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Barlow F. Christensen, Lawyers for People of Moderate Means

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BOOK REVIEWS

LAWYERS FOR PEOPLE OF MODERATE MEANS. By Barlow F. Christensen.
Chicago: American Bar Foundation. 1970. Pp. 313. \$7.50.

During 1970, 37 of the top-ranking 38 graduates from a prestigious law school did not accept New York employment offers; salary offers of \$18,000 to neophytes were met with counterdemands of 20 percent release time for social law practice. Nepotism notwithstanding, many sons of senior partners declined to accept employment in their fathers' firms, preferring service in OEO sponsored programs. Yet, Nader's Raiders found no difficulty in recruitment with minimal salary offers, if any.¹ Several non-profit law firms have been formed to espouse public causes. Brandeis University has announced plans for the establishment of a law school devoted exclusively to public law. These seemingly disconnected facts have clear implications of a radical shift in values, a sharp departure from the profit-prestige-power syndrome that seemed adequate for earlier generations. Each has a direct relation to the effort to provide lawyers for people of moderate means, that amorphous group of tens of millions of citizens referred to as the "forgotten man" in the days of the New Deal. Not only are "pervasive changes in society . . . moving at an almost incredibly rapid pace," but also the "so-called generation gap—often vast in terms of knowledge or understanding—now seems at some points to be no wider in time than a year or two."²

Consider, then, the tragedy sufficient to evoke the comment, "unrealistic, inadequate, irresponsible, and unprofessional. It disserves both the public and the bar."³ Such was the response of a member of the ABA Committee on Availability of Legal Services to the ABA's adoption of a Code of Professional Responsibility permitting a lawyer's participation in group legal services "only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services [so] requires" and, even then, "unless prohibited by such interpretation," only if in conformity with four additional

1. The beginning salary of all Nader attorneys is \$4,500. Harv. L. Rec., Mar. 11, 1971, at 2, col. 1.

2. B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 292 (1970) [hereinafter cited as CHRISTENSEN].

3. Nahstoll, *Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility, DR2-103(D)(5): Stale Wine in New Bottles*, 48 TEXAS L. REV. 334, 350 (1970).

conditions.⁴ In view of the exhortations of the newly adopted Canon 8, that "A Lawyer Should Assist in Improving the Legal System" and Canon 9, that "A Lawyer Should Avoid Even the Appearance of Impropriety," consider, too, the hypocrisy of such action by the ABA House of Delegates after it had been simply informed by the Chairman of the Committee on Evaluation of Ethical Standards that "the lawyers of America are not now prepared to have group legal services extended."⁵ With no public debate, the ABA thus decided it would not waste its funds through emulation of the decade of lobbying by the American Medical Association to resist all efforts to make medical services available to the entire population. Instead, by declaring such activity unethical and espousing adoption of the Code by state courts,⁶ the ABA has foreclosed discussion by reliance on the fiat of rule of court with statutory effect.⁷ Although Barlow F. Christensen's scholarly analysis, *Lawyers for People of Moderate Means*, was not completed when the Code was adopted, it is painfully evident that it would have had no appreciable effect.⁸ There has been no groundswell to amend the Code nor has its adoption by most states raised more than a few ripples of dissent. *By seeking to turn the clock backward, the ABA has only accentuated the*

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, Disciplinary Rule 2-103(D) (5). The four considerations are:

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purpose of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

Id.

5. See Nahstoll, *supra* note 3, at 348 n.35.

6. Presently 26 states have adopted the Code of Professional Responsibility including New Hampshire, Maine, Virginia, Florida, Ohio, West Virginia, Kentucky, Illinois, Wisconsin, Minnesota, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Louisiana, Arkansas, Oklahoma, Colorado, Arizona, Hawaii, New York, Pennsylvania, Maryland, Tennessee and Vermont. In addition 9 other states have approved the Code and are considering adoption. These states are Connecticut, Rhode Island, South Carolina, Georgia, Michigan, Indiana, Alaska, Utah, Nevada, Oregon, Iowa and the District of Columbia. Letter from Fred Beck, Staff Director, American Bar Association Committee on Professional Standards to the *Valparaiso University Law Review*, Mar. 8, 1971, on file in Valparaiso University Law Library.

7. Court decisions have determined that matters of ethics are exclusively within the jurisdiction of courts and cannot be changed by the legislature. See *In re Unification of the New Hampshire Bar*, 109 N.H. 262, 248 A.2d 711 (1968); *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946).

8. Portions of the book had been made available as interim statements prior to publication.

polarization disclosed by the new life pattern of young attorneys.

