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A Lawyer's Duty to Take All Comers and Many Who Do Not Come

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A LAWYER'S DUTY TO TAKE ALL COMERS AND MANY WHO DO NOT COME

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This article centers on the legal profession's failure to meet the needs of low income groups within our society. The author advocates that lawyers have a duty to make their legal services available to all types of people having a variety of legal needs. He also contends that this duty goes beyond that presently required by the Code of Professional Responsibility. The author identifies the inadequacies in the present system of delivering legal services and suggests steps to be taken that would improve the system.

INTRODUCTION

The legal profession as it is currently organized in the United States has failed to meet the needs of many individuals and groups within our society. It has also failed to play a significant role in the quest for social justice and a viable society.[1] What is more important, however, is the unlikelihood that recent attention paid to these failings will produce the substantial changes needed. Radical revision of the lawyer's role and of the delivery of legal services is nowhere in sight.

Since 1965, with the advent of the Office of Economic Opportunity Legal Services Program, the organized bar has paid some attention and given considerable lip service to the twin issues of availability of legal services and access to the legal system. Discussion of prepaid legal service plans, group legal services, and the legal needs of the middle-class has pushed the boundaries of consideration well beyond the poverty group alone.[2] The extension of legal service plans to union and other groups now in existence has increased the potential for revising the way lawyers and legal services are used. All this, however, appears to be substantially limited by the past; by the way the legal profession, as a corporate whole, has viewed and still views itself and its professional responsibilities.

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1. *See* F. R. MARKS, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY (1972).
2. *See Introduction,* B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC (1974).

The Code of Professional Responsibility, particularly Canon 2,[3] is a recent attempt to modernize and enlarge upon the lawyer's duty to the public. However, it falls considerably short of revision as it is circumscribed by tradition and shortsightedness. The Code of Professional Responsibility fails to allow for, or even see the need for, a major redress of the imbalance in social justice; an imbalance produced in part, and reinforced substantially, by the persistent pattern of distributing quality legal services to those who can afford to pay the most for them. While Canon 2 represents the legal profession's most conscious and formal effort to reframe the role of the individual lawyer and the profession, it falls substantially short because it is premised on a basic misconception of the problem called "need for legal services" and because it reflects incomplete thinking about what lawyers can do and should do in a society which is in crisis.[4]

The wording of Canon 2, which provides "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available,"[5] is incomplete. To whom the duty is owed, and for what, can only be discerned by reference to the ethical considerations and disciplinary provisions. It is a duty principally to the poor, to extend to them the same kind of remedies as the rich have enjoyed in the past, and it is a duty to assist the poor in the recognition of the appropriateness of this imitative set of remedies. Canon 2 is incomplete because it does not reflect the possible irrelevance of much of the legal system to the principal problems of under-using or non-using groups. There is no suggestion of law reform.

Canon 2 embraces a *passive* view of the lawyer's role. Limitations are imposed on how lawyers may relate to new groups and what lawyers can do for these new clients. There are even substantial restrictions on what kinds of groups can be sanctioned for group legal services.[6]

Also, Canon 2 appears to be premised on the view that underuse of the legal system is a problem of "informed utilization," re-

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2.

4. There may be those who disagree with the contention that society remains in crisis. Indeed, the drafters of the Code of Professional Responsibility appear to perceive an essentially sound system that simply needs supplement. Herein lies the main difference when thinking about the legal profession and the legal system.

5. *See* note 3 *supra*.

6. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2, DR 2-103(D).

flecting a flaw in past non-users, rather than a problem of *informed delivery*, which reflects a flaw in past delivery.

Finally, Canon 2 speaks only of a *collective* professional duty. The individual lawyer is not seen as having a duty. Such duty as exists is not distributed to the individual lawyer; he or she is not even held accountable for failing to "assist" the profession in the discharge of "its" duty. There is no requirement in the Canon that the individual lawyer search for a more significant social role or ask a deeper set of questions about his or her responsibilities to make the legal system more responsive to contemporary problems.

