



7-1-1966

Involvement of the Bar in the War against Poverty

A. Kenneth Pye

Raymond F. Garraty

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

A. K. Pye & Raymond F. Garraty, *Involvement of the Bar in the War against Poverty*, 41 Notre Dame L. Rev. 860 (1966).

Available at: <http://scholarship.law.nd.edu/ndlr/vol41/iss6/4>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE INVOLVEMENT OF THE BAR IN THE WAR AGAINST POVERTY

*A. Kenneth Pye**
*Raymond F. Garraty, Jr.***

The War Against Poverty was declared less than two years ago with the enactment of the Economic Opportunity Act of 1964.¹ Most of the programs authorized by the act — Vista, Job Corps, Operation Head Start, etc. — are aimed at creating fundamental changes in American life and hence will give rise to legal problems. However, it is the authorization of federal grants to local community action programs and, more specifically, their legal services programs which provides the principal opportunity for the involvement of the bar and its members.²

Senator Robert F. Kennedy described what lawyers can contribute to the War Against Poverty in his Law Day address at the University of Chicago two years ago. The then Attorney General pointed out that lawyers are needed to “make law less complet and more workable,” “to assert rights which the poor have always had in theory but which they have never been able to assert on their own behalf,” to practice preventive law by counselling “about leases, purchases, a variety of common arrangements whereby he [the poor man] can be evicted, victimized and exploited,” and “to begin to develop new kinds of legal rights in situations that are not now perceived as involving legal issues.”³

During the last eighteen months there has been much thoughtful consideration devoted to the question of the roles which should be played by the legal profession and the organized bar in the reformation of the economic, political and social institutions associated with poverty and the provision of legal services to those who are unable to afford them.⁴ The necessity of resolving these matters

* Associate Dean and Professor of Law, Georgetown University Law Center; Chairman, Board of Directors, District of Columbia Neighborhood Legal Services Project.

** Adjunct Professor of Law, Georgetown University Law Center. Ed. note: Mr. Garraty did not participate as a speaker in the Symposium.

The authors express their appreciation to Peter D. Manahan of the class of 1966, Georgetown University Law Center, for his assistance and gratefully acknowledge the advice of their colleagues, Professors Robert S. Schoshinski, Bernie B. Burrus and John R. Schmertz, Jr., who devoted the summer of 1965 to the study of the impact of poverty upon law as the result of a grant from the American Bar Foundation.

1 78 Stat. 508 (1964), 42 U.S.C. §§ 2701-2981 (1964).

2 The 1965 amendments make it clear that legal service programs may be funded: “The last sentence of section 205(a) of the Economic Opportunity Act of 1964 is amended by inserting after ‘including’ the following: ‘, but not limited to;’” P.L. 89-253, 79 Stat. 973 (1965). The Senate Report clarifies the reason for the change:

The listing of activities in section 205(a), of course, is not intended to exclude other types of activities related to the purpose of community action programs, such as legal services for the poor, family counseling, or community organization activities. In order to make this absolutely clear, the committee has also included an amendment to this section which would indicate that programs are to be conducted in fields, including “but not limited to” those which are specifically enumerated.

U.S. CODE CONG. & AD. NEWS 3509 (1965).

3 Address by Honorable Robert F. Kennedy, University of Chicago Law School, May 1, 1964, in 13 U. CHI. L. S. RECORD 24 (1965).

4 U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, CONFERENCE PROCEEDINGS: THE EXTENSION OF LEGAL SERVICES TO THE POOR (1964); WALD, LAW AND POVERTY 1965: A REPORT TO THE NATIONAL CONFERENCE ON LAW AND POVERTY (1965); Cahn & Cahn, *The*

is made clear by the realization that lawyers must be involved if the war is to end in victory.

Lasting changes in the structure of society cannot be effected without altering the legal institutions which shape the social order. Lawyers have a special interest in the determination of whether these institutions should be preserved, modified or destroyed. They have power out of keeping with their numbers. The social reformer and the politician must appreciate the value of the support of the bar and the disadvantages which may result from its opposition. Leaders of the legal profession must appreciate what lawyers can contribute, their power and what the profession has to lose by not acting. The result must be a general recognition of the necessity and significance of involvement of the bar and its members.

The degree, nature and directions of the involvement pose different questions and these are properly the subject of controversy. Although participation in the war has become a social necessity, it does not necessarily follow that support will follow participation. The bar could become involved in vocal opposition to any significant changes in the *status quo*. It would not be the first time that the bar has preferred the old and opposed efforts at change. It is also possible that the organized bar might provide support to the war while individual lawyers viewed it with suspicion, hostility, cynicism or apathy. The support of the organized bar can accomplish little if its members adopt a contrary attitude.

We encourage the active support of both the organized bar and individual lawyers. We think that such support is required by the nature of the lawyer's professional responsibility and will ultimately inure to the profession's self-interest. It is the purpose of this article to explore some of the problems involved and some of the alternatives presented by the involvement of the profession in the War Against Poverty.

How should the bar become involved? The question presupposes the existence of "a" bar, but in fact there is no one bar in this country. The appreciation of this simple fact provides deep insight into the problem of achieving the involvement of the profession.⁵ Less than one-half of the attorneys in the United States are members of the American Bar Association (ABA).⁶ It thus can speak for only a minority of the lawyers admitted to practice. Dean Griswold has described it as "the one great national organization of lawyers in our country,"⁷ but he has also noted that it is a voluntary organization and "though it

War on Poverty: A Civilian Perspective, 73 YALE L.J. 1317 (1964); Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381 (1965); Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A.L. REV. 438 (1965); Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973 (1963); Frankel, *Experiments in Serving the Indigent*, 51 A.B.A.J. 460 (1965); McCalpin, *The Bar Faces Forward*, 51 A.B.A.J. 548 (1965); Paulsen, *The Expanding Horizon of Legal Services*, 67 W. VA. L. REV. 179 (1965); Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROB. 211 (1966); Schein, *Legal Aid Utopia*, 33 J.B.A.D.C. 16 (1966); Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A.L. REV. 336 (1965).

⁵ There are approximately 300,000 lawyers in America, 75% of whom are in private practice, 14% in government service and 11% on the staffs of private concerns. HANKIN & KROHNKE, *THE AMERICAN LAWYER: 1964 STATISTICAL REPORT 1* (1965); Weil, *Economic Facts for Lawyers*, 6 L. OFFICE ECONOMICS & MANAGEMENT 253 (1965).

⁶ GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES* 23 (1965).

⁷ *Id.* at 25.

has considerable influence in many fields, it has no real powers over any member of the profession."⁸

There are, of course, state and local bar associations. Integrated bars have some power over their members. Some, such as the State Bar of California, the Association of the Bar of the City of New York, the Philadelphia Bar Association, the Junior Bar Section of the Bar Association of the District of Columbia and the Young Lawyers Section of the Milwaukee Bar Association, have distinguished traditions of interest in matters of the public welfare unrelated to the financial interests of clients or their members. Nevertheless, comparatively few lawyers actually participate in the activities of these associations. Few lawyers accept their pronouncements as "the position of the bar" except in the field of professional ethics.⁹ The American bar reflects diverse patterns of concentration. Divisions include private practice, government and business; growth, distribution of income, and the educational backgrounds of its members vary.¹⁰ For

8 *Id.* at 23.

9 Even in this area its impact is doubtful. Dean Griswold has commented: "But it might be fair to say that they [the canons] have influence on the lawyers who would not break the canons anyway, and that the lawyers whose ethical practices are more doubtful rarely become members of the Association." *Id.* at 23-24.

10 This cannot be understood without an appreciation of the nature of the differences. A few examples are sufficient. Over one-half of our lawyers are located in cities of over 200,000 people. Less than 140,000 lawyers are available for the remaining cities, towns and rural America. Approximately 39% of the bar is located in cities with a population of 500,000 or more.

In Arizona there was an increase of 109.2% in the lawyer population between 1951 and 1963, while in West Virginia the percentage increased by only .2%, and actually decreased between 1960 and 1963. The number of lawyers in San Diego increased by 115.5% during the thirteen-year period and almost 28% during the three-year period. During the period of 1906-1963, Arkansas, Montana, Oklahoma, Washington, Wisconsin and Wyoming lost lawyers while their population was increasing.

In Arkansas, North Carolina and South Carolina there are over 1,200 persons for each lawyer; in New York, Colorado, Maryland, Massachusetts and Illinois the ratio is less than 600 to 1.

In Arkansas over 62% of the lawyers have not received a degree from a college; in Georgia the rate is 55%; in New Jersey almost one-half hold no undergraduate degree. In each of these states more than 22% of the lawyers never attended college. In Maine, North Carolina and Vermont more than 25% of the lawyers hold no degree from law school. In Vermont over 20% of the bar never attended law school.

In the cities of Houston and Buffalo and the state of Rhode Island almost 90% of the lawyers are private practitioners; in the District of Columbia only 34% are in private practice. In the District 58.2% of the lawyers are in government service compared with only 4.3% of the Boston bar. In Delaware over 30% of the lawyers are employed by private concerns, more than double the national average.