This raises several questions concerning Mr. Christensen's painstaking, dispassionate and clinical analysis of every facet of the socio-economic, historic and ethical factors involved in the effort to extend quality legal services in civil matters at reasonable cost to those who do not qualify as indigent, yet fall far short of the property and commercial interests that have every benefit at their command. Narrowly viewed, perhaps the ABA could salve its conscience by funding such a research project by a Senior Research Attorney of the American Bar Foundation, content that the House of Delegates in its republican form of government would neither examine it nor be swayed by the facts. Charitably, such a work would supply the scholar and the young attorney with solid foundation for their proven espousal of such projects. Ironically, it will provide the United States Supreme Court with a prestigious chronicle to fortify its further protection of such programs on constitutional grounds,⁹ in spite of the clear aspiration of the ABA Code that such fundamental guarantees be eroded, if not reversed, by a later court with strict constructionist views. For it is quite obvious that because of self-preference such programs will not receive the popular acclaim of bar associations, and only through the Court, that least democratic institution of government, will group legal services be tolerated and nurtured.

Conscious of the hot flames of controversy surrounding any discussion of his subject, the author should be pardoned for what may appear to many as an unduly methodical development of his thesis. Those critical of his defensive posture should note that for the most part solid facts are completely unavailable; almost every one of the author's careful developments of theorems is essentially empirical with prime emphasis on history, general experience and deduction. Conceding such limitations, the author has nevertheless assembled a remarkable body of authority for his microscopic analysis of every pertinent factor in the methodology of legal practice. Although such material is constantly focused on the relation of such factors to the service of the public, not surprisingly it also provides an ideal standard against which each experienced attorney may measure his life's work, an understanding of the goals toward which each neophyte may aspire, and sunlight for the guidance of grievance committees.¹⁰

9. See *United Mine Workers 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) (based on first amendment protection for freedom of speech and litigational association).

10. Justice Brandeis observed: "Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best of disinfectants." L. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS SPEND IT* 92 (1933).
Produced by The Berkeley Electronic Press, 1971

The greatest omission of the American legal profession in the twentieth century has been the failure to make counsel available to middle-income groups. Acknowledgement of this shortcoming by the bar had just begun to take place in the 1960's. As the author lucidly predicts, corrective action will require the debunking of myths and clichés fashioned over a century of organization and growth of the bar in its present form and, therefore, will be quite difficult. But initial steps toward reform have been taken.

Mr. Christensen's book can serve as a useful primer on the subject. Underlying issues involved in the problem of legal service availability are cited and analyzed. The sources of the author's information are law reviews, cases and other literature of, by and for the bar. No field research or statistical studies are provided. Nevertheless, the author makes a real contribution to the subject through the exposition of an unusual perspective.

That perspective is an economic one. The lawyer's service is analyzed in terms of objectives, functional characteristics, demand, marketing, costs and production. Such an approach renders several valuable insights. For example, reasoning from the legal aid-OEO legal service experience, the author suggests that the steps which may be taken to increase availability of legal services to the middle class will in turn fuel that demand and make it even greater.

Thinking the unthinkable is another valuable contribution. The notions of lower quality services and open solicitations as a means to lower price and increase accessibility are dispassionately explored. In the same vein, notions of noncompetition in law practice and omnicompetence of the lawyer are (correctly) labeled as myths and the ethical rules which depend on these myths for support are analyzed.

Proposals for increasing the availability of legal service include more efficient law practices, larger practice units, specialization, use of paraprofessionals, recovery of lawyers' fees by successful litigants, legal service insurance, subsidies, better lawyer referral services, relaxation of restrictions on business-getting activities, special law offices for clients of moderate means and "group legal services." Each offends traditional values to some degree, but none is so controversial as the "group legal services" proposal. Stated simply, group legal services (also known under the appellation, "intermediary arrangements") involves a third party recommending or furnishing a lawyer to a client or paying the lawyer in behalf of the client. The bar finds dangers of conflict of interest, solicitation, assembly line methods and price cutting inherent in such arrangements and consistently attacks such arrangements even before

the supposed dangers materialize. Militant bar opposition produced injunctions against automobile clubs and professional, labor and business organizations in the 1930's. The power and prestige of liability and title insurers enabled these group legal services to survive the onslaught.

