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James D. Fellers

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# KEEPING PACE WITH CHANGE— NEW VISTAS FOR LAWYERS

JAMES D. FELLERS*

In any serious discussion of our profession today, the dominant theme is change, innovation, and new direction. This seems perfectly reasonable since never before to my knowledge has there been a time when the profession faced so many challenges or has had such unprecedented opportunities to insure that every man is rendered his "due." None of us is able to ignore the fact that the federal government is now taking increased interest in our collective activities. We seem to be entering a period of time where the supply of legal services to the great mass of low and middle income Americans will increasingly become a *political* issue challenging the legal profession with the kinds of decisions which have long confronted, and often confused and divided, our friends in the medical profession.

Like it or not, this is the case. Consider the following illustration. First, the Senate Judiciary Subcommittee on Representation of Citizens Interests, chaired by Senator John V. Tunney, has been focusing on the organized Bar's efforts in the area of legal services delivery. The Tunney subcommittee has provided a forum for debate about such issues as minimum fees, prepaid and group delivery systems, consumer complaint mechanisms, and delivery to certain groups of citizens, such as the aged. While no specific legislation has been reported by the subcommittee as yet, the media has focused a good deal of attention on the profession as a result of the subcommittee's hearings. As you probably know, this Senate subcommittee came to Houston to the A.B.A.'s Midyear Meeting. Senator Tunney and Senator Mathias heard four persons who testified on behalf of the Association and five others, including Mark Green, who directs the Center for Corporate Accountability Research and who used to be a top "Naider Raider."

The four people who spoke for the A.B.A. were President Chesterfield Smith; Christopher F. Edley, who is Chairman of the Association's Consortium on Legal Services and the Public; Stuart L. Kadison, who chairs the Special Committee on Delivery of Legal Services; and John F. Sutton, Jr., who is the reporter for the A.B.A. Project on Reevaluation of Legal Ethics. The hearings were lively and easily the best attended function of the entire Midyear Meeting. Certainly Mark Green was the most critical of the profession of those who spoke

* Remarks of James D. Fellers, President of the American Bar Association to the North Carolina Bar Association, Summer, 1974, reprinted with permission.

but, almost invariably, the other speakers indicated they recognized there was much work the profession needed to undertake if legal services are to be made available to everyone—not just those who have been able to afford them and to those who are so poor that they can avail themselves of free legal services.

Let me pass now to a second illustration of government concern with delivery of legal services. The Antitrust Division of the United States Department of Justice recently filed suit in federal district court in Portland charging the Oregon State Bar with violation of Section 1 of the Sherman Antitrust Act in establishing schedules of suggested minimum fees. Let me add though that the day before this suit was filed the Fourth Circuit Court of Appeals overruled an earlier district court decision which had found such fee schedules a restraint on trade. The appellate court found that the practice of law was a "learned profession" and thus not subject to Sherman Act prohibitions. Of course many bar associations have already abandoned fee schedules and many others are at least considering abandoning them.

A third illustration is the fact that the Senate Committee on Banking, Housing and Urban Affairs has reported a bill for full Senate consideration which would repeal the current authority of H.U.D. to set maximum settlement charges for homes financed with federally backed mortgages. This bill would also prohibit the paying of kickbacks and other unearned fees. Similar legislation is pending in the House and final enactment late this summer is a distinct possibility. Consumer groups are divided in their support of or opposition to this bill which, incidentally, is supported by the A.B.A.

Fourth, the further development and growth of Bar sponsored prepaid legal services plans has been somewhat threatened by confusion resulting from the positions taken by the A.B.A.'s House of Delegates in Houston. In February, the Antitrust Division of the Department of Justice in testimony before the Tunney subcommittee gave a clear indication that Resolutions which were proposed by the General Practice Section and adopted by the House of Delegates will be deemed violative of the antitrust laws insofar as they give advantage to so-called open panel plans as compared to closed panel plans favored by labor unions and consumer groups. Once the antitrust hurdles are overcome then the problems arising from tax treatment of employers contributing to plans and beneficiaries of plans must also be addressed. Legislation is currently pending in the House of Representatives which would accord tax treatment for legal services identical to that for health services.

Fifth, the Senate passed the National No-Fault Motor Vehicle Insurance Act on May 1, by a 53 to 42 margin. Since the House has not

begun its formal consideration of this measure, final enactment this year is very much in question. However, we do expect that the House will shortly begin public hearings on the Senate bill and other pending House proposals with respect to no-fault. Since the whole no-fault question is such a critical one, and so topical, let me review it with you for a few moments.

