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The Legal Profession: A Look into the Future

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By William B. Spong Jr.

The custom of observing Law Day in the United States had its inception some years ago as an answer to May Day as celebrated in the Soviet Union and other communist nations. Law Day has provided an opportunity for members of the legal profession to remind the American public that here the rule of law prevails, that certain rights are assured under our system of justice and administered by an independent judiciary with an adversary system for hearing civil disputes and criminal charges. Often on Law Day, speakers have dwelt upon the great documents that comprise the foundation of our democracy. Virginians, despite their inherent modesty, have seldom refrained from reminding others that Jefferson, Madison, Mason and Pendleton were the principal contributors to those documents; that George Wythe was the first law professor; and that Wythe's pupil John Marshall, as chief justice, established the principle of judicial review.

Taking stock

It is fitting on Law Day that we in the legal profession take stock and, while applauding the magnificient roles played in American history by lawyers, consider the future of our profession. This past decade has been marked by a period of introspection by lawyers, judges and law schools, resulting in criticisms, often of one another. Our examination of the profession has come about for several reasons. Aroused consumers, often dissatisfied with lawyers' fees, have taken to the courts to challenge sacred cows of the legal profession. Our learned-profession status has been questioned in assaults under the Sherman antitrust law and/or claiming First Amendment protection. Perceptions of public dissatisfaction with lawyers and our legal system have been confirmed by public opinion polls.

We hear the Chief Justice of the United States at home and abroad state that half of the trial advocates appearing in the federal courts are incompetent. A recent study by the Federal Court Center puts that percentage at somewhat less. The judiciary and the legal profession, faced with charges of incompetence, have looked to the law schools as a source of their discomfort. Federal judges in the Second Circuit advocated that lawyers must have successfully completed courses in trial advocacy, evidence, ethics and civil procedure to qualify in their courts.

Some have questioned the value of the traditional casebook method of teaching law and demanded a more practical and clinical approach. As the judges have held forth, others have been moved to observe that only four federal judges have been removed from office for cause in the history of the republic.

If the legal profession fails in matters of legal education, discipline and the recognition of the need for delivery of cost-efficient legal care, it will be the instrument of its own demise.

I make these observations to portray the atmosphere in which we are called upon to consider methods of improving legal education, and the level of competence of lawyers and judges. These are times when some question the competency of lawyers, others question the intellectual elitism of legal education, others demand lay participation in matters involving judicial selection and disciplinary proceedings and others call for a method short of impeachment for the removal of incompetent federal judges.

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Public reaction

Our profession's record with regard to regulation of the conduct and performance of its members, and its hesitation about making legal services more widely available, has resulted in public reaction against powers of self-regulation traditionally exercised. There has not yet been a full-fledged attack on the unique powers of the legal profession, although some might characterize *Surety Title Insurance Company, Inc., v. Virginia State Bar,* as more than simple assault. The *Surety* case was recently dismissed by consent in the Eastern District of Virginia after changes were adopted in the rules providing for formulation and consideration of advisory opinions by committees of the Virginia State Bar and review of certain such opinions by the Supreme Court of Virginia. The cases in which the complaints allege bar regulations and advisory opinions violate antitrust laws and abridge First Amendment rights, culminating in *Bates v. State Bar of Arizona,* portend more questions in the future and continuing scrutiny of the First Amendment rights of lawyers and consumers. A recent example is *Consumer Union of the United States v. Virginia State Bar* which was vacated and remanded to the Eastern District of Virginia for further consideration in light of *Bates.*

Chipping away at self-regulation

Consider the series of cases that have chipped away at bar self-regulation, many decided upon facts and circumstances arising in Virginia. *N.A.A.C.P. v. Button* (1963) and *Brotherhood of Railroad Trainmen v. Virginia State Bar* (1964) set aside statutes, advisory opinions and standards concerning ethics and unauthorized practice by holding that "collective activity undertaken to obtain

meaningful access to the courts is a fundamental right within the protection of the First Amendment." These decisions along with later holdings in Illinois and Michigan are the basis for group legal services as they exist today, particularly closed panel prepaid plans.

Goldfarb v. Virginia State Bar (1975) held that minimum fees schedules adopted by a local bar association and buttressed by advisory ethics opinions do not constitute state action, so as to exempt such fee schedules from the provisions of the antitrust laws. And *Surety Title,* which I have previously mentioned, is a case in which unauthorized practice of law opinions of the Virginia State Bar that limit the right of certification of land titles to lawyers are challenged as violative of the Sherman Act.

