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REORGANIZATION OF THE BAR*

By ELI F. SEEBIRT**

It is a great privilege for the Indiana State Bar Association to meet in this beautifully appointed building. I have no doubt that the President of Purdue University had something to do with its design, but I think that there was a material defect in its design, and that if he had it to do over again he perhaps would cure that defect. I speak particularly of the fact that there isn't any rear exit to the building.

I want to say that I regard Purdue University as being one of our great educational institutions. It has given Indiana a high place in education, and I want to say at this time if I may have a second, that I think it would be very unfortunate if the impression should go out from this meeting that the Indiana Bar Association, in any way resents the remarks of the President of Purdue University. He alone is to be given very much of the credit which has come to Indiana because of the position we have attained in the educational world, and we as lawyers who are accustomed to the contest of court, I am sure, should be the last ones to resent a criticism upon our practice.

I want to say to you, gentlemen, I feel very keenly that the practice of the law in the State of Indiana and elsewhere is under a very severe challenge, and I think President Elliott did us a very great service when he fearlessly called our attention to those facts.

The paper which I am about to present to you is upon some such subject as that. If there is any blame, if I have to have a rear exit, I hope you will first proceed against the President

* An address delivered before the Indiana State Bar Association at Lafayette, Indiana, July 10, 1931.

** Of the South Bend bar.

of your Association because he is responsible for the presentation of this subject at this time.

There is no period of time which the American lawyer contemplates with greater satisfaction than that in which the governments of the original states and of the nation were formed and developed. It was a period of creation; new and untried forms of government were in the making. Constitutions were written and adopted and the entire governmental machinery had to be shaped and made.

This task was largely one for the lawyer. Not only did the time offer the fullest possible opportunity of service by the bar, but it so happened that the time and opportunity brought forward lawyers of extraordinary mental powers, men of the bar who had a keen foresight of the political and social situations that might arise in the future. The enthusiasm created by the success which immediately flowed from our experiments in governmental and political forms, gave to the lawyer a dominant position in the social order; the public looked to the men of the bar for the formulation of public issues, and for the interpretation of the meaning of political movements; it looked up to the profession as learned not only in law but in the philosophy of politics and government; it accepted the fact as fundamental that only men of scholarship and training in the law could be called to the bar. Although neither local nor national bar associations existed to bring the lawyers together as an organized class, the opportunities and the times made the profession a cohesive and unified group influencing and coloring public opinion, furnishing leadership and direction in the development of political science, and lending a guiding hand in drafting legislation needed by the progressive and forward-moving new republic. The American bar emerged out of this governmental and social evolution a virile, compact and articulate group.

Also the lawyer of that time had inherited the traditions of the British bar. It could not be otherwise than that the profession in America was profoundly influenced by the prestige of the exclusive and aristocratic English bar which drew its inspiration from the ancient Inns of Court which had existed for more than five centuries. As early as 1606 by act of Parliament the barristers were enabled to organize the English bar, and for more than a half century before the Revolution the lower branch of the British bar had been organized. The Colonial lawyer had accepted the British concept that the profession

was one of high privilege and rank; that it had an aristocracy of position. This conception could not do otherwise than affect the profession here beneficially; it was a more effective stimulant for good than any code of legal ethics.

Perhaps tradition placed too heavy a responsibility upon the American bar. The strong coherent profession of colonial times was succeeded in post-revolutionary times by bar disorganization. A spirit of democracy swept the country creating a resistance to organized groups and guilds; America for more than a century was rural and agricultural; there was small need of special training and there was a resentment towards the organized profession of lawyers; individualism was the rule; it was said that bar organization destroyed professional freedom.

Between 1825 and the time of the Civil War almost every educational requirement for a life at the bar was wiped out. Every man was equal to any demand; he had a right to take up any occupation; he could enter the courts and try his own law suit. Laymen occupied the benches of both trial and appellate courts. Requirements for admission to the bar were lowered so that neither a knowledge of law nor a general culture was a prerequisite to admission to the bar; and the law as a profession almost disappeared. Statutes were passed throwing the practice open to all; the right of every man to practice law became a conviction in the lay mind, and that the right might at all times be preserved, it was guaranteed in several states by the Constitution itself; the right to be admitted to practice law by all who possess a good moral character was made a part of the fundamental law of Indiana, and a struggle of our bar for almost a century to remove this remnant of rampant democracy has been in vain.