In the states of Massachusetts, New Jersey and Rhode Island over 50% of the lawyers are individual practitioners, while less than 16% of the District of Columbia bar and 24% of the Delaware Bar practice alone. In North Carolina, Iowa and New Hampshire over 35% of the lawyers practice as partners; in Massachusetts and Maryland only 20% are partners. There are over 4,900 lawyers employed as associates in law firms in New York, Chicago, Los Angeles and Washington, a thousand more than employed on a salaried basis in all the law firms located in the other eighteen cities with populations in excess of 500,000.

Recent studies have revealed considerable variations in the economic structure of the profession. In Utah the average income of a lawyer is \$11,800; in Idaho it is \$12,200; but in Indiana it is \$16,100 and in Michigan \$16,500. Associates with 3 to 8 years of experience in Manhattan firms average \$9,000 to \$12,000 and those with 8 to 10 years of experience average \$11,000 to \$22,000. In the states of Idaho, Indiana, Maine, Michigan, Montana, New Mexico, Vermont, Virginia, West Virginia and Wyoming the average income of a lawyer with 5 to 10 years of experience varies from \$10,000 to \$12,800. Within the same states there are significant differences. A 1962 study found that young attorneys practicing less than five years averaged 16% higher incomes in Pittsburgh than in Philadelphia.

In 1961 the net profit of individual practitioners in the country was \$7870 and the average salary for partners was \$18,200. These figures represented increases of 20.2%

example, Ladinsky's recent study of the Detroit bar compared the status of "solo" practitioners with members of firms.¹¹ His findings indicated that the single practitioner generally had a poorer legal education, a lower median net income and suffered the most from encroachment by laymen in areas traditionally reserved to the bar.¹² Generally, the clients of single practitioners were "one shot" cases. He was led to conclude:

It is clear that poorly trained men are likely to end up in individual practice. They lack the technical skill provided by high-quality education and specialized work experience; they cannot handle the more complex and demanding kinds of legal problems of modern society. Low-quality education is one major reason why solo lawyers rarely receive invitations to join the big firms. By default, most solo men end up doing the "dirty work" of the bar: personal injury, divorce, criminal work, collections, title-searching, etc.

The kind of work individual lawyers do is further limited by visibility. The average solo lawyer has no contacts with the world of big business. Neighborhood, ethnic group, family, and perhaps organizational contacts are the relations from which he can build a clientele. Firm lawyers, on the other hand, come more often from high-occupational family backgrounds, and are more likely to establish and cultivate relationships that yield

and 28.8% since 1957. Since 1957 there has been a steady increase in incomes. In Chicago the median income of nonsalaried lawyers increased by 38% (to \$18,000) between 1959 and 1963; in the remainder of Illinois the earnings of nonsalaried lawyers increased 18% (to \$17,200) during the same four-year period. Pennsylvania reports similar increases. Between 1962 and 1965 in Philadelphia the average income of partners increased to \$26,300, an increase of 20%, while the average income of sole practitioners increased to \$15,000, an increase of 25%. Other areas in the state showed smaller increases. The pattern of improvement of earnings is clear.

The productivity of lawyers and law office employees has almost doubled between 1950 and 1963 when measured in terms of their share of national income. The share of the national income produced by the legal services is increasing more rapidly than national income as a whole. In 1947 the gross income from legal services exceeded one billion dollars. In 1957 it exceeded two billion dollars. By 1962, it reached the three billion point. Between 1962 and 1964 it increased another five hundred million.

There is general prosperity at the bar. However, the majority and many of the leaders of the bar are lawyers born between 1905 and 1929 who began their practices between 1929 and 1957. From 1929 to 1951 employees of all industries showed gains in average earnings of 131%; nonfarming self-employed persons experienced an increase in earnings of 144%; the earnings of lawyers increased only 58%. In 1957 over 53% of the lawyers in individual practice had a net income before taxes of less than \$5000. The memory of the lean years inevitably affects attitudes towards proposals which may threaten a newly found financial security.

Furthermore, there are wide differences in the economic status of lawyers in different types of practice. A 1963 study found that 35% of all New Jersey lawyers in full-time practice earned \$10,000 or less. But of this group 81% were practicing alone, sharing space or were partners in a two-man firm. Studies in other states show striking differences between incomes of lawyers whose most important area of practice is corporation law and those primarily engaged in representing plaintiffs.

These statistics are from HANKIN & KROENKE, *THE AMERICAN LAWYER: 1964 STATISTICAL REPORT* (1965); Sheble, *Economic Independence of the Lawyer and the Serious Responsibilities of the Profession*, 29 J.B.A.D.C. 12 (1962); Smith, *Gross Income of Lawyers for Legal Services*, 6 L. OFFICE ECONOMICS & MANAGEMENT 447 (1965); Weil, *A Special Report—Legal Productivity and Share of National Incomes*, 6 L. OFFICE ECONOMICS & MANAGEMENT 371 (1965); Weil, *Economic Facts for Lawyers*, 6 L. OFFICE ECONOMICS & MANAGEMENT 57 (1965); Weil, *The Economic Surveys—Their Design, Meanings and Benefits*, 5 L. OFFICE ECONOMICS & MANAGEMENT 251 (1964); Weil, *Economic Facts for Lawyers*, 5 L. OFFICE ECONOMICS & MANAGEMENT 71 (1964).

¹¹ Ladinsky, *The Impact of Social Backgrounds of Lawyers on Law Practice and the Law*, 16 J. LEGAL EDUCATION 127 (1963).

¹² *Id.* at 139-42.

business and corporate clienteles. Thus, the "good family" and quality law school candidates look attractive to the large firms.¹³

Carlin reached similar conclusions in a more extensive study.¹⁴ He reported that lawyers from higher socio-economic backgrounds are more likely to achieve an "upper level" practice than those from lower socio-economic backgrounds,¹⁵ and that the "upper level" lawyers in turn receive about seventy percent more income from the practice of law than "lower level" lawyers.¹⁶ The economic surveys of Cantor and his associates, the work of the ABA Special Committee on Economics of Law Practice and the recent contributions of Smigel¹⁷ and of Greenwood and Frederickson¹⁸ have added to our knowledge of the bar. There is a clear need for further economic and sociological — if not anthropological¹⁹ — views of the legal profession.

It is clear from what we now know that the bar is not monolithic. We are just beginning to understand the influence of such factors as average income, educational background, the structure of the bar, the chances of advancement, whether the bar is growing, stagnant or decreasing in size, and similar matters on attitudes, approaches and policies of lawyers in different localities and different types of practice.

The "solo" practitioner who ekes out a marginal existence representing individuals for less than adequate fees may not view the proposal for an expanded program of legal services in the same way as the corporate lawyer on Wall Street, the administrative specialist in Washington or a proctor in admiralty in San Francisco. His principal fears are that some of his clients may qualify for free representation; that other clients may compare the quality of his services unfavorably with those of the legal aid lawyer who, secure in a salary, may be able to spend more time in preparation and may also benefit from the assistance of an investigator and a library which the private practitioner cannot afford; that legal aid lawyers may develop reputations for excellence and then hang out their own shingles to compete with him; that nonindigents who formerly might have come to him may now go to legal aid in the erroneous belief that they qualify for assistance and then may be referred to an "uptown" lawyer outside the neighborhood by the legal aid attorney who utilizes the bar association's lawyer referral service. Any of these dire predictions conjure up visions of financial loss which are not shared by his more affluent colleagues who depend upon a different clientele for their compensation.

To this group of private practitioners who fear the competition of legal aid must be added another group which foresees financial loss resulting from the aggressive defense of cases which in the past they have won by default. These are the collection lawyers who make their living from a volume practice

13 *Id.* at 139.

14 CARLIN, *LAWYERS ON THEIR OWN* (1962).

15 *Id.* at 152, n.7.

16 *Id.* at 116.

17 SMIGEL, *WALL STREET LAWYERS* (1964).

18 GREENWOOD & FREDERICKSON, *SPECIALIZATION IN THE MEDICAL AND LEGAL PROFESSIONS* (1964).

19 *Cf.* RIESMAN, *Toward an Anthropological View of the Law and the Legal Profession*, in *INDIVIDUALISM RECONSIDERED* 440 (1954).

in which one lawyer, supported by a staff of secretaries, turns out reams of complaints before the small claims and landlord and tenant courts of our large cities which serve as the collection agencies for his clients. Handling thousands of cases each year at a small fee per unit, they fear any alteration in the system that might destroy the cadence of a municipal court rendition of judgment by default. The representation of a small fraction of these defendants, much less assertions of the right to trial by jury, may cost these lawyers money.

The organized bar and the law schools can, as they did at the Arden House Conference, recognize the "lawyer's responsibility as a guardian of due process of law," "his responsibility to make legal services available to all" and "his responsibility for leadership in legal reform."²⁰ The clarion call for involvement will be accepted by many in the profession as essential elements of professional responsibility which must be implemented even if it costs money. Others, particularly the marginal private practitioner and the collection lawyer, may draw the line when they think the concept of professional responsibility developed by the financially secure may hurt their pocketbooks.

To ignore the differences in economic status and their impact on attitudes would be suicidal to a genuine effort to obtain maximum involvement. Many of the fears may be allayed. Perhaps the support of all cannot be obtained and should not be sought. The first step towards wisdom is an appreciation that the fact of diversity requires different approaches in order to maximize the degree and quality of the participation.