The principal thrust of the Association's position with respect to no-fault follows from two fundamental beliefs: (1) that we should not lightly abandon or seriously impair basic legal rights grounded in the great common law doctrine which holds us responsible for harm we may do to our fellow man, and (2) that problems in the present system vary widely from state to state and can be corrected most effectively and fairly by action of the states. In keeping with these basic principles the major A.B.A. resolution for reform calls on the states to "adopt laws which require that minimum first-party coverage of at least $2,000 be included in all motor vehicle liability insurance policies" but that "those laws should give the innocent accident victim the option to seek indemnity for economic loss from his own insurer or in an action in tort." (August, 1974 Report of the American Bar Association Special Committee on Automobile Insurance Legislation)

Eight states have now adopted plans consistent with the Association's position and the A.B.A. has closely watched the experience of these states as well as the experience of the 11 states with "no-fault" plans using a medical threshold or other form of tort exemption. Although data for final judgments is not yet available, from all indications it appears that state plans are working well. To cite just one example, Delaware now has had two years' experience with a no-fault plan that pays up to $10,000 in first-party benefits but does not bar access to the courts. Rather, it contains a simple prohibition against the pleading of no-fault benefits in any suit brought for additional damages. Proponents of federal "no-fault" legislation have termed this an "add on" bill which they contend must result in higher premium costs. However, Robert A. Short, the Insurance Commissioner of Delaware, has termed the decline in the number of law suits nothing less than "miraculous."

Under the Delaware system during the first two years only one suit was tried, and even that suit resulted in no award. In addition, the Delaware plan has not caused higher premium rates. In fact, it has, in some instances, resulted in lower rates. The Delaware experience is by no means unique. Thus far, 19 states have enacted some form of no-fault legislation, and over half of the remaining states have bills on the subject before their legislatures. The bills enacted to date pro-

vide coverage for approximately 42% of the American population. It seems clear that the existing state plans are taking small claims out of the court systems while, at the same time, assuring adequate compensation for the medical and economic losses of automobile accident victims with both minor and serious injuries. I believe that, in general, the plans have resulted in needed reform. But, nevertheless, I think the American Bar Association's commitment to state experimentation and to state, not federal, adoption of no-fault plans is the best position, at least for a time.

It is my understanding that the North Carolina legislature has been considering no-fault legislation but that your "threshold bill" died in a House Committee after being passed by the Senate in this past session of the legislature. I will be watching Raleigh closely this coming year to see if the "non-tort restriction" bill is introduced, as expected at the moment, and passed.

Before turning to another topic, let me reiterate that I have no objection to no-fault legislation on the state level. But, so far, I do not feel that the "need" for such legislation on the federal level has been demonstrated and, perhaps more importantly, I do not feel that we are yet equipped to propose the most "workable" (and I use that word in its most broad sense) plan. We should wait and observe the state plans—to see whether they accomplish their stated objectives and to see what portions are most adaptable to a federal plan.

Although I highly recommend that we tread water insofar as no-fault legislation is concerned on the federal level, I recommend that we do just the opposite with respect to the legislation to establish a National Corporation for Legal Services. As you probably know, this legislation has traveled an incredibly rocky path for the past few years. At the present time there is a bill which would establish a workable corporation before the Senate. On May 16, the United States House of Representatives passed this bill.

It seems that the whole issue of delivering legal services to the poor has become increasingly buried in a quagmire of political differences and that politicians, not legislators, are the persons imbedded deep in controversy with respect to this legislation, the simple purpose of which is to insure that this country's poorest citizens have access to quality legal services. This state of affairs is more than regrettable; it is tragic. I hope that political pettiness will not literally stifle forever the providing of legal services to America's indigents.

The American Bar Association, incidentally, has vigorously supported, now for close to a decade, federal funding of legal services programs. Shortly after the House of Representatives passed the bill, the A.B.A.'s Board of Governors met in Washington. Sadly, the atmos-

phere in the capital was such that the Board feared the worst for the Corporation. The Senate, we were told, is fearful that if the bill is passed by that body, it will then be met with a Presidential veto. This fear of a veto looms larger than it would if it were based only on mere hearsay and rumors or on political maneuverings. The fear of this legislation being vetoed is bolstered by the fact that Howard Phillips, who was appointed by the President last year to dismantle the Office of Economic Opportunity and who successfully undertook this task, has called upon the President to veto the bill should it pass his desk. After reviewing the situation, the A.B.A.'s Board of Governors decided to pass the following resolution:

