PLANNING THE DELIVERY OF LEGAL SERVICES: THE RESPONSIBILITY AND NEGLECT OF THE LEGAL PROFESSION

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LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY
CANON 2

A Lawyer Should Assist the Legal Profession in 
Fulfilling Its Duty to Make Legal Counsel Available.

EC2-1 The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problem, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Despite EC2 as one of only nine Canons comprising the Attorney's Code of Professional Responsibility, it is estimated that 70% of all Americans are "legally poor." Thirty-two million Americans at 1970 income levels between $5,000 and $15,000 have unmet needs of legal services because they are unable to afford legal services. In Hawaii it is estimated that over 200,000 persons have unmet legal needs. Simultaneously heard today is that there may be too few law jobs for the new law school graduate. Have the basic principles of economics gone awry? With such great need for legal services by middle-income Americans, why is there worry of an oversupply of lawyers? Should this need for legal services be met by lawyers through planning and effort? Who bears the responsibility for that planning? What questions must be answered to plan effectively? What can be done now to better distribute legal services?

This article focuses on the neglect of planning by the legal profession to distribute its skills, to deliver legal services. As a profession, the responsibility of making legal services available to all who may need them has resided with the legal profession and has been recognized by the profession as its responsibility. However, while the profession has placed great emphasis on raising the quality of legal services, the need to improve methods of supplying and distributing legal services across the broad spectrum of persons in need of a lawyer's help has been largely ignored. Many persons say that the profession has worked against the interest of the public or that the legal profession has been unable or unwilling to find ways to equip themselves to compete and has preferred instead to stifle competition.

The Responsibility and Neglect

Lawyers and state bar associations may respond that the responsibility of planning to make legal counsel available to all persons in need of services is being met on a national scale by the American Bar Association. However, inertia in the legal profession on a national level has been traditional, fear of change common, and the effect of its efforts on the availability of legal services slight. One may be reminded that the ABA Special Committee on the Availability of Legal Services began its work in the summer of 1965, had a research project by the American Bar Foundation undertaken to provide the Committee with research support, published a book as part of the project in 1970, and that today in 1976, the legal poor in most states are as poor as they were in 1965. One may be further reminded that as far back as 1937 the American Bar Association formed a Special Committee on Law Clinics, and that today, nearly 40 years later, law clinics are still being hindered by bar associations for infringements of its Canons prohibiting advertising. Finally, one need only be reminded that the 1967 recommendations of the American Bar Association on Prepaid Legal Services went only so far as to amend ABA Canons to permit matters which the U.S. Supreme Court has required be permitted and not much more. To date, one may ask, what has been the impact of the American Bar Association on the actual delivery of legal services to every person in the state who needs them? There has been manifestly little impact.
A partial explanation of the ABA’s lack of impact is that efforts on a national scale to study the problem, and their subsequent recommendations, are subject to such wide differences—geographic, economic, cultural, and value—that the final resolution on a national level will always be suspect as the best solution for a small state. Surveys of the over 400,000 licensed attorneys in the United States today can hardly be said to be more accurate than a statistical study of the less than 1,500 licensed attorneys in Hawaii. On a state scale, the information and variables are manageable. The effects of an experiment on a state scale can be controlled. On a national scale there may be reluctance to try new modes of legal delivery systems for fear that once set in motion an experiment is irreversible. The responsibility of planning a state’s delivery of legal services does lie with the legal profession, but it does not lie with its national organization, fettered by inertia, fear of change, and unmanageable variables.

The responsibility for planning the delivery of legal services in a state lies with the lawyers licensed to deliver legal services in the state. It is on a state level that an attorney is examined and licensed to practice law,11 regulated in behavior by state Canons and disciplinary rules and punished for infraction of rules. While there are U.S. Supreme Court decisions which affect the control of the legal profession in all states12 and American Bar Association recommendations which are adopted by most states,13 the control of the legal profession is fundamentally on a state basis. No state bar association or state supreme court has yet shown a desire to have wrested from it the control of its state’s legal profession by having a national examination, a national license to practice law in any state, or a national disciplinary board.11

With the power of control of the legal profession within a state should come the corresponding responsibility of the legal profession within that state to fulfill the objectives for which that power was granted, the delivery of quality legal services to people in its jurisdiction. The neglect of state bar associations to plan on making legal counsel available is explained in part by the fact that the profession places principal responsibility on the individual attorney. For example, Ethical Consideration 2-25 states, “The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”15 Individually, numerous members of the profession have very unselfishly donated their talents in making legal services available. For specified causes large groups of attorneys have acted in concert to preserve the availability of legal counsel to the poor; as, for example, the great efforts which were expended for the preservation of federal funds to legal aid programs. These efforts, noble as they are by the individuals, have not been adequate to meet the needs of the public for legal services in most states. Very few state bar associations, law schools or state supreme courts have by committee, courses, or philosophy taken a broadly conceived reexamination of the needs and of the methods of meeting the legal needs of the public.