The different experience of various bars with the legal aid movement is also a factor in their attitudes toward participation in expanded legal aid. The Association of the Bar of the City of New York has had ninety years of involvement with the New York Legal Aid Society, one of the outstanding organizations in the country; the District of Columbia bar has had thirty years of experience with a legal aid society which has never been able to fulfill its mission because of inadequate funds; the El Paso bar has a tradition of hostility towards legal aid in all of its forms. It is unlikely that the El Paso bar will find federally financed legal aid more palatable.

The Involvement of the Organized Bar

Obviously the nature and level of participation by the organized bar will be different at the national and local levels and will be distinct from the involvement of individual lawyers. There is much which the organized bar can accomplish. The first step is the demonstration of support and the development of programs designed to educate lawyers concerning the objectives of the War Against Poverty, its legal services programs and what they can do to participate. No one could ask for a deeper involvement than that demonstrated by the ABA during the last eighteen months. In February, 1965, the House of Delegates of the ABA unanimously approved a resolution directing the officers and committees of the Association to:

²⁰ The report is published in 44 A.B.A.J. 1159 (1958). See Countryman, *The Scope of the Lawyer's Professional Responsibility*, 26 OHIO ST. L.J. 66 (1965).

. . . cooperate with the Office of Economic Opportunity and other appropriate groups in the development and implementation of programs for expanding availability of legal services to indigents and persons of low income, such programs to utilize to the maximum extent deemed feasible the experience and facilities of the organized Bar such as legal aid, legal defender, and lawyer referral, and such services to be performed by lawyers in accordance with the ethical standards of the legal profession. . . .²¹

The ABA, in close association with the National Legal Aid and Defender Association (NLADA), has given emphasis to the Legal Services Program of the OEO through its publications.²² The ABA and NLADA have offered technical assistance to communities needing advice on the development of local programs and are cosponsoring regional conferences for bar leaders who wish to know more about OEO programs.²³ The Young Lawyers Section of the ABA has surveyed the status of legal services programs in various localities.²⁴ The ABA student affiliate, the American Law Student Association, is assisting by recruiting law students for part-time and summer service.²⁵ The ABA cooperated with the Department of Justice and the OEO in conducting the National Conference on Law and Poverty in June, 1965.²⁶

In addition to providing support and educating the bar, the ABA has actively participated in basic policymaking and the implementation of these policies. The OEO has wisely sought the participation of the bar in the development of the policies governing its Legal Services Program. Its National Advisory Committee includes among its membership the President, President-elect and immediate past President of the ABA, the Chairmen of its Special Committee on Availability of Legal Services, its Standing Committee on Legal Aid and Indigent Defendants and the President of the NLADA. The National Advisory Committee has played a significant role in the development of guidelines for Legal Services Programs and in applying pressure on the Director of OEO to provide more funds for them. The Washington representatives of the ABA and NLADA have conferred regularly with Mr. E. Clinton Bamberger's staff at the OEO in the day-to-day problems involving the implementation of policies. The American Bar Foundation has undertaken a substantial research project with the object of collecting and evaluating factual information concerning the need for legal services and the development of model proposals for meeting the need.

More recently, the ABA has begun to assert its prestige in the legislative arena on behalf of the Legal Services Program of the OEO. Both the President of the ABA and the Chairman of its Standing Committee on Legal Aid and Indigent Defendants have urged Congress to continue and expand financial support for the program.²⁷ The ABA's involvement has been substantial and significant.

21 Quoted in WALD, *op. cit. supra* note 4, at 68. See McGalpin, *supra* note 4.

22 For example, *The American Bar Association Journal*, *The American Bar News*, *The ABA Guidelines*.

23 See Letter From Honorable Edward W. Kuhn, President of the ABA to Honorable Adam Clayton Powell, March 23, 1966.

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*, Letter From John W. Cummiskey to Honorable Adam Clayton Powell, March 23, 1966.

Unfortunately, the ABA has not spoken as the voice of a unified, organized bar. Charles J. Parker, the President of the New Haven Legal Assistance Association, has pointed out

. . . that it is not safe to assume that members of the local bar or leaders of the local bar association have any knowledge of, or sympathy for, the cause of legal aid in its traditional form or of the pronouncements of the American Bar Association or the State bar association on the subject, let alone any knowledge of, or sympathy for, a program of extended legal services.²⁸

Professor Frankel has described the "rigid hostility to change" on the part of some bar associations, while noting that others are "engaged, deeply interested, watchful, but sympathetic and receptive to the prospect of experimental change."²⁹ Many bar associations adopt neither attitude; their approach is one of apathy tempered by lethargy. Mr. Parker's description of the New Haven County Bar Association could be applied to a number of other local bar associations in middle-sized urban areas:

It is largely a passive organization, not particularly related to, or stimulated by, the projects and activities of either the Connecticut Bar Association or the American Bar Association. It is roused to take action chiefly when it feels that the interests or prerogatives of the local bar are threatened. Many of its members tolerate the medical profession because of the joint involvement of the two professions in personal injury cases, but resent social workers, social planners, community organizers, welfare administrators, and allied "do gooders."

Most of the income from membership dues is spent for refreshments for the members and the executive committee at their meetings. . . .³⁰

The New Haven County Bar Association opposed the program of the Legal Assistance Association to expand its program after a debate not characterized by urbanity. The Connecticut State Bar subsequently determined that the proposals of the Legal Assistance Association would not violate ethical standards. Its president added that the "program and plans of its type are operated in the best interests of both the bar and the public."³¹

Few opponents of bar support of OEO-financed legal services programs can hope to rival the outburst of the President and the Executive Secretary of the Tennessee Bar Association. Not since William Jennings Bryan's summation in the Scopes trial has the Tennessee bar been privileged to witness the rhetoric of a chautauqua tent meeting combined with quotations out of context, misleading conclusions and predictions of damnation. In an article picturesquely entitled "Et Tu, Brute!"³² the ultimate effect of the OEO Legal Services Program is bluntly described:

28 Parker, *The Relations of Legal Services Programs With Local Bar Associations*, in OEO & U.S. ATTORNEY GENERAL, CONFERENCE PROCEEDINGS: 1965 NATIONAL CONFERENCE ON LAW AND POVERTY 126, 131 (1966).

29 Frankel, *supra* note 4, at 460.

30 Parker, *supra* note 28, at 131.

31 *Id.* at 136.

32 Bethel & Walker, *Et Tu, Brute!* 1965 TENN. S.B.A.J. 11.

Conceived in the minds of lawyers—sheltered during its period of gestation by members of the legal profession—given birth by reason of the undaunted labors of lawyers—nourishing the very tap roots of its operations for almost two centuries upon the fertile minds and imaginations of the members of the legal profession, the federal government of the United States now embraces to its bosom a program which encompasses within its very being the destruction of the free, vital and independent protector of human rights—the creator of the system—the legal profession.³³

For those who are interested in how this phenomenon is to be accomplished by the revolutionaries at the OEO, the authors provide more specific charges:

On the subject of OEO's relationship to the organized bar and legal aid:

The general attitude of the people of OEO in regard to the program seems to be one of steamrolling over any objections or criticism of the program.³⁴

On the subject of the relationship of legal services programs to local community action agencies:

It is noted that no concern is expressed regarding the insertion of lay intermediaries and organized groups of non-professional persons having control over the operations and handling of the individual's legal affairs. The independence of the attorney to represent his client is disregarded as unimportant.³⁵

On the subject of to whom and in what kind of cases services should be provided:

In other words, the program is one which provides competition for the independent practicing lawyer, the competition acting in flagrant violation of the Canons of Ethics of the legal profession, providing few, if any, of the proven and time honored safe-guards needed by the individual client, and all supported by the taxpayer. . . .

Under the program as it is presently constituted, those counted as "poor" today can well form the mere nucleus of what, by definition is "poor" tomorrow. Nothing prevents all encompassing federalism from embracing all within its grasp as "poor" and needful of government tendered legal aid, even as it has and is greedily clutching virtually all other programs in its headlong plunge into socialism.³⁶

33 *Ibid.*

34 *Id.* at 14.

35 *Ibid.* The *OEO Guidelines* provide:

Whether a legal services program is conducted by a community action agency or is independently funded, if the poor are to be effectively represented, there must be assurance of the independence of professional legal judgments from policies of the local community action agency. It is not inconceivable that a legal services program will represent its clients against other delegate agencies of the community action agency or even against that agency itself. Independence is best assured by the creation of a separate policy making board for the legal services program. The legal services program, while coordinated in a community action agency, should determine its own policy within the framework of the Economic Opportunity Act and the policy directives of the Office of Economic Opportunity.

OEO, GUIDELINES FOR LEGAL SERVICES PROGRAMS 8 (1966).