But the seeds of regeneration of group legal services were also planted in the 1930's. Decisions of courts and bar association ethics committees upheld various legal aid and other "*pro bono publico*" arrangements, including the activities of the Liberty League, a group offering free legal services to "victims" of the New Deal. These precedents provided the underpinning for *NAACP v. Button*¹¹ in which the United States Supreme Court struck down Virginia's anti-solicitation laws as applied to the civil rights litigating activities of the National Association for the Advancement of Colored People. A year later, the constitutionally protected scope of group legal services was expanded in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*¹² wherein the Court afforded similar protection to an arrangement in which a union negotiated a discount in contingent fee arrangements and recommended lawyers to union members for prosecution of their claims under the Federal Employees Liability Act.¹³ Those who had read *Button* and *Brotherhood of Railroad Trainmen* as protections for the assertion of federal rights were disabused of such a narrow reading by *United Mine Workers v. Illinois State Bar Association*,¹⁴ protecting an arrangement in which a union's salaried attorney-employees represented union members in prosecution of their personal injury claims under state law.

This trilogy of cases substantially overlapped in time the five-year effort of the American Bar Association to modernize the century old *Canons of Ethics* into a *Code of Professional Responsibility*. In January 1969, the ABA's Special Committee on Evaluation of Ethical Standards published a preliminary draft of the Code which included provisions legitimizing the group legal service activities of: 1) legal aid or public defender offices, 2) military legal service offices, 3) lawyer referral services, 4) bar associations and 5) professional associations, trade associations or other non-profit organizations.¹⁵ This was too much reform for the American Bar Association. The final draft of the Code, which was adopted by the ABA House of Delegates in August 1969, le-

11. 371 U.S. 415 (1963).

12. 377 U.S. 1 (1964).

13. 45 U.S.C. §§ 51 et seq. (1964).

14. 389 U.S. 217 (1967).

15. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 2, Disciplinary Rule 2-102 (Prelim. Draft, Jan. 15, 1969).

gitimized the group legal service activities of: 1) legal aid or public defender offices, 2) military legal service offices, 3) lawyer referral services, 4) bar associations and "any other non-profit organization . . . but only in those instances and to the extent that controlling constitutional interpretation . . . requires the allowance of such legal service activities."¹⁶ The final draft approach has been characterized as, at worst, patently unconstitutional¹⁷ and, at best, "a bare bones approach that would shame a carrion."¹⁸

It appears that the ABA's regression will be only a temporary setback to the cause of group legal services. California,¹⁹ Oregon²⁰ and the District of Columbia²¹ are adopting standards corresponding more nearly to those of the preliminary draft than of the ABA final draft. Wisconsin has been the scene of a Judicare experiment. The ABA Special Committee on Availability of Legal Services has undertaken to sponsor experiments in legal cost insurance.²²

As with any professional vivisection, much of this book may be difficult to assimilate; yet, the author is quite capable of inspired communication when the occasion warrants. Consider: "[t]his is not to say, necessarily, that proscriptive laws [stifling outside competition] are wrong, but only that such laws can preserve neither the profession's monopoly nor its status unless lawyers are in fact meeting public demands and expectations;"²³ and "[t]he ideal of the American legal system being equal justice under law . . . the fact is that as the litigative system now functions, equal justice can be had only if both sides . . . are fully represented by competent counsel. . . . If all litigants are to be equal . . . then no litigants can be 'more equal' than others."²⁴ As for the bugaboo of barratry: "[W]hile the stirring up of frivolous or fraudulent claims is undoubtedly evil, the stirring up of legitimate claims which would otherwise go unasserted because of the prospective claimants' poverty, weakness, ignorance, or naiveté may in fact be a positive

16. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, Disciplinary Rule 2-103 (D).

17. Latto, *Legal Ethics and Grievance Committee Recommends Adoption with Amendments*, D.C.B.J., Jan.-Mar., 1970, at 61-63.

18. Brown, *ABA Code of Professional Responsibility: In Defense of Mediocrity*, 5 VAL. U.L. REV. 93, 106 (1970).

19. See Nahstoll, *supra* note 3, at 349.

20. *Id.*

21. Latto, *supra* note 17, at 61-63.

22. CHRISTENSEN 65-71.

23. *Id.* at 28.

24. *Id.* at 78-79.

good.”²⁵ Concerning the exploding effort of those seeking to obtain change within the system: “collective effort to achieve common goals is increasing in all fields of social, political, and economic endeavor, and it is a virtual certainty that such activity in the field of legal services will also continue to grow.”²⁶ As for the “exclusive license to provide legal services to the public” and “the tradition of self-regulation based upon ethical principles:”²⁷ the public cannot be deprived “of any meaningful part in determining what is in its own interest;”²⁸

[i]n presuming the infallibility and immutability of existing restrictions and in ignoring expressed desires of the public . . . those who would restrict enterprise by legal controls in the name of the public good have the burden of proof, and a heavy one. . . . The public is not obliged to prove its need; the legal profession is obliged to justify the restrictions.²⁹

And regarding “intermediary arrangements” where the primary tests of potential conflict of interest and of genuine threat to the lawyer’s professional independence may be somewhat in doubt: “other public-interest considerations—such as the importance of the individual rights being asserted or the practical unavailability of other sources of legal assistance—may nevertheless demand that it be permitted to exist.”³⁰ Even with the fortification offered by the author’s analysis, these are powerful, non-nonsense words.