Bar associations as we know them could not exist under conditions of this kind, and inevitably there was sure to be a revulsion against this tearing down of the profession and against low professional standards. Gradually and tardily this revulsion expressed itself through the organization of and activities in bar associations.

Beginning about 1870 voluntary bar associations were organized in New York and Boston, and others soon followed in the states and larger cities. The organization of the American Bar Association was in 1878. It was not intended that these voluntary associations should be co-extensive with and inclusive of the entire bar—rather they were to represent those who desired

fellowship and social intercourse, and the idealists in the profession; the associations were selective and admission was obtained on invitation.

There is no purpose herein to detract from the work and achievements of the voluntary bar associations; they have been instruments of great good to the profession and the public; they have done much in securing the adoption by the states of many Uniform Laws; they have been the only organizations that have worked for the acceptance of Codes and Canons of Legal Ethics; and they alone have accomplished much in raising the standards of admission to practice.

But it is freely admitted by most lawyers working in these voluntary associations, that the purposes of such organizations are desultory; they function irregularly and intermittently; they do not serve and represent the entire profession; and they have not broken down the individualism of the lawyer, or brought the bar of a state into group consciousness; and that little is being done by the lawyers as an organized profession to make more efficient the administration of justice.

The incapacity of American lawyers to work together in organizations is illustrated by comparison with the medical profession. The American Medical Association was organized in 1847 with the purpose of being comprehensive and inclusive of the entire profession; 154,000 physicians and surgeons are members—more than 61% of the entire profession. Less than 20% of American lawyers belong to their national association. There are 3,500 lawyers in the State of Indiana; of these only 1,433 are members of the Indiana State Bar Association, and approximately 500 members are delinquent in their dues; fewer than 30% can be relied upon to give financial support to the Association, and not more than 15% attend its meetings and participate in its proceedings. We must admit, what lawyers in most other states are required to admit, that lawyers as an organized group are not playing a big and important part in influencing political and social thought and action in our state; the profession's influence in legislative matters is inept; the bar of today has no opinions and its voice in great public matters is unheard and unheeded.

I wrote this article about a week ago. I think if I had to do it this morning, it might have been different. I might say I think the piece of legislation that was passed by the last legislature, and of which Judge Martin spoke yesterday, is the big-

gest thing that has happened in the history of Indiana, so far as the legal profession is concerned.

But in connection with my paper, and what I have said, I do want to point out what Judge Remy said, and it is a shame to our profession, that the members of the legal profession in the legislature had precious little to do, and can claim very little credit for this most progressive step.

I might say to you that in the State of Illinois where the Legislature has just adjourned the lawyers of that legislature voted against every progressive step relating to the law that was proposed.

The press and educator are making more important contributions to the betterment of the administration of justice than is the lawyer. It is true that in important movements in all communities you find some member of the bar giving leadership but he is acting by himself; he does not and can not represent or express the group sense and opinion of his profession; the best minds of the profession have not been brought into helpful accord by the power of cooperation and organization. Our profession is lagging behind the advance of the whole people.

But even a worse confession must be made and that is that the bar of Indiana exerts almost no influence for good upon its own members; we are giving no effort to the defense or promotion of ethical or moral standards and we are complacently winking at the most indefensible practices. Advertising, ambulance chasing and all other kinds of solicitation go on undisturbed and unchecked; exorbitant fees are collected from the criminal class under the pretense of fixing honorable judges and prosecutors; subornation of perjury is not unknown; while the bar of other states is fighting for the increase of educational standards to four years of college pre law training, and three years of law study, lawyers of standing in Indiana are moving the admission of barbers, clerks, constables, and factory workers that never saw the inside of a high school, and never read a single law book; these and many more things are happening because the profession as an organization has neither the power nor the will to cleanse itself. We are losing our leadership; we are losing position because we deserve to lose it. We are losing the respect of the public because we ourselves have no respect for our profession.

