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Winter 1979

The Legal Profession: A look Into the Future

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Spong, William B. Jr., "The Legal Profession: A look Into the Future" (1979). *Popular Media*. 86.
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A Look Into the Future

EDITOR'S NOTE: Dean Spong delivered the following address at Law Day meetings of the Norfolk-Portsmouth and Roanoke Bar Associations last May. He has footnoted the text of his talk to reflect subsequent developments.

THE custom of observing Law Day in the United States had its inception several 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 dwelled 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.

During our recent Bicentennial celebration, the late Eppa Hunton and Martin Burks were commissioned to prepare a resolution acknowledging the contribution of Virginia's lawyers to the founding of the Republic. These gentlemen were somewhat surprised to learn that neither George Mason nor James Madison were lawyers, but recovered to embrace them thusly: . . . "whereas other Virginians not formally admitted to the bar but nonetheless through private study learned in constitutional law and governmental philosophy, profoundly influenced the nation's history, etc. . . ."

One of the benefits of the Bicentennial celebration has been a renewed interest by historians in the legal rather than political careers of the great Virginians who were practicing lawyers. It is comforting to those who are timid about court appearances to learn that Thomas Jefferson had a dread of arguing cases. It is interesting to read of the lifelong rivalry between two great lawyers, Edmond Pendleton and George Wythe.

Wythe often found Pendleton more than his match. Once, after suffering a series of losses to Pendleton in the General Court at Williamsburg, Wythe considered giving up the practice of law to enter the ministry. A Williamsburg wag admonished him that this would provide no escape from Pendleton; that if Wythe did become a minister, Pendleton would also take the cloth, rise to the pulpit and out preach him. The rivalry between these two splendid legal minds continued in another context after Wythe became Virginia's first Chancellor and Edmond Pendleton became first President of the Court of Appeals of Virginia. Having appellate jurisdiction over the findings of the Chancellor, Pendleton reversed over half of the 150 appeals of Wythe's decrees. But they were friends. With Jefferson, they wrote the forerunner of what is today the Code of Virginia. David Mays, Pendleton's biographer, declined to speculate on Wythe's thoughts when as a pallbearer he helped carry his great rival to a last resting place.

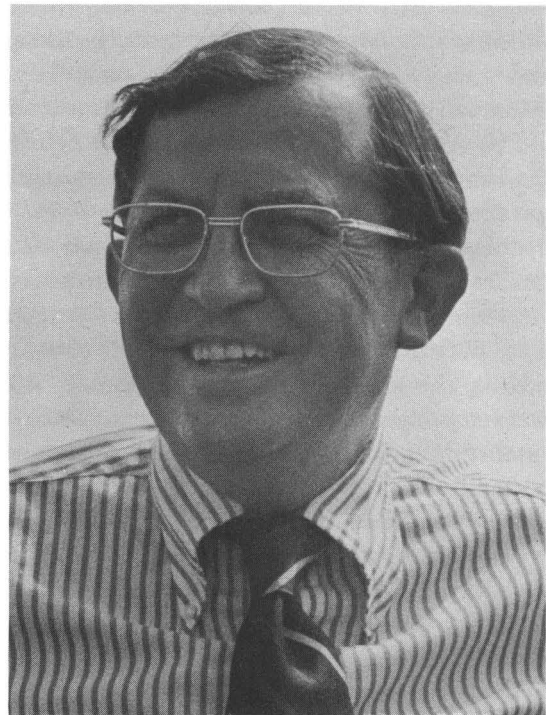
But enough of the past. It is fitting on Law Day that we in the legal profession take stock of ourselves and, while applauding the magnificent roles played in American history by lawyers, consider the future of our profession. This past decade has been marked by a period of introspection by lawyers, judges and law schools, resulting in criticisms, often of one another. Our examination of the profession has been brought about for several reasons. Aroused consumers, often dissatisfied with lawyer's 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, one taken here in Virginia.

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 incompetency, 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 case book 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. 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.

It is fair to say that 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 will characterize *Surety Title Insurance Company, Inc., v. Virginia State Bar*, recently remanded by the Fourth Circuit to await a determination by the Supreme Court of Virginia of its role in the process leading to unauthorized Practice of Law opinions, as more than simple assault. The cases with complaints that allege bar regulations and advisory opinions violate antitrust laws and abridge first amendment rights, culminating in *Bates v. State Bar of Arizona*, must also be viewed as significant.

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*,



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(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) in which I wryly submit all of us had a monetary interest, held, as you know, that minimum fee 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.

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 challenges as violative of the Sherman Act. There are two questions which should be addressed by the Supreme Court before bar groups can determine the direction that regulation of our profession will take.