I.

There is one critical error, reflected in Canon 2 and its ethical considerations, which is pervasive. It is the assumption that non-users and under-users of the legal system have the same kinds of legal problems as past users, but that they have lacked only opportunity (principally price) and sophistication to use the legal system as others have used it. This is a traditional view, one which is reflected in the expressed wish that the profession, as an institution, "assist laymen to recognize legal problems,"[7] and in the hope that individual lawyers will support "proper efforts"[8] to meet the needs of those unable to pay for services.[9]

There is a certain validity in the traditional view: the poor do have many unattended problems which are similar to those of the rich. They do need an extension of services for those problems and they do need some assistance, as do others, in the recognition of both the problems and the appropriateness of legal solutions to these problems. It is not contended that this traditional view is palpably incorrect. Rather, it is woefully incomplete. It limits the response of the profession to where, in the long-run, it may be needed the least.

The absence of a complete model of legal need has been continued, in part, by the research community in the way it has thought about and approached the problems of delivery of legal

7. *Id.* at EC 2-2.

8. *Id.* at EC 2-25.

9. This view has also been reflected in a speech by Roger Crampton, President of the Legal Services Corporation, in Los Angeles, Sept. 24, 1975. Mr. Crampton stated that the goal of the new corporation was to insure "that the poor receive the same quality and range of service that is provided to the rich."

services and of legal need. So-called "legal need" studies have assessed the patterns of use and non-use against models which are based on the ways the legal system has been used in the past.[10] It was not until the Mayhew-Reiss study,[11] that there was a suggestion that what was being shown was essentially circular; that the non-using poor (and non-using middle class) did, indeed, recognize the legal appropriateness of property remedies, but that the non-users did not necessarily relate their most serious problems to the legal system.

Cost was not the only or necessarily the major factor of non-use. Relevance was crucial. Where remedies were well established and supported broadly in the community, legal cognition and even use was relatively high among all groups. But, where these conditions were absent, both designation of a problem as "legal" and actual lawyer-seeking was significantly reduced. The poor in particular, did not recognize that the use of lawyers was feasible where there was no previous legal solution to a problem—even a pressing, persistent, and systemic problem. Nor did they recognize lawyer usage where broad community support or internalization was lacking.[12] The law was not seen as an instrument of social change.

There is every indication that a pattern of non-use of the legal system for a group's most pressing problems has had an impact on the outlook of group members. It has reduced their "legal competence" and their willingness to assert their needs through the legal system.[13] "Legal competence" is something very different than the lack of sophistication upon which Canon 2 is premised. Legal competence does not relate alone to recognization or awareness of legal problems. It relates as well to a willingness to seek new legal responses.

The implications of the incomplete model of legal need for Canon 2 seem clear.[14] The legal profession has an institutional image of what it can do or is willing to do. It is an image based on past patterns of delivered legal services. It is a static view. Lawyers are

10. For a discussion of early "legal need" studies see P. STOLZ, THE LEGAL NEEDS OF THE PUBLIC: A SURVEY ANALYSIS (1968).

11. Mayhew & Reiss, *The Social Organization of Legal Contacts*, 34 AM. SOC. REV. 309 (1969).

12. *See* F. R. MARKS, THE LEGAL NEEDS OF THE POOR: A CRITICAL ANALYSIS (1971).

13. J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR; ISSUES FOR SOCIOLOGICAL RESEARCH (1967).

14. *See, e.g.*, EC 2-2 *supra* note 7.

to educate laymen on what they do rather than listen to what they could do. What is needed is an active self-image that involves reaching out. A promise of new remedies that reaches out to hear the new, or see the painfully old, in new ways. There is none of that presently in the tone of Canon 2. Indeed the restrictions on advertising,[15] on champerty,[16] and barratry,[17] and the restrictions on group practice all go back the other way. The shift that is needed is an institutional willingness to go where the problems really are rather than insist that the non-users come to where the legal system and the legal profession presently are.