36 Bethel & Walker, *supra* note 32, at 16. The *OEO Guidelines* provide:

A proposal must describe the standard by which the eligibility of clients will be determined. The legal services program, like all other OEO efforts, directs its

On the subject of legal ethics and unauthorized practice of law:

Though willing and eager to enter the practice of law and compete with the legal profession, the government does not wish to adhere to the high standards which the legal profession has established and maintained. Rather the government wishes to push aside the valued, protective restrictions of the Canons of Ethics, ignore the states' restrictions and requirements on who shall be admitted and licensed and encourage laymen to engage in the practice of law. The federal government program would allow solicitation and advertising, it would advocate champerty and barratry, it finds no objection to the use of lay intermediaries, it finds little value in the confidentiality of the relationship between a client and his attorney. . . . The government recognizes no ethical sanctions preventing lawyers from striving to create litigation.³⁷

On the subject of bar involvement:

Cooperation or non-cooperation with OEO policy—either one—leads to socialism and destruction of the legal profession. The answer then must lie in the alteration of the program not participation in or resignation to it.³⁸

On the subject of how this can be accomplished without participation, the authors are silent.

We submit that there is not even a vague similarity between the OEO Legal Services Program and the mythical strawman created by the Tennessee Shakespeareans. A serious disservice has been done to the bar and the nation by the misrepresentation of the nature of the programs being initiated. There is every right to criticize and oppose. Federally financed programs of legal services give rise to issues of deep importance to the profession, and the entire spectrum of viewpoints should be voiced in the debate concerning their resolution. On previous occasions one of the present writers has raised strong objections to some OEO policies.³⁹ There is no right, however, to make misrepresentations

attention and the community's resources to the needs of those afflicted and disadvantaged by poverty. OEO will not provide funds for programs to provide free legal assistance for individuals or organizations who can afford to employ private counsel. The standard should not be so high that it includes clients who can pay the fee of an attorney without jeopardizing their ability to have decent food, clothing and shelter. This is a program of legal assistance for the poverty stricken . . .

Programs should not provide free legal advice in fee-generating cases, such as contingent fee cases or other cases in which a fee provided by statute or administrative rule is sufficient to retain an attorney. The test should be whether the client can obtain representation. When a case generates a fee sufficient to employ competent private counsel, the client should be referred under an appropriate lawyer referral system. If the fee is not sufficient to attract a private lawyer, the client may be eligible for the assistance of the OEO-funded program.

OEO, *op. cit. supra* note 35, at 19-20.

37 Bethel & Walker, *supra* note 32, at 18. The *Guidelines* provide:

Needless to say, attorneys directing or employed in a legal services program must ensure that the conduct of the program conforms to the Canons of Professional Ethics and Rules of Professional Conduct of Lawyers. The Canons are intended primarily to serve the best interests of the public. Neither the letter nor the spirit of the Canons prohibits the effective representation of the poor, as evidenced by the experience with legal aid for more than 75 years.

OEO, *op. cit. supra* note 35, at 8-9.

38 Bethel & Walker, *supra* note 32, at 26.

39 Remarks by A. Kenneth Pye, Assembly of the American Bar Association, Aug. 11, 1965; Pye, *supra* note 4.

when the facts are accessible. The *OEO Preliminary Guidelines*⁴⁰ were available to the Tennessee authors, but nowhere in the article is there any reference made to them. The President of the NLADA, a strong supporter of OEO-financed legal services programs, is quoted in such a way that the reader would conclude that he was an outspoken opponent.⁴¹ Nowhere is any reference made to the attitude of the ABA or its leaders.

Fortunately, many local bars have adopted different attitudes. In the District of Columbia, a Judicial Conference Committee approved the establishment of an expanded program of legal aid and the presidents of the local bar associations encouraged individual lawyers to support it. In Los Angeles, St. Louis, Newark, Miami, Durham, North Carolina, in South Bend, Indiana, and in other cities, bar associations have been willing to give at least tentative endorsement to new programs. In some localities with several bar associations, attempts are now being made to work out differences in order to develop a program which has general bar support.

In the future, we shall probably witness a general movement of bar associations to get on the bandwagon. Except in a few communities, it seems likely that the organized bar will support federally financed programs designed to provide lawyers for individuals with private legal problems who are clearly unable to pay a fee acceptable to a lawyer in the community. The reason for the attitude is obvious. The leaders of the bar realize that many citizens are being denied the services of lawyers because of poverty. Local communities cannot or will not pay the price to provide lawyers to all those who cannot afford counsel. The only hope of providing the necessary services is through federal financing.

The objective of the federal program, however, is not to give an aspirin to the patient who has a headache. It seeks to remove the cause of the headache. Mr. E. Clinton Bamberger made the distinction clear in his recent address to the National Conference of Bar Presidents:

We cannot be content with the creation of systems of rendering free legal assistance to all the people who need but cannot afford a lawyer's advice. This program must contribute to the success of the War on Poverty. Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effects of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition. . . .⁴²

The challenge to the bar arises when it must determine whether it will support programs which are not solely designed to provide a lawyer to stay an eviction or to represent a client who is haled before a small claims court, but which plan to devote a significant part of their resources to community organi-

40 *Tentative Guidelines for Legal Service Proposals to the Office of Economic Opportunity* (Spring, 1965), in WALD, *op. cit. supra* note 4, at 112.

41 Bethel & Walker, *supra* note 32, at 24.

42 Address by E. Clinton Bamberger, Jr., National Conference of Bar Presidents, Chicago, Illinois, February 19, 1966.

zation, group protest and law reform. The question is whether the bar will become involved in projects in which lawyers are asked to serve as the architects of a social revolution. Mr. Bamberger put the issue to the bar in his address:

. . . It has been for centuries the task of lawyers to change the *status quo*. It is fallacious to think of lawyers as guardians of tradition — rather we are the guardians and watchdogs of orderly change. It is perhaps the greatest genius of the Anglo-American system that we have always, except when confronted with the terrible agony of the Civil War, been able to change the deepest and most fundamental characteristics of society peacefully, with a stolidity of government and laws that is the awe and envy of other nations.

Today, we are asked once again to follow brilliant tradition. Lawyers are exhorted to guide, control and direct a change in our society. I ask you to put your traditions and skills to work, not for the benefit of the corporations, not for the benefit of the federal government, but for the benefit of the poor. . . .⁴³

Involvement in a program which has the object of causing a social revolution is quite different from involvement in a program designed simply to provide a lawyer for a poor man. Yet, unless there are fundamental changes in the institutions which contribute to the perpetuation of poverty, the lawyers of the next generation will be faced with the necessity of providing services to more people who have the same kinds of legal problems.

Even if the object of reform — as distinguished from services — is regarded as the principal objective, the problem of methodology will remain. We must face the issue of whether the bar should support and whether individual lawyers should participate in the movements of social protest which are developing in the ghettos throughout the nation. The close relationship between poverty and race in some areas and the alliances between newly organized groups of the poor and some segments of the civil rights movement will raise questions of the lawyer's role in counselling civil disobedience which must be answered.

Much of the reform needed cannot be accomplished through the litigation of test cases. It requires legislative action. Thus, the extent to which the lawyers of the poor should engage in lobbying activities and political action must be decided. A bar which is genuinely dedicated to reform may reject involvement in programs which see the political process as the only effective means of achieving it.

Decisions concerning the conditions under which lawyers should be made available to the poor, the determination of the level of poverty at which services will be made available and the manner in which the availability of these services should be made known to the poor have traditionally been made by the bar, either unilaterally or in association with the representatives of the business community, whose financial support was needed. The concept of involving the poor in such decision-making is new. The bar at national, state and local levels must determine the extent to which it will become involved in programs where these vital decisions are made by a constituency broader than the profession.

43 *Ibid.*

In the 1962 Tucker Lectures at Washington and Lee University, Mr. Orison S. Marden pointed out that the bar's responsibility to make legal services available to all citizens is the natural corollary of the monopoly to practice law granted to the profession by the people.⁴⁴ The bar has an obligation derived from its monopoly position to develop institutions which will insure that legal services are available to all. Lawyers have a right to receive fair compensation for their services, but they do not have the right to erect barriers which preclude any substantial segment of the community from obtaining legal services. The bar has the right to develop rules governing the conduct of its members, but these rules likewise cannot be permitted to deny counsel to those who need a lawyer. There are delicate questions involved in compromising the different interests sought to be advanced. A standard of indigency to determine eligibility for legal services should not be so low that people are denied the use of legal aid when they are unable to afford a reasonable fee. Neither should the standard be so high that legal services are provided free of charge to the person who could pay the normal fee, thus depriving a practitioner of a potential paying client. The Canons of Professional Ethics should promote standards thought to elevate the level of the profession to the mutual advantage of the bar and the public. But observance of these canons may have the effect of limiting the availability of lawyers or raising the costs of legal services to a price which many citizens who are not indigent cannot afford. Whether the social loss which results from making legal services less available is justified by the advantages to society gained by an asserted higher level of professionalism may pose difficult questions. None of these issues involves the legal profession alone. The public has an interest in any decision of the profession which affects the availability or quality of services provided by those to whom it has granted a monopoly.

Many of the issues facing the bar in the War Against Poverty — the acceptance of federal financial support to provide lawyers for those who cannot afford them when local funding is inadequate, the determination of who should receive free legal services, the structure of the programs by which such services will be provided, whether services aimed at law reform through the political and legislative processes should be provided and the appropriate allocation of resources for these purposes, the extent and manner in which the poor should be educated concerning the existence of legal rights and the availability of legal services to protect them, and the participation of the poor in the determination of these matters — are really only specific examples of two more general problems which the bar must face. What must be done to make available to all the quantity, quality and types of legal services now available to business and the rich? To what extent should those who need the services participate in the decisions concerning to whom and under what circumstances they will be made available?