As stated, bar disorganization has existed in almost all the states. It has particularly been felt in the western states, where

there has been added to the individualism of the lawyer the isolation of great distances. And in these western states has especially taken root the idea of a legally integrated self-governing bar. Bar organization acts have been passed by the legislatures of nine states, eight in the west and one in the south. They are North Dakota, Alabama, Idaho, California, New Mexico, Nevada, Oklahoma, Utah and South Dakota. The demand for adoption of such an act has made progress in Virginia, Oregon, Washington, Michigan, Minnesota, Kentucky, Ohio and Texas. Each year will find additional states added to the list. These laws are usually referred to as "The State Bar Act."

In some states, including California and Nevada, the Act creates a public corporation designated as "The State Bar"; it has the powers of a corporation such as to enter into contracts, to acquire and hold property, and to sue and be sued.

In other states such as Alabama, Idaho, North Dakota, Utah and Oklahoma, the act creates a bar association or provides for a Board of Governors or Commission with power to formulate and to submit to the Supreme Court for approval and adoption rules relating to professional conduct, and to act as a fact-finding body in matters of discipline and disbarment; it gives to the board the duty of examining candidates for admission.

All these acts provide that the membership shall be all persons entitled to practice law in the State.

I might say in reference to Mr. Peters' article, and his address which he has given, that in the State of Nevada, I believe it was, under this provision of these state bar acts, where every practicing lawyer must be a member of the state bar, a prosecution was started in a lower court in the State of Nevada against a trust company for practicing law in violation of this provision of the State Bar Act.

The trust company was found guilty and the case went up to appeal on the Supreme Court, where it was affirmed. It would seem in the adoption of these state bar acts, they might solve the question which Mr. Peters presented.

The really big thing in the whole movement is the idea of including every lawyer as a member, and no better argument as to this vital point can be made than that contained in a bulletin of the American Judicature Society on State Bar Organization:

"It is desirable, as a matter of principle, to have the association include every lawyer in the state. The words bar and bar association should be synonymous, as they are in all other progressive nations. A lawyer not

fit to associate with his fellow lawyers is confessedly not fit to associate with clients. The public holds the organized profession responsible for the conduct of all lawyers, whether members or not. It is possible for a non-inclusive association of the bar, to punish non-members under statutory powers, and the act so provides, but punishment is not all of discipline. The prevention of unprofessional conduct is the only thing which will raise the bar to the place it aspires to hold, and that continuing vigilance and discipline which avails to prevent misconduct is hardly to be expected except in the case of members. The non-member is outside the stimulating atmosphere of professional ideals; he is in a position to do a great deal of mischief by jeering at the organized bar as a pharisaic and aristocratic institution."

An annual license fee must be paid by each member of the profession. It is usually \$5.00 per year. The State Bar is usually self-supporting through the collection of annual license fees and fees to be paid by applicants for admission to practice. The Board of Governors vary in number in the different acts, some having a member from each judicial district in the State, while others have a member from each congressional district. The governor from a particular district is nominated and elected by the votes of the members resident in that district. The Board of Governors elect their executive officers. The only officer receiving a salary is the Secretary. The Board is the governing body of the bar of the State. It is required to aid in the advance of the science of jurisprudence and in the improvement of the administration of justice.

With the approval of the Supreme Court, the Board appoints a Committee on Examination of Applicants. Very definite and specific powers are conferred upon the Board in the matter of disbarment of members, and persons thereby disbarred have the right of review before the Supreme Court. In some of the acts the Board finds the facts in disbarment cases and reports the same to the Supreme Court for action. The Board has the power to adopt rules of professional conduct, and when approved by the Supreme Court these rules become binding upon the members of the profession, and they can be disbarred or suspended for a violation thereof.

In some of the Acts the governing Board or Commission has the power to divide the State into districts, or to appoint local committees; it is not intended that the Governing Board shall handle all the complaints that arise throughout the State. These district or local committees investigate complaints and possess the powers prescribed by the Board and are subject to rules

established by the Board. Through these local and district organizations responsibility is passed on from the head down to the lawyer in his local community. Under the system of voluntary bar association there has been almost no contact or relation between the State association and local associations, but in these statutory organizations, the district organizations federate all local bar associations into the State organization, and furnish all bar activities with the qualities of uniformity and coordination.