The traditional view of legal need has another flaw, suggested by Professor Galanter.[18] Many legal remedies which are broadly recognized in the community can be the basis for demonopolization of the legal profession's exclusive dominion over the response to the problem; that is, legal problems need not require lawyers. For example, government agencies have provided for private redress for breach of minimum wage laws and consumer fraud.[19] Remedies also can be structured for either self-help or paraprofessional attention. Demonopolization of the legal profession's hold over universally recognized solutions or procedures can have the effect of freeing even more lawyer time for the quest for legal resolution of some of society's more acute problems.[20]

The traditional model of legal need has accurately reflected only what the law has been good for in the past, what lawyers have in fact spent their time doing. Even the poverty group has been relatively efficient in the use of lawyers when encountering a tradi-

15. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2, EC 2-9, EC 2-10, DR 2-101, DR 2-102 which defines and limits the advertising practices permitted to the lawyer.

16. *Id.* at EC 2-20, EC 2-21, DR 2-106, DR 2-107, which define when contingent fees are permitted and what fee arrangements between attorney/client and attorney/attorney are proper.

17. *Id.* at EC 2-3, DR 2-104 which discourages attorneys from creating litigation to harrass others, or from contacting non-clients for the purpose of being retained to represent them, and which outlines how far attorneys may go in accepting employment where advice to take legal action has been given.

18. Galanter, *The Duty Not to Deliver Legal Services*, 30 U. MIAMI L. REV. 929 (1976).

19. *See id. See also* Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107 (1975).

20. A parallel can be noted in the release of lawyer energy in those states which adopted no-fault insurance. Not all future displacement will result in an increase in medical malpractice cases; some novel or newly supported theories for environmental protection or employment discrimination may ensue.

tional legal problem.[21] What is missing is the employment of legal services to realign power relationships within the community. Chronic non-users have not really had the sense that the law has worked, or will work, for their interests. This is the real challenge for the profession.

In addition to individual under-users, or groups of under-users, there are a host of clientless, or issue oriented situations that call desperately for the application of lawyer skills. Environmental issues, housing issues, armament issues, and racial equality issues are a few of the areas which may defy the rule of individual or group injury as a prior condition for the quest for a legal remedy. The earth needs lawyers. We are living in an age where remote or speculative injury in a juristic sense may turn out to be the final irremediable injury. The public responsibility stance of the new Code of Professional Responsibility, particularly Canon 2, does not suggest or allow for the possibility of a pro-active bar searching for causes of action, even to the extent of representing its own civic concern, as distinct from professional concern.

When it comes to group representation, which is the next lesser level of abstraction, the restrictions placed on group eligibility and lawyer relations to groups make it unlikely that groups will coalesce to use lawyers to push their broader interests. A "proper" sanctioned group is one which is not formed for the purpose of utilizing lawyers; legal service must be incidental to the main purposes of the group.[22] This is a broad discouragement to those who might seek lawyer help for wholesale redistribution of rights rather than individual legal aid service.

Perhaps more important, even for existing, "proper" and sanctioned groups, there is an inhibition of active lawyering within Canon 2. There is, in other words, an insistence that group lawyers should behave toward their group differently than United States Steel's lawyers behave toward that incorporated association of capital and management. Long-run and persistent interests should be identified and addressed even if the client has not yet seen the injury, the possible ramifications, or the possible solutions.

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21. CURRAN & SPALDING, *supra* note 2.

22. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2, DR 2-103(D)(5). The language of this disciplinary rule indicates that the recognition of any group is a concession to recent Supreme Court decisions. *See* UMW, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

II.

The model of the lawyer role embraced in the Code of Professional Responsibility is both traditional and highly conservative. As already noted, it is a passive model. There is a need to be more explicit about a complete legal need model, a lawyering model, and a model of informed delivery.