First, how *direct* must legislative or judicial rule making be to qualify for immunity as state action, as activity compelled by the state acting as sovereign? Must we have a statute? Or a specific rule or opinion adopted by the state's highest court?¹ Second, is state action exemption available if a Court perceives that the harm of the anti-competitive 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?

There are 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. In January *Ohralik v. Ohio State Bar Association* was argued before the Supreme Court in which a disbarred Ohio lawyer claimed first amendment protection for soliciting clients in a hospital room shortly after an accident. Counsel for the disbarred attorney relied largely upon *Button* and *Brotherhood of Railroad Trainmen*. Should the Supreme Court set aside the disbarment, and I do not believe they will, we may be faced with a situation where, as in advertising, standards will be applied by the various states to set forth the circumstances under which lawyers may *in person* solicit clients.²

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.

I have fallen into the academic habit of discussing appellate cases. It is important that we recognize that well over ninety 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 re-

ceive 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 prohibitions against advertising to allow yellow page listings prior to the *Bates* decision.³ 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 weight specialization, and—if not to adopt mandatory continuing legal education—to broaden the concept and offering of continuing legal education programs.

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 decided pending cases I have discussed. 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 no 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 Dean who is, in most instances, limited in knowledge of an individual's character to the exposure he might have had to the student. In recent weeks cases have been reported where entire admissions records were falsified at the Universities of South Carolina and Michigan. A year or so 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 the 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.

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. The Chairman of a State Disciplinary Committee recently observed:

"I think that we have developed a 'live and let live' philosophy. We really do not care much about what our colleagues are doing unless they cross us. There is a good deal of talk among us about how we covet professionalism, but there is really not much indication to me that we have any overwhelming concern for the public interest in relation, at least, to the activities of our fellow lawyers."

There are areas where one might identify quality controls for the legal profession. The marketplace operates to allow consumers to decide by their purchasing power who are good lawyers and who are not, so that the less competent will ultimately be weeded out. I do not believe that this is an effective means of insuring quality or helping public perception of the legal profession. There is also a sequence of steps required to practice: admission to law school, satisfactory completion of law school requirements, passage of a bar examination, admission to the bar, and in some jurisdictions, certification as a specialist. These are attempts to assure quality of ultimate performance by limiting those who may render service by examination and formal requirements.

Another method of determining whether a practitioner is qualified will be tested by evaluation of a particular professional service. The two principal means of testing this are by professional discipline systems and malpractice litigation. We have no present methods of monitoring and improving the competence of lawyers. Few disciplinary hearings are concerned with competence. Malpractice litigation is an expensive way to have one's incompetence questioned.

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.

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 Erlich, the host Dean: It now appears predictable that by the end of this century the number of nonlawyer 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 possibly 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 to me but in an age of Star Wars and Close Encounters that may be understandable.

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

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 may be the instru-

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this nation well. On Law Day 1978, 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. And, also, 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.

FOOTNOTES

1. On July 25, 1978 the Supreme Court of Virginia amended Paragraph 10, Section IV of the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court to establish new procedures for formulation and consideration of advisory opinions by Virginia State Bar committees and the Council of the Virginia State Bar and, also, providing for review of certain advisory opinions by the Supreme Court of Virginia and for an approved opinion to become a Rule of Court.

2. On May 30, 1978, the Supreme Court affirmed the disbarment of Ohralik in *Ohralik v. Ohio State Bar Association* 436 U.S. 447, denying First Amendment protection for personal solicitation by a lawyer of clients in a hospital room. On the same day the Court reversed and remanded *In re Primus* 436 U.S. 412, 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, South Carolina 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.

It should be noted that in July of this year the District of Columbia Bar amended its disciplinary rules to permit *in person* solicitation, but prohibiting any right to pay a third party to seek business for an attorney.

The Board of Governors of the California Bar by a vote of 12-6 adopted a proposed rules change in August that allows solicitation under certain conditions. The proposed change prohibits the use of false or misleading statements; the use of coercion, duress or harassment; and representations made when the potential client is in a distressed state and cannot exercise reasonable judgment. Members of the California Bar are now considering the proposed change.

3. It should be noted that shortly after the *Bates* decision, in August of 1977, the House of Delegates of the American Bar Association adopted amendments to Canon 2 to allow some price information in newspapers, periodicals and on radio. In August of this year, the House of Delegates amended the ABA code to permit television advertising. Consequently, on August 30, 1978 the Justice Department moved to dismiss its anti-trust suit against the American Bar Association, filed on June 25, 1976. The government's complaint had alleged that the American Bar Association was in violation of Section One of the Sherman Act because it had adopted and was enforcing restrictions on competitive advertising by lawyers.

The Legal Profession

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ment 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