Pragmatically for the legal profession, the failure to plan to meet the needs of the public has been self-detrimental. The profession’s neglect to respond in the past to the increased need for legal services has resulted in the loss of many areas of work. Fields of practice formerly in the domain of the lawyer—such as trust work, bankruptcy, real estate transactions, and title searching are now also being handled without attorney supervision by lay persons less skilled than attorneys but better able to meet the needs of the public. Because of high attorney fees, some states have enacted specific legislative limitations on attorney functions such as no-fault automobile insurance laws. Possible federal legislation portends the further loss of control of the legal profession by legislative action; the U.S. Senate Subcommittee on Representation of Citizen Interest saw in 1974 that “central to the Subcommittee’s purpose is the need to bring essential legal services within the reach of average Americans.” The need for legal services is rapidly accelerating in American society by increasing urbanization, more complex government regulations, new right to counsel rulings of the Supreme Court and a heightened awareness on the part of the poor and middle class of their legal problems.16 Unless the legal profession takes affirmative control of the profession by meeting the needs of the public, the profession will continue to lose control of fields of their profession through default of their services to persons less skilled than the attorney but better able to respond to the needs of the public.

Planning the Delivery of Legal Services
It is not surprising that there has been little action on a state level to address the maldistribution of legal services. The most fundamental questions
not only have not been answered, they have not been asked. Fundamental to distributing legal services in a planned manner are answers to the questions:

A. For every human being subject to the legal process of a state or the United States, what kind of fundamental legal services should be available and to what degree should it be available?

Should there be universal access to the courts and lawyering services? If not, in what areas should a person have the “fundamental right” to legal counsel regardless of a person’s ability to pay? To date, the practicing legal profession has not affirmatively answered this question preferring instead to do only what the U.S. Supreme Court has compelled in its right to counsel cases which have principally been in the criminal field. Even at that, it appears that the licensed attorneys cannot meet the need for services compelled by the court. The recent U.S. Supreme Court decision in Argersinger v. Hamlin extends the right to counsel to misdemeanor cases in which there is a possibility of loss of liberty through incarceration. It is estimated that implementation of this decision would require attorneys for 11 million cases a year. Are there areas of civil rights or just fundamental fairness which are so basically a part of the philosophical fabric of the United States that legal counsel should be available to any person regardless of ability to pay? As in voting rights? In discrimination on the basis of race? Inhibitions of free speech? Then what of a right to divorce and the corresponding right to legal counsel for a divorce?

B. Who is not getting fundamental legal services? What groups of people can be identified as not having legal counsel available for their fundamental rights or any counsel for fundamental matters? Can they be identified by geography? Or by cultural factors—as fear of courts, language barriers, and the shame of asking for help? Or by the lack of mental capacity such as the insane, unconscious, or very young? Or by those whom we have long identified for economic want—the poor and for most matters—middle-income persons?

C. Is the profession, as presently constituted, equipped to meet the need for legal services? Is there a sufficient number of attorneys? In 1966 Hawaii had the 46th lowest ratio of attorneys to state population and in 1970 that ratio dropped to 50th in the nation. What is the significance of those ratios? How does that number fit with the availability of lawyers to go where the need is geographically, culturally, and at its economic terms of anticipated attorney income?

D. Is the present traditional manner of practicing law adequate to fulfill the need for legal services by the public? How can the legal profession improve the system of office operations and law practice? Should it: Develop prepaid legal service plans? Encourage greater office efficiency and law clinics? Develop the use of paraprofessionals as advocates in certain areas? Provide incentives to encourage practitioners into specific areas of need?

E. What alternative modes to the formal legal system should the legal profession encourage? Would, for example, new forms of arbitration, mediation or lay counseling assist in reducing the public’s need for legal services? Within these alternative modes how can the individual’s rights be safeguarded without an attorney—society’s designated protector of rights?

A State Bar Association’s Opportunity to Act

To address the above questions, the Bar Associations of each state should establish a Standing Committee on the Availability of Legal Services which would conduct such research and analysis as is necessary to advise the bar association and State Supreme Court on where the profession is failing to meet the legal needs of the public and what the state’s legal profession should be doing to fulfill those needs. A paid, fulltime executive director who is an attorney, and a secretary should be charged with conducting research and implementing programs in concert with the advice of the Standing Committee. Financing of these persons and an office could be through an assessment of every practicing member of the profession in the state.

Even without the executive director and secretary, there are numerous things which the legal profession in a state can do to ameliorate known needs for legal services. Within Hawaii’s present rules governing the legal profession the following activities can be implemented now. Most of these ideas have been provided in another state as a single effort of the bar to meet legal needs of the public; the following activities can and should be implemented concurrently.