It has been agreed that there is a place for traditional legal aid, although one should bear in mind the possibility of routinizing and channeling traditional legal responses so that the legal profession does not retain exclusive control over their application or rendition. Beyond, however, there is a need for lawyer assessment of inchoate group needs. This is a part of our need model which cannot be reached by the "educational" inputs envisioned in Canon 2, for it is not a problem in informed utilization by the individual or groups. Rather, it is a problem requiring the education of lawyers because it is a problem of informed delivery. For given existing groups, lawyers for the group need to inform themselves of group problems or problems of individuals in the group which have not been related to the legal system and for which there is no broadly recognized legal response. To repeat, this is more a problem of lawyer education than of group or "lay" education which the drafters of Canon 2 would have us believe. The need addressed here is inchoate injury; the lawyering duty is to hear and to quest for new remedies, to relate the legal system to their clients.

Any model of legal need must also recognize what access to lawyers means, independent of actual use. This point relates to the legal competence area. It relates to a sense of power and autonomy not heretofore enjoyed by under-users of the legal system. It is a question of lawyers "being there," on call for a more extended group of would-be users. This point is easy to accept at an abstract level, but on an applied level it brings us directly to the question of whether a lawyer should have a right to reject a proffered matter (for price or other reasons) and ultimately whether the price system for the distribution of quality legal services meets society's needs. Leaving the ultimate questions until last, it is clear that lawyers cannot be on stand-by, or be a source of power for the heretofore powerless, unless there is a radically revised explicit individual duty to take matters which are offered within the range of a lawyer's competence. The need here is for access. The lawyering duty is to be available in reality, not in the abstract. It is here we begin to see

the pinch of the duty that is not individually distributed by Canon 2.

Another part of the unstated legal need is the clients' need for location. This has to do with information, translation, and reality. At one point in the development of the common law, lawyers were not needed as much in the translation function. A relatively homogeneous population in small communities was able to observe and translate for themselves, what was happening to surrogate contestants in law suits, and locate themselves accordingly. A large, heterogeneous, industrialized, and urbanized society put an end to such facility. Groups became isolated. Poverty is only one way to talk of this isolation. As the shift to a fragmented society was occurring, the bar became more and more attentive to only one segment. Location of the means of achievement and the limits of reality for property owners and managers came to mean counselling. In the process, the isolated groups were deprived of counselling, and location of their lives in terms of overall community agreement.[23]

The traditional educational approach of Canon 2 will not supply the location function for isolated groups. Estimates of possibilities, as well as an awareness of rights held in common with others are needed. This requires a bar that is willing to use vigorous advertising and even a degree of "chasing" to disseminate the kinds of information needed. It is a communication of information coupled with manifest willingness to test frontiers that is necessary: the kind of commmunication that took place between California Rural Legal Assistance and Cesar Chavez in the early days of the United Farm Workers struggle. It is the kind of aggressive coupling of information and willingness that characterizes the current efforts of a few to end discrimination against women (a heretofore isolated group) in the marketplace. In this context, rules against advertising, which assume a passive bar, require reexamination and revision. Groups need location information, wholesale counselling, and a willingness to test frontiers.

Any model of legal need has to have room for "clientless situations"; for a public interest response from the bar that does not necessarily relate to the interests of any given set of clients. In this

23. CIVIL JUSTICE, *supra* note 13. The consequences of this deprivation, ensuing conflict resolution and rule making had less and less to do with these isolated groups. The cycle of irrelevancy and distance commences.

context, the stringent rules against what kind of groups may be coalesced and sanctioned under DR 2-103(D)(5)[24] has touching relevance. Lawyers are not necessarily the only or best identifiers of broad public interest issues which should be tested. Groups organized around a central theme of obtaining legal services relating to the unique interests or unique vigilance of its members—for example, ecologists—might be a necessary intermediate step toward a broad based model of public interests response. Group response may not be appropriate for all clientless situations,[25] but clearly the stringent rule about proper groups[26] has implications for the broader social responses of the bar.