For those who need tangible illustrations, reference is made to the recent effort of franchisees to obtain relief from widely claimed abuses³¹ in class suits under the antitrust laws. Such litigation costs can easily range from a modest \$100,000 to one million or more.³² Efforts of franchisees to raise litigation funds among other members of the litigating class have been met with the counterclaim that such activity was

25. *Id.* at 145.

26. *Id.* at 253.

27. *Id.*

28. *Id.* at 254.

29. *Id.* at 255-56.

30. *Id.* at 278.

31. H. BROWN, *FRANCHISING: TRAP FOR THE TRUSTING* (1969), reviewed, Swygert, 4 VAL. U.L. REV. 224 (1969); Brown, *A Bill of Rights for Auto Dealers*, B.C. IND. & COM. L. REV. 757 (1971); Brown, *Franchising: A Fiduciary Relationship*, 49 TEXAS L. REV. 650 (1971).

32. See *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir.), *rev'd on rehearing en banc*, 364 F.2d 161 (2d Cir. 1966), *aff'g* 235 F. Supp. 1 (S.D.N.Y. 1964), *cert. denied*, 385 U.S. 987 (1966) (over \$80,000 was awarded to plaintiff’s legal consultant for services prior to institution of an antitrust suit).

itself a combination in restraint of trade³³ and of improper solicitation sufficient to warrant the disallowance of class status, dismissal on the merits and referral of the attorney's conduct to the grievance committee of the state bar association.³⁴ In order to prevent such practical limitations from making the pursuit of antitrust relief illusory, this writer has recommended to the Judicial Conference that the Federal Rules of Civil Procedure and of Multidistrict Litigation be amended to permit early notice of suit to each member of the class, including proposals for joint effort to share the costs of litigation, subject to court supervision.³⁵

Finally, since this volume raises serious doubts concerning the ethical propriety of well over a dozen major provisions of the *ABA Code of Professional Responsibility*, it is appropriate to ask why the leaders of the bar were unwilling to await the publication of such an important treatise which they must have known was almost ready for issuance. It is certainly relevant to suggest that such newly discovered evidence not only justifies immediate reconsideration of the entire Code by the ABA, but also requires notice to every court which has rubber stamped it or now has it under consideration.³⁶ The author is to be congratulated for entering where so few have dared to tread. For while there is a growing belief that the self-policing practices of the ABA are as harmless, though pernicious, as that of little boys tearing off the wings of flies,³⁷ the direct and repercussive effect of ABA pontifications are still a force with which to be reckoned. Fortunately, there are not only genuine ethical considerations but also legal principles whose power is superior to the

33. Merit Motors, Inc. v. Chrysler Corp., Civil No. 2000-70 (D.D.C., filed Mar. 3, 1970).

34. Halverson v. Convenience Food Mart, Inc., Civil No. 70C-499 (N.D. Ill., filed Mar. 3, 1970).

35. In addition to the first amendment protection for freedom of litigational association, note 9 *supra* and accompanying text, private enforcement of the antitrust laws has long been recognized as an essential adjunct to the government's obligations. See Bruce's Juices, Inc., v. American Can Co., 330 U.S. 743, 751-52 (1947). This practice is facilitated by obtaining competent counsel regardless of local restrictions against the practice of law by out-of-state attorneys. See Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir.), *rev'd on rehearing en banc*, 364 F.2d 161 (2d Cir. 1966).

36. Aside from serious ethical and legal objections to the proposed Code, in this writer's brief before the Massachusetts Supreme Judicial Court no less than eight of the Code's provisions are being challenged under the Declaration of Rights of the Massachusetts Constitution and under the due process, equal protection and free speech clauses of the United States Constitution. In Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968), the author cogently argues that the canons are primarily directed at "the solo practitioners and the small firms, to those called the 'little lawyers.'" *Id.* at 245.

37. Until adopted in local jurisdictions, the ABA Code is technically binding only on ABA members, though grievance committees and courts have long regarded ABA opinions as persuasive.

self-interest implicit in the statement that "the lawyers of America are not now prepared to have group legal services extended."³⁸ Compared with the public interest to be served, it is impertinent to ask what the lawyers of America are willing to accept.

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38. Nahstoll, *supra* note 3, at 348 n.35.

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