• As a part of the present Lawyers Referral Service there should be an attorney available for a half hour consultation at a flat one-time fee—e.g.,
$15 for a 30-minute consultation. This service would aid in reducing the three most often stated reasons why the need for legal services of the average income person go unmet: cost of services, inaccessibility of lawyers, and perceptions of lawyers. For a small charge the person may see if he has a cause of action, whether the matter can best be disposed of without an attorney, and what he can expect of seeing an attorney and pursuing a law suit. The consultant attorney should be located in the Lawyers Referral Service office and required not to take any cases arising from that office. The person at any time before or after the consultation, could be given attorneys’ names through the usual manner of the Lawyers Referral Service’s operations. The Lawyers Referral Service and Consultation Service should, as part of a preventive law education program, be advertised widely and often.

- Another major reason lay persons don’t see lawyers is ignorance of the need for and value of legal services. The legal profession should, on a large scale, encourage community legal education. Every person in the state should have a fundamental understanding of the legal process, when they can sue and be sued, their constitutional rights and responsibilities, and basic principles of law in areas such as contracts, torts, constitutional law, and criminal law. Community college and high school courses on law for the layman should be developed and assisted. Books and pamphlets on specific problem areas common to many people, such as landlord tenant laws, should be written and distributed by the legal profession to familiarize the public on laws affecting them.

- The profession should develop and encourage preventive law concepts and checklists which simplify planning by lay persons before they are in legal difficulty—such as having an attorney write their will or read the contract prior to the purchase of their house. The concept of preventive law, also called positive law, is well established, but not widely implemented. The State Bar Association of Michigan has sponsored an Annual Family Legal Check-up since 1956 and advertising of the concept has been approved by the American Bar Association.

- The profession should publicize through the media preventive law, when to see an attorney, and the Lawyers Referral Service. This is not a call for advertising by individual attorneys which is presently prohibited, but is a call for the organized profession—bar association, law school, or judiciary—to plan and develop informative, responsible, and educational advertisements.

- Neighborhood law offices should be developed by the profession and permitted to advertise. These law offices would be self-financing. But because they would be limited to clients of moderately low income, they would require the active participation of bar associations. In 1962 there were 28 such offices in the Philadelphia area.

- The profession, on at least a state level, should affirmatively identify, encourage, and assist the development of new means of delivering legal services. Prepaid legal service plans should be the development of the legal profession and not the development of either the state or federal legislatures, or insurance companies. Research funds should be put into model law offices, systems, and equipment to increase law office efficiency.

Summary
The legal profession has by self proclamation and by the authority and privileges given to it, the responsibility of planning to insure that the delivery of legal services is available to persons in need. That responsibility, borne to date by both the individual attorney and the American Bar Association, has not been adequately met. In part this is due to the scope of the problem—assessment of needs and development of new patterns of practice and information—which are group in nature. However, too large a group, the national scale, has little applicability to a small state. Needed is a large effort by the state’s legal profession—bar association, law school, and judiciary—to control itself and to plan the delivery and distribution of legal services in order to fulfill the purposes of the profession.

There are many things which can be done on a state bar association level—particularly in the assessment of needs, community legal education programs, and lawyer referral service activities. The legal profession has been deemed since antiquity to be essential to American society, has been granted privileges to fulfill that function and has been directed to change in order to preserve and advance the social values that are its reason for being. However, while the nature of American society and the need for legal services has changed enormously, there has been slow, even retarded changes in the profession. The seriousness of the need for the legal profession’s responsiveness is not to be underestimated. At stake is not the legal profession but the fundamental trust in and fairness of America’s system of justice.
Footnotes


4See also, Occupational Outlook Quarterly, Fall 1975, p. 2.


7Report of the American Bar Association Special Committee on Availability of Legal Services, as found in Hearings Before the Subcommittee on Representation of Citizen Interests of the Committee of the Judiciary. United States Senate, held on May 14-15, 1974, p. 137.


9Christensen, Barlow E. Ibid.

10Cheatham, Elliot E. A Lawyer Whose Nerdole. 63 Col. L. Rev., 975.


12Federal courts authorize practice only after certification to practice by a state.


14Graduation from an ABA-approved law school is the requirement of most states to take the bar examination.

15There is the National Discipline Data Bank maintained by the American Bar Association which serves as a clearinghouse of information on attorneys who have been disciplined; it is for informational use only.


17University of Hawaii School of Law Catalog, 1975-76, Honolulu, p. 16.


20Ibid.


22Student Lawyer. Ibid. p. 24.


25University of Hawaii School of Law Catalog, 1975-76, Honolulu, p. 16.

26Cheatham, Elliot E. Ibid. p. 975.

27Hawaii has two recent developments in this area: Kapiolani Community College's Legal Assistant Program and the Committee for Youth Legal Education.


32Ibid., p. 980.


34State Statutes on Unauthorized Practice of Law, in Hawaii. See HRS 507-14.


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