These problems would exist if we had no War Against Poverty. The problem of the availability of legal services is not a problem peculiar to the poor. We have a substantial number of the middle class who cannot now afford

⁴⁴ Marden, *Equal Access to Justice: The Challenge and the Opportunity*, 19 WASH. & LEE L. REV. 153, 154 (1962).

a lawyer.⁴⁵ This inability results in part from decisions made unilaterally by the legal profession. If we win the War Against Poverty, one-fifth of our population presumably will be raised from the ranks of the poor to the middle class. The problem of the availability of legal services will not have been changed, however, unless the new members of the middle class will then be able to pay fees which lawyers will accept as fair compensation.

The involvement of the bar in the War Against Poverty has simply advanced the timetable for the profession. It is requiring us to begin to rethink the liturgy and dogma of the profession. We must consider the impact of our present professional standards on the availability of legal services, the relationship between indigency standards and the fees deemed reasonable for services of particular types and whether the profession has a right to refuse to provide certain types of legal services to those who seek them. In addition, we must begin to work out relationships with others who also have a deep interest in these problems in order that the public, as well as the profession, receives an opportunity to be heard and to participate in the making of vital decisions.

Reevaluation of Professional Standards

In assessing the role of the bar in the War Against Poverty the professional ethics of the bar must be considered for two reasons. Some have maintained that the type of legal services programs being financed by OEO violates the Canons of Professional Ethics. These charges must be answered if the endorsement of many lawyers is to be secured. Furthermore, modification of the canons is now under study. The impact of our present standards of conduct on the availability of legal services to the poor and the near-poor is an important factor in determining what changes should be made.

The ABA has long been active in an attempt to widen the availability of legal services offered to the poor and the near-poor. The contributions of the ABA's Committees on Legal Aid and Indigent Defendants and on Lawyer Referral Service antedated the declaration of the War Against Poverty. At the present time two different committees are at work dealing with these problems. One is studying the availability of legal services; the other is considering revision of the Canons of Ethics. It is our thesis that the problems of the two committees are closely related and that they must work together if a satisfactory relationship between professional ethics and the availability of legal services is to be achieved. The bar must examine whether the social needs of the poor and near-poor for expanded legal services can be fully satisfied within the framework of our existing ethical concepts. A discussion of some of the canons and opinions interpreting them will demonstrate the problem.

In general, the Canons of Professional Ethics follow the traditional concept

⁴⁵ See CHEATHAM, *A LAWYER WHEN NEEDED* (1963); Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A.L. REV. 438 (1965); Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973 (1963); Cheatham, *The Growing Need for Specialized Legal Services*, 16 VAND. L. REV. 497 (1963); Note, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, The Duty, and a Solution*, 26 U. PITT L. REV. 811 (1965).

that the attorney should be passive in his relationship with society. This passive posture is based on several assumptions: that lay persons know when they have a legal problem; that they know a lawyer or can easily locate an attorney who can solve the particular legal problem; and that they are able to pay the lawyer at least a minimum fee. Although these assumptions might have been true in the rural society of yesteryear, it is doubtful that they have the same validity in the urban society of today. While activist local bar associations may help fill the gap where the basic assumptions are invalid, the ultimate solution may require a modification of the approach to the canons themselves.

Canon 27 — Advertising

Any form of advertising or soliciting of business by attorneys has been consistently condemned. The most commonly cited reason for barring advertising is that it is undignified and results in commercialization of the legal profession, thereby lowering public opinion and confidence in it.⁴⁶ Under Canon 27 the attorney may not make his availability known by any of the usual advertising means.⁴⁷ While solicitation by an attorney is not inherently wrong or improper, it is not viewed as being compatible with the self-respect and best interest of the profession.⁴⁸ An exception to the rule against solicitation has been recognized when an attorney was willing to provide legal services without fee to indigents whose constitutional rights were allegedly being violated.⁴⁹

Individual attorneys may, under provisions of Canon 40, write and publish general articles on legal subjects for purposes of public education,⁵⁰ but the attorney runs the risk that the article may be misinterpreted as a personal solicitation.⁵¹ A group of attorneys may not sponsor any form of legal clinic for the poor if the names of individual attorneys will appear in advertisements promulgating the plan.⁵² Greater latitude has been given to local bar associations in establishing legal clinics and lawyer referral services. There has been no objection when a bar association retains supervision and control and where information concerning the service is promulgated in the name of the association.⁵³ Similarly, in the field of public education, local bar associations have been encouraged to publish articles designed to make the public aware of the legal processes so long as any semblance of personal solicitation is avoided, the publication is not motivated by a desire to increase professional employment, and it is carried out in good taste.⁵⁴ The rationale behind the opinions with regard to Canon 27 could lead to the conclusion that only through bar associations can the taint of commercialism and self-interest be eliminated. Such an interpretation, however, is not required. A legal aid organization which simply educates the citizens of the community as to their legal rights and the availability of legal services should not be restricted by the canons if the project is

46 Op. 1, Committee on Professional Ethics and Grievances (Jan. 15, 1924).

47 Op. 43, Committee on Professional Ethics and Grievances (Sept. 17, 1931).

48 Op. 111, Committee on Professional Ethics and Grievances (May 10, 1934).

49 Op. 148, Committee on Professional Ethics and Grievances (Nov. 16, 1935).

50 Op. 92, Committee on Professional Ethics and Grievances (May 2, 1933).

51 Informal Opinion C-552, Committee on Professional Ethics and Grievances.

52 Op. 191, Committee on Professional Ethics and Grievances (Feb. 18, 1939).

53 Op. 205, Committee on Professional Ethics and Grievances (Nov. 23, 1940).

54 Op. 179, Committee on Professional Ethics and Grievances (May 8, 1938).

motivated by a desire to help the public and conducted in a dignified manner.

Only patent law and admiralty law are recognized as specialties. Attorneys may not advertise any specialty even though it could be an important factor to a member of the public who is looking for a lawyer, either because the client would prefer a specialist or because the specialist might be able to provide the service sought at a lower cost than the general practitioner.⁵⁵ In large urban areas, most individuals do not know attorneys and are forced to play a type of lottery with the attorneys listed in the Yellow Pages. The individual finds the type of attorney he needs by talking to a friend, by chance or by use of a lawyer referral service. One must question whose interest is being protected — that of the public or the lawyer — when advertising is condemned per se on the basis that it is beneath the dignity of the profession. Perhaps the interests of the public can be better served not by prohibiting advertisement and thus limiting the availability of lawyers, but by relaxing the rule and permitting lawyers to become more generally known through some form of limited advertisement. It may be possible to modify the rule against advertising and make the availability of lawyers more generally known without permitting unwanted commercialization.

Canon 28 — Stirring up Litigation

Canon 28 is directly related to the common law crime of maintenance, which was aggravated where the perpetrator was a lawyer who by reason of his special professional privileges is precluded from instigating, promoting or prolonging litigation for his own benefit. The ABA has condemned the classic types of maintenance cases which involve attorneys buying up claims, searching for lost heirs or employing runners to solicit business.⁵⁶

An attorney who volunteers his legal services to prospective litigants and couples his offer with a solicitation of employment violates Canons 27 and 28.⁵⁷ However, if the attorney volunteers his services on behalf of an indigent person without compensation and a constitutional question is involved, no ethical objections arise even though some elements of "stirring up" and solicitation are involved.⁵⁸ A strong argument can be made that Canon 28 does not prohibit an attorney from fermenting litigation where no constitutional question is involved if he thinks such litigation has merit, if he is dealing with persons whose economic and intellectual level is such that litigation is not normally contemplated by them as a means of settling disputes and if there is no element of personal gain involved. We are just beginning to learn about the poor and their legal problems. We know that as a class they are not conscious of their legal rights and remedies. It would be hypocritical to provide lawyers to represent them and deny the lawyers the freedom to encourage them to assert rights which have long been dormant.

Canon 35 — Intermediaries

Even before the adoption of Canon 35 in 1928, the ABA condemned

55 Op. 286, Committee on Professional Ethics and Grievances (Sept. 25, 1952).

56 Op. 173, Committee on Professional Ethics and Grievances (July 24, 1937).

57 Op. 9, Committee on Professional Ethics and Grievances (April 28, 1926).

58 Op. 148, Committee on Professional Ethics and Grievances (Nov. 16, 1935).

the practice of lawyers working through intermediaries on the ground that such a practice was a form of indirect solicitation and exploitation of lawyers.⁵⁹ A 1925 opinion dealt with the issue of an automobile club which advertised the services of its lawyers and offered free legal service as an inducement to join the organization. The ABA opinion concluded that such practice violated ethical restrictions on the use of lay intermediaries and may have constituted the unauthorized practice of law by the automobile club.⁶⁰ In a later opinion it was decided that an attorney who assisted in the incorporation of businesses by working for an intermediary was in effect assisting in the unauthorized practice of law as well as violating Canon 35.⁶¹ Other opinions condemn the practice of working through lay intermediaries on the ground that the practice destroys the necessary direct personal relationship between the lawyer and his client.