Relevant questions

The challenges raised questions that should be addressed before bar groups can determine the direction that regulation of our profession will take. First, how *direct* must legislative or judicial rulemaking be to qualify for immunity as state action, that is as activity compelled by the state acting as sovereign? What will represent an articulate expression of state policy with regard to regulation of the legal profession? Must we have a statute? Or a specific rule or opinion adopted by the state's highest court? Second, is the state action exemption available if a court perceives that the harm of the anticompetitive restriction outweighs purported public benefits?

Answers to these questions will help address the underlying problems facing the bar today. To what extent will the profession regulate itself and to what extent will it be regulated by state and federal government?

First Amendment

There are also fundamental challenges to the Code of Professional Responsibility that involve First Amendment rights. The *Bates* decision authorizing truthful advertising, including fees, for routine legal services, following upon *Virginia Pharmacy Board v. Virginia Consumer Council* (1976), was decided on First Amendment rights but addressed advertising and not *in person* solicitation. Last May in *Ohralik v. Ohio State Bar Association,* the U.S. Supreme Court affirmed the disbarment of a lawyer, denying First Amendment protection for personal solicitation of clients in a hospital room. On the same day, the court reversed and remanded *In re Primus* and held that a state could not impose discipline upon a lawyer for advising a woman of her legal rights or writing to tell her that free legal assistance was available. The lawyer was associated with the Carolina Community Law Firm in Columbia, S.C. and the Columbia branch of the American Civil Liberties Union. Thus, the court has now held that some personal solicitation is protected by the First Amendment but the limits are not yet defined.

If lawyers are to continue in fiduciary positions they have traditionally occupied, it is important that the bad apples be sorted out at the time of entry.

Ohralik is clear in prohibiting overreaching by a lawyer in a hospital room, but suppose the solicitation is not *in person* but by mail. Would a letter from a lawyer sent to a patient in a hospital soliciting legal business have First Amendment protection if the language was not fraudulent or deceptive? Several state bar groups are presently debating proposed disciplinary rule changes concerning solicitation.

Parts of the Code of Professional Responsibility prohibiting lawyers from commenting publicly on cases have been struck down as unduly burdening the speech of attorneys. In *Chicago Council of Lawyers v. Bauer* (1975), such speech was held in some instances to be protected in both criminal and civil cases by the First Amendment. In March of this year in *Hirschkop v. Snead* (1979), the Fourth Circuit by a vote of 6-1 rejected the rule limiting comments on civil trials but held that the Supreme Court of Virginia could apply restrictions on what lawyers might discuss publicly in criminal cases being tried before juries.

The future of our profession will, in large measure, depend upon public perception, for this will contribute to the climate in which legislative and judicial decisions affecting the profession are made.

Complaints against lawyers

I have fallen into the academic habit of discussing appellate cases. It is important that we recognize that well over 90 percent of the complaints against lawyers by the general public involve fee disputes, procrastination by the lawyer, over-promise by the lawyer, and conflicts of interest, often because of financial involvement by the lawyer with the client. Most cases of dishonesty, when reported, are dealt with by courts and by the disciplinary committees. These receive maximum publicity and are significant in shaping public opinions of the legal profession.

The challenges in the courts and in the Congress to self-regulation of the legal profession have usually resulted in efforts by the organized bar to move toward easing particular grievances. For instance, the American Bar Association, as you know, relaxed the prohibition against advertising to allow *Yellow Page* listings prior to the *Bates* decision and after *Bates* to allow price advertising in newspapers and periodicals, and on radio and television. Also, the American Bar Association, after two or three years of heated debate, relaxed ethical prohibitions that existed with regard to closed panels for delivery of prepaid legal services. Efforts are being made to establish lawyer referral services, to have lay participation in discipline and judicial selection proceedings, to weigh specialization, and—if not to adopt mandatory continuing legal education—to broaden the concept

and scope of continuing legal education programs.

Character investigation

There are no ready answers to some of the questions I have raised. Indeed, in many instances we may not know questions or answers until the Supreme Court has provided further guidance. There are, however, two observations I should like to make that do not involve judicial determination. They relate to the process by which lawyers are educated, admitted to the bar and practice. First, with few exceptions, students are admitted to law school, educated, take the bar, qualify to practice and begin practice with not more than a cursory investigation of character. It is true that letters of recommendation are solicited for admission to law school but these more often deal with academic qualifications than with character references. Students are certified to take the bar examination on the basis of representation by a law school dean who is, in most instances, limited in knowledge of an individual's character by the exposure he might have had to the student.

