advertising that, by carefully defined standards, deceives consumers.

—A national lawyers' tithe could be established to help achieve the system of justice that the canons talk about. A progressive percentage of law firm billings—from 1 per cent to 5 per cent or its equivalent in firm pro bono time—could be tithed to fund the delivery of legal services to the poor or middle income, or to public interest lawyers defending unrepresented interests. If
the state requires that doctors serve an internship prior to their full accreditation, it should not be unreasonable to make this tithe of lawyers a condition of being granted a valuable license by the state. This tithe, to be at all effective, must be national and not state-wide, for the latter would degenerate into the Reno-Delaware program—that is, lawyers would seek out the state with the lowest tithe.

Finally, the American Bar Association should impose and enforce a policy requiring any section chairman or official to disclose clients or who would benefit as a result of any policy they recommend to the House of Delegates. Once this is done, it should not prove impossible to forbid the participation of any section official in the determination of a policy that will directly benefit one of his clients, and to forbid the collecting of legal fees from specific clients for Association activity.

These proposals seek to increase the representation of previously unrepresented groups and to dust an Association cobwebbed with conflicts of interest. But it is important to stress that other remedial changes can be acted upon by this committee: consumer class actions, a consumer protection agency, court and agency awarded legal fees to public interest lawyers, and a change in the tax law to permit foundation-funded public interest lawyers to lobby are all essential for fulfilling the reality of representation for much of the public. Reforming lawyers, however, is still a sine qua non to reforming our system of justice.

Mr. Ortique:

I WOULD LIKE to limit my discussion to the role of the organized bar in providing legal assistance to those citizens who are least able to secure representation—the poor and the disadvantaged.

Since it was founded in 1911, the National Legal Aid and Defender Association has assumed leadership in conjunction with the American Bar Association and other national organizations of lawyers, such as the National Bar Association and the Association of American Law Schools, in ensuring that the legal needs of the poor were met by the same high quality professional service as is available to persons with means...

While the growth of the legal assistance movement has been very rapid in the last ten years, we have not yet begun to meet the needs of the poor in this country. Here is the challenge of the organized bar.

There are more than three hundred fifty-five thousand attorneys licensed to practice law in the United States, and fewer than six thousand of them work for legal services or defender programs. While representation in civil matters has increased substantially in the last ten years, a former director of the Office of Economic Opportunity, in testimony before Congress, estimated that in 1971 the legal services program was only meeting 28 per cent of the poor’s legal needs. In the area of criminal representation, the need is even greater and the resources even less adequate...

While the efforts of the private bar to supplement the poverty lawyers’ work have been substantial, they are inadequate to meet the needs. The pro bono publico, assigned counsel and the experimental judicature activities of the private bar have filled some of the gaps in our system of justice. However, the pro bono activities of the private bar cannot even begin to meet the level of need without some economic incentives.

There is currently a debate taking place within the profession and, I understand, within the halls of Congress, as it pertains to the recent Legal Services Corporation Bill that overwhelmingly passed the Senate last Thursday, on whether the neighborhood offices staffed with full-time poverty lawyers should be totally replaced by a system of compensation to the private bar, or judicare, as it is sometimes called. While I understand that there may be some of my brethren at the bar who honestly believe that a judicature approach would be the best method of providing legal representation to the poor, I fear that the motives of others, who also advocate the judicature approach, are primarily to reap the economic benefits of a subsidized law practice, or even worse, to dilute the efforts and impact of existing means of ensuring the legal rights of the poor.

I do not believe, as some have charged, that full-time poverty lawyers have or should have a monopoly on providing representation to the poor. And I believe that the private bar should and must be extensively involved in securing equal justice for poor Americans. I also believe that the most effective, economical, and proved method of providing such representation is through the use of full-time, well-trained legal service and defender lawyers supplemented by the private bar.

N.I.T.A. Announces 1974 Program

To INTENSIVE three-week sessions in the art of trial advocacy are being sponsored during 1974 by the National Institute of Trial Advocacy. The first will be held at the University of Colorado, Boulder, from June 16 to July 5, and the second is on the Reno Campus of the University of Nevada from July 14 to August 2.

Enrollment is limited to persons who commit themselves to attending the full three-week course. Team teaching is the principal method of instruction, and students will be assigned to sections of about twenty-two each. The program is one of intense, full-time study, except for the free period on weekends.

The tuition for each 1974 session is $900. Applications must be filed with the administrator by May 3, and a deposit of $100 is due by May 24. Information and applications may be obtained from the administrator, Robert E. Oliphant, University of Minnesota Law School, Minneapolis, Minnesota 55455 (telephone 612/373-9980).

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