> WHEREAS the American Bar Association since 1970 has vigorously supported the enactment of legislation authorizing a federally-funded non-profit corporation to succeed the Legal Services Program of the Office of Economic Opportunity and
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> WHEREAS the U.S. House of Representatives on May 16, 1974 passed H.R. 7824 the Legal Services Corporation Act of 1974 as reported by a Committee on Conference of the House and Senate and
>
> WHEREAS H.R. 7824 reflects a compromise of differing versions of legislation passed by both Houses of Congress after four years of Congressional consideration of the concept of a legal services corporation during which period the interests and concerns of all interested constituencies, including the organized bar, have been fully considered, debated and resolved and
>
> WHEREAS H.R. 7824 in its current form provides framework which will allow the continuation of a professional program of legal services to the poor
>
> NOW THEREFORE BE IT RESOLVED That the American Bar Association reaffirms its support for a National Legal Services Corporation and
>
> FURTHER RESOLVED That the American Bar Association urges the United States Senate to expeditiously act favorably on H.R. 7824 and
>
> FURTHER RESOLVED That the President of the United States is urged to approve and enact H.R. 7824 if and when it is approved by the Senate and
>
> FURTHER RESOLVED That the President of the American Bar Association is authorized to communicate the position of the Association to the Senate, the President and to state and local bar associations.

Chesterfield Smith has contacted every state and local bar association and suggested that they take appropriate action to see that legal services to the poor do not become something we speak of in the past tense. I hope everyone here will help to see that a suitable cor-

poration is established immediately. Our entire profession has the responsibility of insuring that this legislation is passed and that a corporation to provide legal services is established. If we should fail to establish a corporation we have allowed a mighty blow to fall on delivery of legal services. Today, when we should be broadening our delivery, we cannot allow ourselves to slide back and cease delivery to our country's most needy.

Let me abruptly turn now to another event which took place in Washington, actually now almost a year ago, at the same time as the last Association annual meeting. Ralph Nader and some of his associates held a two-day symposium on the legal profession. Its official name was "Verdict on Lawyers," although it became stylish to refer to it as the "counter-convention." Among the speakers at the symposium were James Lorenz, formerly with the California Rural Legal Assistance Program of the Office of Economic Opportunity and now head of a statewide California law firm focusing on legal problems of the middle class. Mr. Lorenz said consumer groups soon "will be in a position to bargain with lawyers about fees they charge." He suggested that court rulings with respect to bar association minimum fee schedules being a restraint of trade in violation of the Sherman Antitrust Act might well be applied "to other kinds of restrictions established by bar associations." Lorenz is quoted as saying, in addition, that he would "be happy to talk to anyone who is interested in beginning consumer-oriented actions against bar associations in their state."

Jethro K. Leiberman, whose topice was "How To Avoid Lawyers," suggested that Mr. Nader "appoint a *working panel* to investigate specifically what areas of legal practice are amenable to takeover by paraprofessionals and what areas of conflict and coordination can be better served by non-legal solutions—be they administrative, self-help, or something else." He said the panel also "will have to decide what the legitimate limits of unauthorized practice should be" and "might also wish to recommend the abolition of the unified bar." Mr. Leiberman, an author and lawyer who recently was named editor of the newly created Law Section of *Business Week* magazine, agreed that society needs "keepers of the rules" but he asks, "need they be lawyers?" His answer, of course, is "that in many kinds of conflicts and many kinds of rules they need not be."

The list of such remarks could be extended considerably, but I trust I have made my point. It is simply this. We have in Washington (1) a Congressional Committee whose jurisdiction specifically involves the delivery of legal services, and thus in a very real sense the practice of law, in conjunction with (2) a powerful consumer lobby promoting legislation to expand and improve the delivery of legal services to an

estimated 140 million Americans in the low to middle income range, combined further with (3) a reform oriented group of lawyer activists with great skill in mobilizing public, press, and Congressional interest in their views and projects. These three ingredients provide the kind of mix, it seems to me, which will have a major impact on the shaping of public policy on legal services and ultimately on the way you and I practice law. By no means do I want to suggest that *our* mood should be one of gloom and despair. That would be unforgivable. I would hope that each of you is ready and willing to face up to the problems that confront the legal profession as to the supplying of legal services, notwithstanding or pursuant to the involvement of the government and the consumer.

In this connection there is, I think, one fact which is the most important one to have in mind when contemplating the future of the legal profession and it is this. Almost every challenge arises in areas in which the bar itself has already taken the initiative. Every question raised is one which the bar has already raised itself. Perhaps we are just beginning to realize the magnitude and the complexity of the problems, but I am optimistic that we will be able to meet the public needs of legal representation. For a profession dedicated to service to the public, there has never been a greater opportunity to serve.

Under our Code of Professional Responsibility it is the obligation, not only of the A.B.A. and of state and local bar associations, but also the responsibility of every member of the bar to "assist the legal profession in fulfilling its duty to make legal services (counsel) available." This language contained in Canon 2 of our Code admonishes us to work together in fulfilling this obligation. We must look to each other, exchange information, encourage cooperation and promote experimentation in the public interest.