Recently, cases have been reported where entire admissions records were falsified at the universities of South Carolina and Michigan. A few years ago, the same student was twice admitted to Harvard Law School, no mean accomplishment, on false records since he had really never obtained an undergraduate degree.

We cannot guarantee that there will not continue to be fraud and abuse of the admissions process. However, I question whether law schools, including the one with which I am associated, are making sufficient effort through alumni and officials at undergraduate schools to investigate the general character of applicants for the practice of law. If lawyers are to continue in fiduciary positions they have traditionally occupied, it is important that the bad apples be sorted out at that point of entry. This is not a simple task. Rights of privacy, consistent with the spirit of the Bill of Rights, should continue to be respected. Nevertheless, additional efforts by alumni and allocation of resources for thorough admissions interviews are needed.

Measuring competence

Secondly, although our disciplinary proceedings are designed to punish the dishonest, there is nothing within the disciplinary system that is designed to measure competence. The Code of Professional Responsibility requires that lawyers report one another for incompetence. I would not insult your intelligence by pretending that this takes place. Disciplinary bodies for the most part attempt to resolve complaints of incompetence by having the lawyer straighten out the matter rather than imposing sanctions.

We are becoming a litigious breed. There remains a need for competent lawyers.

The profession might endeavor to assure competence by tightening requirements to become a lawyer such as law school admission, law school graduation, bar examinations and examinations for certification as a specialist. This could further limit those who might enter the profession and lead to charges of protectionism. Moreover, it would be interpreted as contrary to policies that encourage minority professional education.

On the other hand, if we allow the public to learn from experience who are incompetent lawyers, this will hardly create a better opinion of the profession. Some states are adopting programs of mandatory continuing legal education, but there is no relationship yet established between attendance without examination at legal conferences and lawyer competence.

Some states are beginning to establish or consider temporary licenses to practice. Such licenses are held during a probationary period of two to three years while the new lawyer's competency and ethical proclivities are observed. This is an additional limiting step and its value will depend upon perfecting better methods of monitoring and evaluating competence. The temporary licensee would occupy a status similar to the intern or resident in the medical profession.

The future

In 1975 I was among a hundred conferees who assembled at Stanford to discuss law in a changing society. The discussions were sponsored jointly by the American Bar Association and the American Assembly. None of the conclusions were revolutionary but a general consensus evolved that has been confirmed by developments since the conference took place. Some of these were recently summarized by Thomas Ehrlich, the host dean:

> It now appears predictable that by the end of this century the number of non-lawyer personnel who participate in the delivery of legal services will exceed the number of lawyers. Economic pressures will require the delegation of tasks to persons who are specialized and can perform those tasks at lower costs than all-purpose lawyers. The use of computers for research purposes, already part of the operation of many large city firms and bar organizations, will become standard equipment for most lawyers. There will be increasing specialization by lawyers and the development of nationwide law firms. It is also predictable that the number of sole practitioners will diminish rapidly. The demand for legal services will require mass production techniques where recurring common problems can be dealt with wholesale. None of this seems overly visionary.

You might ask if this does not portend less need when there are already too many lawyers. I do not believe so. There are growing areas of the law and increasing need for legal service. We are becoming a litigious breed. There remains a need for competent lawyers.

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I am certain some of these prospects disturb you for the future of our profession. The legal profession is a high calling and even when much of the very basis of the profession as we have known it is threatened, we retain a degree of self-regulation greater than any occupational endeavor in our economic system. It is true that the traditional lawyer-client relationship will be impaired and perhaps depersonalized by changes that are taking place. Nevertheless, there remains within the power of the practicing bar the capacity to direct much of its fate, provided the public understands the value of a self-regulated, independent legal profession and the unique demands of the adversary system.

If the legal profession fails in matters of legal education, discipline and the recognition of the need for delivery of cost-efficient legal care, it will be the instrument of its own demise. For over two centuries, lawyers have been the balance wheels of our democracy. In appointive posts, businesses, legislative bodies, on school boards and in countless civic undertakings, they have brought a measure of civility to civic and political life and a capacity to probe and analyze that have served this nation well.

On Law Day, we should acknowledge the rich heritage of the rule of law in a free society and understand that its continuation is dependent upon the profession's recognition of the multiple responsibility lawyers have to clients, to the profession, to the courts and to the public—a weightier responsibility because of the complex and changing society in which we live. This requires a greater sensitivity to the need for better methods of delivering legal services, as well as efforts to demonstrate the value of our profession to a questioning public. The best formula for the latter is not new: It is to render prompt, competent and independent legal service for a reasonable charge to each client represented. □