There is a provision in some of these laws that the Governor, Supreme Court and Legislature of the State may request of the Board or Commission an investigation and study of and recommendation upon any matter relating to the courts of the State, practice and procedure therein, and the administration of justice, and thereupon it shall be the duty of such Board or Commission to cause such investigation and study to be made, reported to an annual meeting of the State Bar, and after the action of that body, to report to the same officer or body making the request; also that the State Bar may make such a study upon its own initiative and report the same to the Governor, Supreme Court or the Legislature.

It is said that "The outstanding features of an incorporated state bar are these: every lawyer who practices is a member. In form it is a representative organization, due consideration being given to geography. It has control over admission and discipline. It yields adequate annual revenue without undue burden on anyone; and it places responsibility squarely upon the whole profession."¹

If a lawyer ceases to maintain his membership in the State Bar his right to practice thereupon terminates. The requirement that every lawyer licensed to practice *ipso facto* becomes a member of the State Bar has been most vigorously resisted. The Supreme Court of Nevada recently answered this objection as follows:

"The petitioner contends generally that the State Bar Act, as a whole, is violative of the fundamental principles of our government in that those engaged in the practice of law are compelled to accept membership in a corporation in order to practice their profession. This contention furnishes the most popular criticism of the members of the profession opposed to the law.

¹ See Philip J. Wickser, *Bar Associations*, 15 Cornell L. Q. 390 (1930).

"As hereinabove stated, the membership, character, and conduct of those entering and engaging in the legal profession has, since the inception of our state government, been regarded as the proper subject of legislative regulation and control. The right to follow any of the common industrial occupations of life does not extend to the pursuit of professions or vocations of such nature as to require peculiar skill or supervision for the public welfare. In the adoption and approval of the legislation under review, the Legislature evidently considered that the time had come in the administration of the law that attorneys and counselors at law, who constitute an integral and indispensable unit in the administration of justice, should be organized as a body politic, with delegated power subject to the control of the Supreme Court and the Legislature for the benefit of the public welfare in a matter of great public concern."²

The enactment of these laws in the several states has been met with bitter opposition from many lawyers of independent attitude who resent any interference with the customs and traditions of the profession as they have known them. There is no other profession, trade or calling where opposition to change is more vocal and insistent. Many able men have vigorously opposed this form of forced bar organization. Perhaps the argument in opposition can be illustrated best by quoting from Mr. W. D. Guthrie, who spoke at the Washington conference as follows:

"We who are responsible for the future destiny of the profession are not justified in running the risk involved in compulsorily incorporating into a state organization thousands of men and women who have never shown the slightest . . . professional pride, or any interest whatever in professional organization. The existing voluntary bar associations are generally functioning with satisfaction and usefulness. . . . They are competent to perform all the duties and render all the service, public or professional, which it has so far been suggested might be rendered by any compulsory all-inclusive organization. We, who are a voluntary body of lawyers, have been drawn together by the fact that we are interested in all that's best and highest and noblest in our profession. It is because we are thus, because of our services and our interest, that we are representative, not so much of the whole bar as representative of the elite of the bar, of the best part of the bar. You will accomplish nothing by what is called democratizing the bar, pulling down the bar to the level of the great majority and destroying that incentive to work which now inspires most of us in an Association of this kind."

But in the states where the integral bar act has been tried, their experience has not been that it has destroyed or reduced the service and interest of lawyers who made up the voluntary bar associations. Instead they find exactly the same men active

² *In re Scott*, 292 Pac. 295.

and working in the incorporated or state bar. Indeed a different and bigger field of service is thrown open to the men who have carried the burden of voluntary bar organization. They find that questions which absorbed their time and which were never settled because of lack of power to act, have been removed from debate and dispute, and no longer is the profession consuming its energy in establishing fundamental standards concerning admissions and proper conduct.

The law brings every member of the profession under some relation to or influence of the Supreme Court. Rules of professional conduct as suggested by the State Bar and accepted by the Supreme Court have a very positive and personal meaning to the members of the profession. The code of many men of the profession has been formed in the criminal and police courts. They need a new code emanating from the state's highest tribunal for the administration of justice.

Wherever lawyers investigate the operation of state bar acts they become enthusiastic in their support. Officers of local, state and national bar associations are usually found to be in favor of the law. Seven of the last nine presidents of the American Bar Association have endorsed the idea of the integral state bar. Such men as Chief Justice Hughes and Elihu Root have approved it. The American Judicature Society, composed of some of the most eminent lawyers and law school educators, has been untiring in its advancement. It is not a proposal of restless reformers in the profession.