The potential is unlimited. At the same time, I believe that it cannot be overlooked that there is much already done of which we can be proud. In the past few years we have made significant strides in the delivery of legal services. The "prepaid legal services" concept, which is now the subject of federal legislation in the context of labor-management relations and in which many consumer groups feel the solution to the delivery problem lies, is a therapeutic result of bar association effort. I am sure you are familiar with the A.B.A. experiment with a prepaid plan in Shreveport, Louisiana which began operation in 1971. Since that time the A.B.A. has provided leadership and guidance in this rapidly growing field. Now more than 40 state bar associations have committees working on prepaid legal services.

Many state and local bars are looking to our Special Committee on Prepaid Legal Services for assistance and information. At the same

time, it is correspondingly important that the A.B.A. look to state and local bars for information and ideas and for experimentation and evaluation in this widening area of prepaid legal services. As I have suggested, and as many of you are aware, there has developed a distinct difference of opinion as to "how" prepaid plans should be constituted. On the one hand many lawyers and bar associations adhere to an "open panel" approach on the theory that this will provide greater independence and freedom of choice. Union and consumer groups, however, appear to have overwhelmingly chosen a "closed panel" approach primarily because of its apparent economy of operation. While I am conscientiously dedicated to maintaining the independence of the client-lawyer relationship and have my personal preferences, I do not necessarily advocate open panels or closed but rather *open* minds about their relative merits and a human understanding of the real issues.

At this stage in the development of prepaid legal services there should still be room for practical experimentation. The real issue, as I see it, is how to provide economic legal services. A sophisticated public simply will not "buy" open panel plans without accompanying efforts to make the delivery of legal services more efficient and less costly. They will "buy" instead closed panel plans because of their economy. It is thus apparent that a bar association desiring to preserve "freedom of choice" of attorney in prepaid plans must deal with the problems of upgrading its whole operation and of improving each attorney's capacity to provide quality representation at lower costs. Some of the methods of accomplishing this may be through specialization, increased use of paraprofessionals, computerization, shared facilities and services, and better referral mechanisms.

The A.B.A. has been working on *all* of these problems. We have become increasingly aware, however, that they are related, that we must think more broadly in terms of many-faceted systems of providing legal services. One step in this direction within the A.B.A. has been the creation of a Consortium on Legal Services and the Public. The Consortium is composed of the Chairmen of seven A.B.A. Committees dealing with delivery of legal services and six additional members. It serves as a forum for the exchange of information and ideas and as a device for relating the activities of each of its constituent committees to the common objective of making legal services available to more people at less cost. Within the Association, the Consortium also serves an educational role by raising issues and presenting programs at our Annual and Midyear Meetings. As the A.B.A. began to increase its activities in the area of legal services, it was quickly realized that there was little or no factual data available on the public's

need for legal services or the extent of utilization of legal resources. There was widespread belief that legal needs were not being met, but this conviction could not be supported with evidence nor were the dimensions of the problem ascertainable.

In order to provide this information, a comprehensive national study is now being conducted by the A.B.A.'s Special Committee to Survey Legal Needs. This Committee has received generous funding from various sources and has retained a prestigious national survey organization to conduct the field work. We expect the results of this study to provide valuable information in assisting the Association and the profession in planning programs for making legal services available. I might add that the results will be made public and will be available to all who are interested. Although the results of our study will be of great value in future planning, we have not elected to wait idly for the conclusion of the survey before initiating progressive programs or stimulating tangible thought.

The Association's Special Committee on Legal Assistants, for example, has provided leadership in the rapidly growing area of paraprofessional training. Guidelines for the accreditation of legal assistants' training courses developed by this Committee have been adopted by the House of Delegates. The use of paraprofessionals in many areas of practice has already substantially reduced costs. In addition to dealing with many "current" aspects of providing legal services, the Association has also created a new Special Committee on the Delivery of Legal Services which has been charged with studying "future" and "alternative" methods of providing legal services to various moderate income groups and to the public generally. This Committee is expected to make recommendations concerning the provision of legal services and to evaluate new ideas. Some of the specific areas of the Delivery Committee's attention will be the rapidly proliferating group legal services movement and the suggestion for the creation of "special legal clinics" for moderate income persons.

This committee will aid the Association in planning for the future, as well as in responding to existing demands. In conclusion, then, we are truely in a time of danger, and of challenge, and of opportunity. We must not become defensive and turn our backs on what we already have accomplished as well as what we must do with respect to our public responsibility. We have much to do, but I am confident that the world will be a better place because we have moved to do it. Thank you very much.