Finally, there is one other element of a new lawyer role that does not fit neatly into a model of legal need, but is nevertheless part of the legal need of those who use lawyers, and is definitely part of informed delivery. Compassion, love, attentiveness, and cooperation are ways of explaining this element. Absence of distance or aloofness are other ways of talking about it. Too often authoritative distance characterizes a lawyer's relations with his clients. Past non-users and under-users have considered this part of the cost of lawyer-seeking. This point relates to whether a problem remains in a context of the client's life and within the client's control or whether it is surgically draped and taken into the lawyer's world and related to the lawyer's outlook.[27] Clients, even those with traditional problems, need to be understood in their own terms.

III.

Given a more complete model of legal need, there remains the question of what the duty of the profession as a whole, and of the individual lawyer, is or should be. If the above comments are to be credited, even in part, it is clear that one must talk about the overall professional responsibility of the collective to be something more than the dangling requirement "to make legal counsel available." Legal counsel must also be made: (1) relevant where it has not been relevant in the past; (2) socially useful for situations, as well as

24. *See* note 22 *supra*.

25. For a complete discussion of clientless situations see MARKS, *supra* note 1, at 224-38.

26. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2, DR 2-103(D).

27. D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974).

individuals and groups, that require or could use lawyer skills; (3) applicable to the readjustment and realignment of power and property relationships; and (4) comforting for all groups and classes.

The individual lawyer should not be exempted from the imposition of a specific and enforceable duty. The Disciplinary Regulations in the Code of Professional Responsibility and the delivery mechanisms should be revised. Each lawyer should be required to spend a certain percentage of time delivering services to those who cannot pay, or extending time in the public interest or other socially relevant ways, such that each lawyer is required to relate to all individuals and all groups on a more equal basis than the present system allows. The extension of prepaid legal service plans affords an opportunity to think about, and accomplish, some revision of the delivery system. The following are some suggestions and thoughts about specific steps that may be considered.

As already mentioned, disciplinary sanctions are needed against any lawyer who refuses to take a matter because the individual or group seeking his or her services lacks a fee, because the matter is too controversial, or because the lawyer simply is not interested in the subject matter. Certainly there needs to be a system that limits overburden on any particular lawyer, or properly allows a lawyer to refuse the case because of lack of skill or competence.[28] But, at rock bottom, the ethic needs to be stated in terms of a duty to take all comers. This is premised on the notion that a lawyer offers a public service; that there is an individual duty not to assist the historical and heretofore persistent distribution of quality legal services to a very narrow elite group within the society. It is suggested that the freeze-out of certain groups has been systematic and that only drastic revision can change this configuration.

This disciplinary rule should apply to large firm lawyers, medium size firm lawyers, and sole practioners alike. However, here emphasis will be placed on the obligations of the large firms, for it is these firms, with powerful and affluent clients, that can best afford to take on this responsibility. As a result of market pressures, these firms are able to purchase top law school graduates year in and year out. This reserve of quality legal talent to serve corporate inter-

28. We have such a theoretical limit now, which requires lawyers not to take matters in areas where they do not possess competence. DR 6-101. Unfortunately, at least for those matters they want to handle, this provision has not limited the case-taking judgments or actions of lawyers.

ests contributes to the maldistribution of legal services in our society. If the effects of this maldistribution are to be corrected, the private sector of the legal profession, as a whole, must be truly available to all comers.

The past versions of public service, resting for the most part on voluntarism, have not been enough. Nor, in conception, could they ever be enough. Voluntary tithing arrangements for legal aid have been insufficient even to satisfy the traditional goals and service model of legal aid. For example, The Lawyers Committee for Civil Rights Under Law, principally a large establishment firm designed to address broader social issues through voluntary effort, has done significant work; but in the main, it does not represent a significant redistribution of wealth or power within our society. This, I believe is crucial. Furthermore, the public interest efforts of some large firms, incipient in the late sixties, have become a whimper.