An attorney who accepts employment by corporations, trade associations or unions for the purpose of providing free legal services to employees or members concerning their personal affairs acts in violation of Canon 35.⁶² The fact that individuals needing legal assistance may be more inclined to seek help through the institutions which they know and trust rather than some unknown attorney selected at random has not been persuasive to the bar in the past — neither has the argument that attorneys employed in such a capacity can develop expertise in special types of cases and may be able to handle them competently for lower fees. The advantages to the public incident to financing legal costs through the insurance principle also has been deemed to be outweighed by the traditional reasons for condemning the practice.

The recent holdings of the Supreme Court in *NAACP v. Button*⁶³ and in *Brotherhood of R.R. Trainmen v. Virginia*⁶⁴ may facilitate a reexamination of the bar's attitudes towards Canons 27, 28 and 35. In 1963 the *Button* Court refused to apply a Virginia statute making solicitations by lawyers a crime. NAACP had attorneys encourage Negro parents to bring suits when their children were denied admission to a public school and later represented them in resulting litigation without charge. The action by the attorneys in protecting the constitutional rights of their Negro clients was upheld under the provisions of the first and fourteenth amendments of the Constitution. Since the attorneys did not receive any fees as a result of the litigation, no commercialization was involved. In the *Brotherhood* case, decided the next year, the Court held that the right of a union to hold out lawyers selected by it as the only approved lawyers to aid members and their families in railroad accident cases and to solicit their employment was protected by the same amendments.

In contrast to the *Button* case, the impact of the *Brotherhood* decision was directed at the actions of lay members of the union and not to attorneys. The Court failed to find in the case the elements of solicitation or "ambulance chasing" by attorneys, although the brief submitted by the railroad contained evidence

59 Op. 8, Committee on Professional Ethics and Grievances (April 28, 1925).

60 *Ibid.*

61 Op. 31, Committee on Professional Ethics and Grievances (March 2, 1931).

62 Op. 273, Committee on Professional Ethics and Grievances (Oct. 25, 1946).

63 371 U.S. 415 (1963).

64 377 U.S. 1 (1964).

of such a practice. The case stands for the proposition that lay members of a group have a constitutional right to recommend a lawyer to that group as having special skills and may even solicit their services.

Some writers have viewed the *Button* and *Brotherhood* cases as a new constitutional means to enlarge the scope of available legal services. We do not share their enthusiasm. Nothing in the opinions grants any constitutional protection to the lawyer involved in group legal services, whether it be sponsored by unions, corporations or other types of associations. The *Button* and *Brotherhood* cases are significant landmarks in constitutional law. They do not solve the problems for the bar or preclude alternative solutions to them. Their significance is to highlight the problems and the need for a speedy solution. We suggest that the bar must move towards the approval of group legal services as a means of making legal services available.⁶⁵ It must develop means of regulating the practice rather than prohibiting it. The alternative is to develop some other institution which will make the services available. The problem will become more serious as the War Against Poverty elevates more people out of the class where they were entitled to free legal services. Our abhorrence of the lay intermediary cannot be permitted to block the availability of legal services.

Canon 42 — Expenses of Litigation

An opinion rendered during World War II reached the conclusion that an organization which rendered legal services to servicemen could advance expenses to indigent servicemen without an agreement for reimbursement, even though the lawyer handling the case may have contributed to the organization for that purpose.⁶⁶ This opinion would seem to justify the advancement of expenses by legal aid agencies where a lawyer's self-interest is not at issue and where the need is similar.

The indigent plaintiff in a contingent fee negligence case who is ineligible for legal aid representation is not so fortunate, however. While a pauper's oath may help pay some of the court costs, the attorney who represents such a client will no doubt have additional pretrial expenses, which may be uncollectable if the case is lost. It is doubtful if he may make any advancement without the expectation of reimbursement. In any case he is not permitted to advance any funds unconnected with the litigation.⁶⁷ Thus, he cannot advance funds to a client for living expenses without violating Canon 42.⁶⁸ Faced with this situation, the ethical counsel may be forced to give up his fee and advance some living expenses or send his client to some charitable institution in the hope that it can provide continuing assistance until the case comes to trial. The fact that recovery appears certain and that the injury which resulted in the claim caused the indigency is apparently deemed irrelevant. One of the reasons for the prohibition is the potential conflict of interest between client and attorney. However, the possibility that permission to advance expenses would open the door to the

65 See *Report on Group Legal Services*, 39 CAL. ST. B.J. 639 (1964); Schwartz, *Foreword: Group Legal Services in Perspective*, 12 U.C.L.A.L. REV. 279, 284 (1965).

66 Op. 259, Committee on Professional Ethics and Grievances (Dec. 17, 1943).

67 Op. 288, Committee on Professional Ethics and Grievances (Oct. 11, 1954).

68 *Ibid.*

unscrupulous lawyer who could use the privilege as an improper inducement for soliciting cases is probably a more significant reason. It should be possible for the legal profession to devise some way to deter the unscrupulous and at the same time add more humanity to its standards. Local bar associations should consider the establishment of a revolving fund to be used by attorneys who represent semi-indigent clients. This fund could be used for the purpose of guaranteeing the payment of expenses of litigation where clients themselves could not assure reimbursement if the case were lost. The requesting attorney under this system would be required to justify advancements of expenses to the local bar association and clients would have to reimburse the fund if they were successful in their litigation. If the fund is administered by knowledgeable attorneys, the temptation to seek advances for expenses less than essential to the proper presentation of the case could be controlled adequately.

Canon 47 — Unauthorized Practice

Prior to the adoption of Canon 47 the profession condemned as unethical the practice whereby individual attorneys assisted a lay organization in the practice of law.⁶⁹ The rationale first used was that such a practice was an improper exploitation of lawyers by laymen in violation of Canon 35 and in some cases an improper division of a fee with a nonlawyer in violation of Canon 34. With the adoption of Canon 47 in 1937 it was no longer necessary to condemn the practice through the interpretation of other related canons. The Canon is obviously aimed at banks and other commercial institutions that draft wills and other legal documents with the assistance of paid counsel.

Of course, the question as to whether a particular organization is engaged in the unlawful practice of law will depend on local statutes and the decisions of local courts.⁷⁰ Canon 47 is merely a device of the legal profession to stop the practice by making it unethical for an attorney to assist in the unauthorized practice. It should have the support of the profession insofar as it discourages the unlawful practice of the law for commercial purposes, but it clearly should have no application to organizations which provide legal services on a nonprofit basis. Years ago Professor Karl Llewellyn reminded us that the unauthorized practice of law is more a symptom of an illness rather than an evil per se in that it is an indication on the part of the public of a general dissatisfaction with the legal profession.⁷¹ Unauthorized practice would increase, not diminish, if legal aid were included within the prohibition of the Canon. Fortunately, the courts have recognized that different factors are involved where a legal aid society organized as a nonprofit corporation provides legal services to indigents.⁷²

Canon 12 — Fixing the Amount of the Fee

Canon 12 lists a number of factors that should be considered by an attorney in establishing a fee, including the customary charges of the bar for

69 Op. 122, Committee on Professional Ethics and Grievances (Dec. 14, 1934).

70 Op. 198, Committee on Professional Ethics and Grievances (Oct. 21, 1939).

71 See *Report on Group Legal Services*, *supra* note 65.

72 *Azzarello v. Legal Aid Soc'y*, 117 Ohio App. 471, 185 N.E.2d 566 (1962).

similar services. It also provides that a client's poverty may require a lesser charge or none at all.

During recent years many bar associations have established minimum fee schedules as a guide for attorneys. Some local bar associations, concerned with the evils of fee cutting by attorneys and shopping by clients, have attempted without success to establish mandatory fee schedules.⁷³ In 1961, however, it was held that the habitual charging of fees less than the established minimum without proper justification may be evidence of unethical conduct.⁷⁴ While proponents of this opinion can justify the rationale of the decision on the basis that fee cutting is unprofessional, it may be difficult to justify in the eyes of the general public. Any type of price fixing is associated with protectivism and self-interest. The opinion may serve as a brake to the cautious but well-meaning attorney who might otherwise not hesitate to charge low fees in deserving cases. Lawyers who depend upon the near-indigent for many of their clients and young lawyers who serve the poor as a matter of expediency may have difficulty in complying with the opinion.

This does not mean that the opinion is wrong. A sound system may divide the public into those who can afford reasonable fees and should consult the private practitioner and those who cannot and should receive counsel from institutionalized legal aid. We may develop a system where the client pays what he can afford and the difference may be made up from a fund administered by the bar and supported by government or foundation grants. What cannot be permitted is insistence upon strict observance of minimum fee schedules while maintaining the indigency standard for legal aid at a level where citizens who cannot afford the approved fees are nevertheless ineligible for legal aid.

The Public Interest in Ethical Standards

It is clear that the necessary decisions concerning the standards of professional responsibility and their impact upon the availability of legal services are of concern to the public as well as the profession. In the past the determination of the canons has been regarded as a prerogative of the bar. Yet we assert that the purpose of the canons is to benefit the public. The public has a right to be heard concerning the manner it is to be benefitted or protected by those to whom it has entrusted the monopoly of providing legal services. It is to be hoped that the excellent committees now studying these problems will make maximum use of those outside the profession in determining how best to serve the public interest.