Where these bar acts have undertaken to confer upon the Board or Commission the power to disbar, the power to determine rules of practice and rules of decorum, such provisions have in two instances been held to be unconstitutional in that by these provisions the legislature has undertaken to confer judicial power upon an administrative body.

These acts have been vigorously attacked upon constitutional grounds in many of the states. The state bar act of Idaho enacted in 1923 was assailed on the ground it created a corporation by special law. If the question had been squarely presented to the Supreme Court it probably would have been declared invalid on that ground. But the legislature in 1925 re-enacted the act in substance but created an association instead of a corporation and this last act has been held constitutional by the Supreme Court. About the only difference in the two acts is that in the first the State Bar is called a corporation, while in the

last it is called an association; it possesses many powers of a corporation, and it is somewhat difficult to see why it is not a corporation.

The Supreme Courts of California and Nevada have held their respective acts constitutional notwithstanding the fact that the constitution of each of said states contains a provision against the creation of a corporation by a special act. Each court held that this constitutional provision does not apply to public corporations.

Indiana courts have frequently held that our constitutional provision against creating a corporation by special law applies to public corporations, so that it is probable that such a law in our state would have to follow the form of those states, which creates a board of governors or commission to administer the law known as the "State Bar Act," and with powers only to recommend rules on professional conduct to the Supreme Court, and with power to find facts and submit the same to the courts in matters of discipline. Because of its constitutional provision Indiana stands in a class by itself, and unusual difficulties stand in the way of our adoption of the usual form of State Bar Act. Perhaps the safest course would be to create a Board with administrative power only, with powers to find facts in disciplinary matters, to recommend rules of conduct, and give to the Supreme Court the final power to make the decision and to adopt the rules.

The comprehensive provisions relating to disbarment alone would be of great benefit to the profession and the public of Indiana. Under the existing law by which disbarment can be had for only very limited statutory causes, and the defendant is given the right of trial by jury, the power of disciplining the profession is practically futile and is attended with such difficulties that it is seldom undertaken. A lawyer of our state in his private life may violate every law of the state and be immune from disbarment. Under our Constitution a person must have a good moral character to become a lawyer, but he does not have to have a good moral character while he is a lawyer.

It may be that we are not ready in Indiana to have the bar organized by statute; some of the warmest advocates of the integrated bar idea urge that it be adopted only after the profession is made ready for it. It may be that it is desirable that we should do some pioneer work in creating a demand in the

profession and a consequent support for the law. We must interest the public and the press in the proposal for it must be borne in mind that there must be back of the proposal not alone a purpose to benefit our profession, but to benefit the public. No statute of this character will stand the test unless a primary object is higher and better service of the bar to the general public.

There is a very great need that the bar of Indiana shall be organized upon a basis that will give representation to the entire membership of the profession; the voice of every lawyer should be heard in the election of the officers of our State Bar and in the adoption of its policies. The organized bar of this State must be made representative of the profession, and there must be created a new spirit and morale to fight for the preservation of the ideals of the profession. We must present a united front against practices that are undermining the integrity of the profession, and that are impairing the confidence of the people in the administration of justice.

The opportunities for distinguished service now and hereafter to be presented to the bar in preserving the fundamental institutions of government may be just as great as were the opportunities of service in the formation of these institutions.

The attack is being made on many fronts. There is the tendency to centralize all power in the national government; to put the government into competition with private initiative; to obtain special legislative relief for groups and blocks at the expense of other people; and to engage in endless forms of unsound and uneconomic experimentation during times of industrial distress when the powers of resistance of the people are down. In meeting this attack the nation needs a unified and well-organized bar.

In Indiana there are issues pressing upon us that call for the services and assistance of the entire profession—the creation of a non-partisan judiciary, procedural reform, the equalization of the burdens of taxation, and the enforcement of law. There is a call to the entire bar of the state for great public service. There is a challenge to the profession to pull together and not apart. There is an opportunity not only to serve ourselves, but to give a needed leadership in the solution of great public questions. A voluntary bar has done little in giving this leadership; a statutory self-governing bar can hardly do less.