Any obligation to take all comers has to be coupled with a sense of broader social responsibility and an abandonment of the view, reflected in Canon 2, that all that is needed is mere supplement to a system that has worked.

Whether the legal profession cares to recognize it or not, it has played a significant role in arriving at and failing to ameliorate present inequities in wealth, power, degrees of freedom, and human dignity within our society. The legal profession now has a duty, and has always had a duty, to participate in major reshifting of wealth and opportunity. This means that the identity of large firms with certain interests, to the exclusion of others, needs to be ended, and their loyalties broadened. Part of the obligation to take all comers requires a shift of self-image on the part of lawyers toward neutrality, except as each matter is accepted. This may, indeed, be a separate duty of lawyers, i.e., refrain from over identifying with narrowly defined interests. It may come as a result of the application of the prime duty to take all comers.

One may express skepticism that an imposition of sanctions on the individual lawyer to take all comers will, by itself, work a massive reorganization or redirection of private legal services. Further, I do not necessarily believe that the profession, as a whole, cares to do or is capable of the radical revision that seems needed to match the delivery of quality legal services to any realistic or socially just model of legal need. The legal profession does not presently see its role as including significant effort toward a redistribution of wealth, power, and participation. A choice has to be made which balances

the risk of riding out present crisis, the risk of failure to meet true legal need, and the risk of externally imposed massive revision of the legal profession. The suggestion of professionally policed individual obligations, however, does point out the existence of a dilemma. The chances are that at a minimum, we are talking about the partial socialization of the legal profession, because of the need for some mechanism to enforce the distribution of burdens.

Governmental efforts to use legal services to redress an imbalance of wealth and power are highly vulnerable to political veto to the extent they appear effective or successful. This certainly was the experience of the O.E.O. Legal Services Program's "law reform" effort. Similar effort by the private bar would not be as vulnerable.

Governmental involvement could take the form of tax incentives for departures from the price mechanism for delivering legal services, or it could involve direct grants.[29] Governmental involvement could also come in the form of a revised license structure, adopting renewable licenses and requiring that class neutrality and public interest response be conditions of renewal.

In the end we may be talking not of partial, but of full socialization of legal services. We may need to face this. Even free enterprise systems face the continual process of finding and redressing imbalances. The only argument is whether the transfers should be attempted inside or outside the market system.

Legal services can be considered a form of wealth, just as the entitlement and distribution of medical services has come to be considered.[30] The ill effects resulting from maldistribution of legal services are more diffuse and less readily apparent than the effects from a maldistribution of medical services, but in the end the society may be more crippled from the maldistribution of legal services. Present distribution of legal services—where the winners have purchased and co-opted a large majority of quality legal services—can be seen as a block to much needed social revision. Nationalization of the legal profession can be viewed as an indispensible step toward broader revision.

If the legal profession as a whole recognizes a need for something far more basic than supplementing present forms of delivery,

29. *E.g.*, The Federal Defender Program. Direct grants are an easier way of encompassing much of what is called public interest work; it involves contracting out watchdog functions and deputizing private attorneys general.

30. *Cf.* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

nationalization may not occur. This recognition includes seeing the present in realistic terms. However, in macrocosm, the major energies of the legal profession are addressed to what is, rather than what should be. In applied terms, under-users and non-users of the past describe this tension; the problem is to see them in new terms rather than in imitative terms. The extension of prepaid legal service plans may offer an intermediate opportunity for the bar to begin to make some important steps toward the revision of its own system of distribution and thereby toward informed delivery. If the infusion of new groups into the legal system is looked upon as a benefit, and if the approach is to listen and learn, throwing caution and restrictions on group formation and on lawyer relationship to such groups to the wind, who knows?

The panel discussion in which Mr. Marks participated can be found on page 946 at the end of Professor Galanter's presentation.