To be effective, ethical standards must reflect public needs in an ever-changing social environment. They must also receive the wholehearted acceptance and support of the bar. In addition, the standards must be interpreted in accordance with their spirit and intent to prevent the abuses at which they are aimed.

We do not presume to have exhausted the possibilities for increasing the legal services available to the public within present standards. Our object has

⁷³ Op. 171, Committee on Professional Ethics and Grievances (July 23, 1937).

⁷⁴ Op. 302, Committee on Professional Ethics and Grievances (Nov. 27, 1961).

been to demonstrate the need to reexamine the canons in the light of their impact upon the availability of legal services and to argue that the profession must either make changes in its present standards or develop new institutions when the demands of the profession require adherence to the traditional rules.

In the future, changes in the canons, in their interpretation or in the development of new institutions will enable the legal profession to provide a wider scope of legal services to the public in general and to the poor and near-poor in particular. The passive nature of our profession will undergo a change, and lawyers will be made more accessible through institutions which the public knows and understands. We think that individuals should be able to receive legal services through group plans where the mere economics of the plan will result in lower fees. We have faith that the profession will take the action necessary to reflect the public need and will do so without sacrificing the high ideals of the legal profession.

The Problem of Economics

The bar must also examine the relationship between the economics of the practice of law and the availability of quality legal services. This is necessary for two reasons. The acceptance and support of individual private practitioners can only be obtained by a candid appraisal of the impact of expanded legal aid programs on their financial security and the opportunity for economic advancement. Furthermore, the economics of the practice of law provides us with insights into the problem of identifying the people who cannot afford legal services and the number of lawyers needed to provide them with the effective assistance of counsel.

We cannot ignore the impact which an effective program of legal aid may have on the lawyers who practice in the communities being served. It is possible that no prejudice will result because the persons for whom lawyers are provided will usually be individuals who have had no prior relationship with a lawyer and who would not consult a lawyer if legal aid were not available. It may be argued that lawyers will be helped because they will now be able to refer cases of deserving but nonpaying clients to legal aid where previously they would have felt an obligation to handle the case personally if no other lawyer were available. It is suggested that a lawyer who makes a practice of representing clients for fees which are less than his services are worth is in a dilemma. He may be violating the canons;⁷⁵ he is headed for economic disaster if he spends the time necessary to prepare his cases properly. He is behaving unethically if he accepts cases and then does not devote the time necessary to prepare them competently. From the point of self-interest the lawyer should not engage in a practice where he cannot obtain the compensation necessary to permit him to devote the time necessary to the representation of his clients. The profession should not permit lawyers to engage in such a practice even if they are willing to do so.

Others believe that real competition will result from government-financed legal service programs. They argue that many practitioners now represent sub-

⁷⁵ Canon 12.

stantial numbers of people who would be eligible for free legal services under the proposed programs. The same lawyers also represent people who can pay higher fees. The lower-than-reasonable fees charged the poor and the reasonable fees charged the more affluent combine to make up their income. The loss of fees now paid by the poor will constitute the straw that breaks the camel's back. Furthermore, even in the poorest neighborhoods there are some clients who can pay a fee or who have personal injury cases. These clients now come to the lawyers practicing in the neighborhood where they reside. A program educating the poor concerning the availability of legal services will inevitably result in some of these persons going to legal aid. Legal aid offices will presumably refuse to accept these cases, but if the interviewer utilizes the services of the lawyer referral service, the paying client may be sent to a lawyer in some other section of the city, thus depriving the practitioner in the neighborhood of a case which normally he would have received.

At the present time we simply do not know which of these contentions is meritorious. Our experience with legal aid in the past is not very helpful. These programs were understaffed and could not represent the numbers of clients who will be able to obtain lawyers from the adequately financed programs now being initiated.

It is essential that we ascertain the effect that these programs will have on the marginal practitioner if we are to persuade individual lawyers to become involved. We may find that no economic hardship will result. The economic hardship may be reduced by innovations such as the development of neighborhood panels within the existing lawyer referral system in which only neighborhood lawyers may participate.⁷⁶ Even if we find that some lawyers will be hurt, it does not necessarily follow that bar support will dissipate. The bar may reach the conclusion that the profession as a whole will benefit even if some of its members who regularly charge less than the minimum fees will suffer. In such a situation the support of those who will be hurt will have to be sacrificed, but the general support of the bar may be obtained.

Many of the issues involved in assessing the economic impact upon the bar revolve around the issue of indigency standards. The *OEO Guidelines* describe the standard which should be used in general terms: "The standard should not be so high that it includes clients who can pay the fee of an attorney without jeopardizing their ability to have decent food, clothing and shelter."⁷⁷ What does this mean in dollars and cents? Indigency standards in use by legal aid organizations vary greatly. Some organizations rely on the subjective judgment of the interviewer as to the person's ability to pay a fee which would induce a private lawyer to accept a case. Some determine eligibility by the nature of the case, e.g., public welfare matters. A recent study has indicated some interesting automatic rules, such as that in Ithaca, New York, which extends no service to able-bodied men from 21 to 55 years of age; San Bernardino, California, which will not handle plaintiffs' cases; Columbia, South Carolina, which will undertake no type of court action; Corpus Christi, Texas, which bars assistance to

⁷⁶ Such a system has been approved by the Bar Association of the District of Columbia at the request of the Neighborhood Legal Services Project.

⁷⁷ *OEO, op. cit. supra* note 35, at 19.

any applicant who owns a car; Paterson, New Jersey, which denies service to anyone owning real estate regardless of the circumstances; Springfield, Illinois, which bars legal aid help to anyone who owns household effects other than those exempt from execution for debts.⁷⁸ Many have specific income limits ranging from that of Hidalgo County, Texas, which denies assistance to unmarried applicants without children who have incomes in excess of \$75 per month, to Philadelphia, which provides services to an unmarried person without dependents who makes less than \$280 each month and to the married man who makes less than \$345, and the District of Columbia, which provides services to the unmarried person with a net take-home pay of \$55 per week and then adds \$15 for each dependent.⁷⁹ Frequently, the rules of local legal aid societies permit flexibility in the application of these standards.

It is clear from a review of the standards in force that most of the present standards have no rational basis in the sense that they have not been adopted as the result of a thorough study of either the effect of a particular standard upon the availability of legal services or its impact upon the private practitioner. Obviously there can be no national standard which would be appropriate in every locality, but eligibility standards should be predicated upon factual information dealing with the actual costs to the applicant for food, clothing, shelter, medical expenses, transportation and the reasonable fee in the community for the services sought, as well as the income of the applicant, his assets, debts and their causes.⁸⁰ We must abandon the idea that every applicant is either poor and unable to afford legal service of any type, or rich and therefore able to pay for all kinds of legal services. We must work out relationships between the types of services sought and the ability of applicants to afford to pay a reasonable fee for a particular service. We may reach the conclusion that there are classes of cases, such as disputes involving public welfare, in which all applicants need free legal assistance. We may decide to permit legal aid to handle the mass of petty cases in which clients need only ten minutes of advice or a phone call and are unable to pay more than a nominal fee. In many cases, however, a more appropriate test would be the applicant's capacity to pay for the kind of service which he seeks, not simply what his gross or net income may be. Such an approach would provide us with a system of legal aid for the poor which rests on a rational economic basis and would assure most lawyers of the reasonableness of programs designed to provide legal services to those meeting the standards.

Much of the background work is being done. What we need to do is to relate the knowledge and concepts which are developing from the study of the economics of the practice of law to the problem of providing legal services to

78 Cordek, Memorandum *re* Rules Governing Eligibility for Legal Aid Services Other Than Those With Respect to the Subject Matter of the Case, American Bar Foundation (mimeo 1966).

79 *Id.* at 1-8. Ed. note: This data is based upon information available at the time of the Symposium and later information indicates some changes have been made. Letter From Silverstein, Associate Project Director, American Bar Foundation, to A. Kenneth Pye, June 3, 1966, copy on file in the office of the *Notre Dame Lawyer*. For the latest available data, see American Bar Foundation, Preliminary Report: Eligibility for Free Legal Services (mimeo May, 1966).

80 Kean, Memorandum *re* The Ability To Pay for Legal Services, United Planning Organization (mimeo 1966).

the poor. An example may be helpful to demonstrate our point. The Atlanta Legal Aid Society, Inc., has a standard which provides a lawyer only to applicants who have a take-home pay under \$125 per month with allowances for dependents at the rate of \$25 per month.⁸¹ An applicant who has a wife and three children and who makes more than \$2700 a year is ineligible for legal services. The recommended minimum fee schedule for Atlanta suggests a fee of \$20 an hour as reasonable for office work; \$200 a day for trial practice in a court of record and \$200 for an uncontested divorce case.⁸² Can we really assume that a man who has \$52 a week to pay for the food, housing, clothing, medical expenses and transportation for a family of five can afford to pay a \$200 attorney's fee?

In the recommended minimum fee scales the bar has developed standards for the determination of reasonable fees. These fees are not mandatory and Canon 12 permits variations, but the basis for the fee schedules is that the amounts suggested are reasonable. Should they not also be used to determine what fees a responsible practitioner will probably charge? Through the use of data available from the Bureau of Labor Statistics the cost of living in an area can be determined. The net income of the applicant, his assets and liabilities (and their causes), the living costs for his family and the fee set for the service which he desires provide us with a standard which can be understood and applied. Much less flexibility would be required than in present standards which are either completely subjective or unrealistic to the extent that waiver of the standard becomes the rule rather than the exception. The bar's toleration of flexibility and subjective approaches in undermanned legal aid offices in the past may not carry through to programs which have the manpower to do the job.

Other information derived from economic surveys of the profession must be used in the development of legal services programs. The bar understands and accepts data derived from its own studies of efficiency in law office management. Lawyers will be more likely to accept their own criteria as a measure of what should be done in providing legal services to the poor. Recent studies have developed statistics on the use of lawyers' time. A study of practice in New York revealed that the average practitioner spent 15 percent of his time on administration and public relations, 3 percent on education, 18 percent on unpaid legal work, 64 percent on paid legal work. The determination of the hours available for compensable legal work⁸³ is now being used to determine hourly charges. The same data can be used in determining the number of attorneys needed to staff a legal aid office properly. The New York study demonstrated that there were less than 1600 hours per year available for work on cases. The 1965 standards of the NLADA indicate that the caseload of a full-time lawyer should not exceed 900 matters a year.⁸⁴ Administration, self-education and public relations are a part of the legal aid lawyer's job as well. Can we really expect one

81 Dugas, Memorandum *re* Standards of Indigency, District of Columbia Neighborhood Legal Services Project (mimeo 1966). See ed. note *supra* note 79.

82 ABA STANDING COMMITTEE ON ECONOMICS OF LAW PRACTICE, STATISTICAL ANALYSIS OF RECOMMENDED MINIMUM FEES FOR SELECTED LEGAL SERVICES 14 (1964).

83 See Cantor, *Ethics and Economics in Hourly Fees*, 50 A.B.A.J. 951 (1964).

84 NLADA, STANDARDS AND PRACTICES FOR CIVIL LEGAL AID ¶ 9 (1965).

lawyer to handle 900 matters competently in 1600 hours? We must reevaluate the caseloads of legal aid attorneys after consideration of the facts disclosed by the economic surveys. We should seek bar support for expanding programs for legal aid by using the same data.

In the past, indigency standards have been unilaterally set by the bar or by legal aid with bar approval. Representatives of the poor must participate in setting standards not only because involvement constitutes good therapy, but because the poor have something to offer to the discussions. They know how much it costs to rent an apartment, feed a family of four and travel to and from work. They know whether a responsible citizen who is poor would further compromise his meager standard of living by attempting to raise a fee which a lawyer would accept or whether he would simply forfeit his rights because of the expense involved. They may also provide insights into the quality of the services provided by members of the bar who undertake the representation of the poor for fees low enough for the poor to afford.

Others must be involved too. The lawyer has expertise in determining the fees which prevail in the community for different kinds of legal services and the fee which must be charged in order to provide adequate compensation for a particular case. He possesses no special expertise in the standard of living of the poor, the costs of other services which the poor also need, comparable standards for medical and welfare services or the attitudes of the poor. Economists and sociologists may have knowledge and approaches which will help in reaching an appropriate standard. Representatives of these disciplines should join with lawyers and representatives of the poor in studying the problem and developing standards. Lawyers and social workers have begun to pool the knowledge of the two professions to solve problems of mutual concern.⁸⁵ The development of standards for legal service programs provides an appropriate subject for more interdisciplinary effort.

It is essential that the bar's educational program reach its members. It is not enough to talk about the plight of the poor man who cannot afford a lawyer. The bar has to come to grips with the basic issues and answer the arguments being made by opponents of the program. This involves an education of many lawyers in the basic economics involved in making legal services available by the private practitioner or legal aid. It involves educating the bar to the importance of taking a realistic attitude towards legal ethics and an appreciation of the impact of ethics on those outside the profession. It is not enough to defend the canons on the ground that they are in the public interest. They must really serve the public. It is essential that the organized bar keep all lawyers aware of what is happening in the legal aid movement, of its successes, its failures, its problems with local bars and the manner in which they have been solved.

In the next few years many of the so-called indigent class will be "crossing over the line" from complete poverty to a state of semipoverty where their income will make them ineligible for legal aid. An increasing number of people will

⁸⁵ See Foster, *Law and Social Work*, 53 KY. L.J. 29 (1964), Cook & Cook, *The Lawyer and the Social Worker — Compatible Conflict*, 12 BUFFALO L. REV. 410 (1962).

be required to seek assistance of a referral type agency.⁸⁶ Preparations should be made to expand lawyer referral services to meet this anticipated demand. A referral service that is either understaffed or inefficient will do more harm than good and is better off discontinued. Many employers, union officials and civic groups wish to afford their employees or members the opportunity of securing adequate legal services. There is nothing unethical in local bar associations making available the facilities of lawyer referral services to these groups in a manner that would be helpful to the individuals of that group. The usual arrangement whereby the referring official conducts the initial interview at the referral facility and refers the person to a particular lawyer is certainly not mandatory. There is nothing wrong in making the facility mobile and offering "on the job" referral service at prearranged times. The referral office could conduct the preliminary interview at the place of employment. It is not inconceivable that when circumstances require, an attorney from the panel could set up shop at a suitable office at the same location. The establishment of lawyer referral facilities on a neighborhood basis would be but another means of increasing the availability of legal services to the public.

The Involvement of the Individual Lawyer and Law Firm

Not only the organized bar but also individual lawyers should become involved in the OEO Legal Services Program. For most, the involvement must be limited to personal support for the movement, professional courtesies when a legal aid lawyer is the adversary and financial support in communities which must finance local matching funds from private contributions of the bar. Other lawyers can play an important role in persuading local community action programs to make adequate funds available for legal services programs and in contributing their services as members of the boards of local community action or legal services programs.

For some, involvement may be more direct. In programs modeled after the Durham, N.C., plan, individual lawyers in rotation will represent indigents with compensation coming in part from a fund financed by the OEO. Such programs will fail unless the best practitioners and the best law firms participate, because the OEO will not continue to finance programs in which only marginal practitioners elect to participate. In the urban programs where nonprofit corporations retain lawyers on a salaried basis, there is also a need for the best of the profession. The salary ranges are such that the programs can compete with law firms and government at the lower levels, but there are few positions with competitive salaries for the best lawyers out of law school more than five years. What is needed is the recruitment of the brightest young lawyers with the expectation that the turnover will be high after a few years. More is gained from having the brainpower of the best young men for a few years than will be lost by inex-

⁸⁶ See 1964 ABA ANN. SURVEY OF LAWYERS' REFERRAL SERVICES: SUMMARY OF REPLIES. Only 125 of the 200 lawyers' referral services reported. Their replies indicated that there were 99,491 applicants for referral and that 78,544 cases were referred to lawyers by the 125 services.

perience. The new programs cannot become the refuge of the lawyer who cannot compete in private practice.

The understanding and cooperative involvement of the law firms is necessary in order to recruit the young men desired. The young man must be able to integrate into the mainstream of the profession when he leaves legal aid or he may not be willing to accept a position initially. Law firms should adopt hiring policies which will consider young men with one or two years of legal aid experience for employment and grant them credit for this experience in determining their salaries. Law firms should also consider the possibility of releasing younger associates to work with legal aid for a year during which their salaries would be paid by the legal services program. The relationship between the private practitioners and legal aid would be closer. The future leaders of the bar would develop experience which will enable them to deal with the legal problems of the poor in years to come, and legal aid will have a continual influx of the first-rate young people necessary to develop the creativity and imagination required of programs seeking to reform the law. This kind of involvement by lawyers can produce substantial dividends.

Conclusion

There is always the possibility that the bar will choose not to become involved or will decide to oppose these programs. In the long run such an attitude will redound to its detriment. Those unable to afford lawyers must be provided with an opportunity to be represented by counsel if our legal system is to flourish. The bar cannot ignore the needs of the public or sacrifice the welfare of the public for parochial interests. In the 1830's de Tocqueville concluded that the bench and bar composed the American aristocracy,⁸⁷ but thirty years later laymen were practicing law in many of the states.⁸⁸ The profession cannot forget that in a democracy power resides in the people. A democratic society will not permit any profession to exercise monopoly power and then restrict its services at public expense for private profit. The public reaction may reflect itself in permitting members of other professions or nonprofessionals to perform the services traditionally provided by the bar. Accountants, banks and social workers would profit at the expense of the bar and perhaps the public. The public reaction might reflect itself in greater regulation of the profession with the limitation of the freedom of the private practitioner and the possible restriction of the protection of clients whom he represents. The reaction will certainly be felt in disrespect for law and its ministers.

Fortunately such possibilities are remote. The genius of the American bar has been its capacity to meet changing conditions while protecting traditional values. Properly viewed, the War Against Poverty is simply another skirmish in the profession's age-old struggle to protect the rights of those needing assistance and to make equal justice to all a reality.

⁸⁷ 2 DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 184-85 (2d ed. 1836), quoted in GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES* 15 (1965).

⁸⁸ GRISWOLD, *op. cit. supra* note 87, at 16.