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Why Lawyers Have Often Worn Strange Clothes, Claimed to Work for Free--and Been Hated

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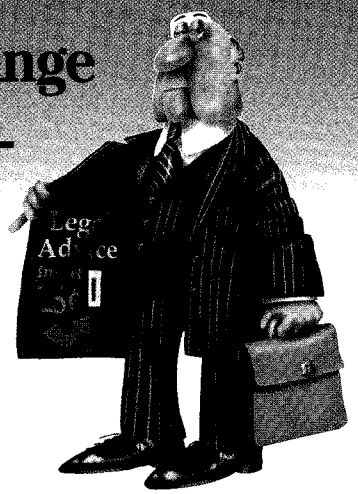

by Hugh Spitzer

This essay was prepared for the Access to Justice Committee's panel discussion at Celebration 2000 in Spokane, September 15, 2000.

Lawyers and judges have almost always dressed differently from everybody else — usually in clothes outdated by a couple of centuries. In sixth century Constantinople, lawyers were known either as advocati or togati.[1] The latter term came from the fact that they wore togas, which everyone else in the Greco-Roman world had abandoned two centuries earlier.

Today, our judges are dressed in robes that date to the same late Roman period — these are the garments that priests, the Emperor and most of the nonlawyer elites were wearing. Go north of our border, and you'll find both judges *and* lawyers wearing robes, plus those little white dickeys at their necks. In some English courts, the costume is still topped off by wigs dating to the 17th century, and in parts of Europe the judges don black pillbox hats.

"I'm on my way to Nordstrom," an associate recently announced in the elevator. "I need to buy a shirt for court this afternoon. I've got the tie, but no shirt!" In today's world, many people come to work in Dockers and polo shirts, but not lawyers who appear before those black-robed judges.

Why have lawyers and judges always adorned themselves in ancient regalia? Obviously, they must symbolically transform themselves from private individuals into "law speakers" for the community.[2] They become tools of a longstanding legal system, and special clothes offer clues to others (and reminders to themselves) that they have special responsibilities, both to their clients and to the community at large. The "retro" clothes that lawyers and judges wear also remind everyone that law is *old*, that it isn't meant to change rapidly, and that it offers stability and predictability in a changing world.

Throughout history, judges and lawyers have always been expected to work for something other than themselves — for their clients and for the community at large. Judges take oaths to uphold the law regardless of their personal views. In very early Rome, the penalty for a judge who "made a case his own" or took bribes was death.[3] Lawyers in our legal culture are treated as "officers of the court,"[4] as they have been since the Middle Ages.[5] Like other persons in the three "learned professions,"[6] they serve others. (The clergy serve God and others' souls; doctors their patients; and lawyers their clients.)

It is important to recognize that what the clergy, doctors and lawyers work *with* is categorically different from other types of human endeavor. A farmer works the land he or someone else owns, yielding his products for sale. A potter buys clay, puts it on her wheel, and produces an object for purchase. But the work of a priest (a robe wearer) is incapable of ownership. A physician (wearing the symbolic white coat or stethoscope) operates on *someone else's* body. And the lawyer works with *law*, which is nonmaterial, intangible and entirely incapable of being owned by anyone.

A historical look reveals that lawyers' and judges' sense of responsibility to provide access to justice has had its ups and downs. There certainly was no golden age when attorneys, in particular, maintained a single-minded focus on their role as quasi-public servants. This short article reviews those ups and downs, and suggests that improving our performance in providing access to the legal system is not only the right thing to do, but is also in the interest of law professionals.

Why People Have Always Hated Legal Monopolies

A distinguishing characteristic of the professions is that they are meant to serve others in areas of endeavor that are difficult for most people to do themselves.

That's the idea, and it's also part of the problem. People resent their reliance on professionals. A clerical monopoly on access to God was a major cause of the Reformation. Folks today are flocking to the Internet to get medical information first hand so that they are not entirely dependent on doctors.

And lawyers? Surprise! For some reason the special clothing, the status as "officers of the court," and the professional focus on the clients' interests haven't always produced the desired awe and respect.

Quite the contrary. In large part *because* law belongs to everyone in the community, citizens have always resented the fact that access to *their* law was controlled by specialized gatekeepers. The history of Western law is replete with attempts to improve direct access to law by non-specialists, or (often unsuccessful) attempts to eliminate the gatekeepers altogether.

The first written code in ancient Rome, the *Twelve Tables*, was chiseled into stone and placed in the Forum in 451-450 B.C. That code was in response to the public's frustration with a patrician priest/lawyer monopoly on the content of the law.[7] It took the threat of a mass walkout from Rome to complete implementation of the *Twelve Tables*.[8] But the rules of procedure remained the exclusive (and secret) domain

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of patrician lawyers for the next 250 years, when a magistrate named Appius Claudius Caecus finally allowed them to slip out for publication.[9] Interestingly, what are regarded as the two greatest achievements of Roman Law — its secularization and its availability in a written, comprehensive format — resulted directly from popular demand for access to that law.

From time to time people have attempted to avoid lawyers altogether.[10] The ancient Greeks tried to block the development of the profession by outlawing payments to legal advocates.[11] But this ban turned out to be a "dead letter" because competent lawyers were hard to find absent payment.[12] Attorneys were discouraged in Norman England, and it took several hundred years after the Conquest for the institution to fully develop.[13] Years later, the Quakers who left Britain for Pennsylvania brought with them a popular distrust of the legal profession. George Fox wrote of a "blackness" that enveloped lawyers.[14] Puritan Massachusetts attempted to highly regulate and block the practice of law, putting all of its laws into one little pocketbook available equally to all.[15] Massachusetts and New York unsuccessfully tried to ban the use of lawyers.[16] In 19th century America, the attorney was popularly stereotyped as the "villainous forecloser of mortgages and pursuer of maidens,"[17] and "that popular suspicion was a leading cause in dissuading people of small or moderate means from bringing to lawyers much preventive and adjustment work on which, in their own interests, they should have had counsel."[18]

But it turned out to be difficult for any sort of complex society and economy to function without complex laws, and this led to unavoidable specialization, i.e., to the use of lawyers. European and American attempts to ban the legal profession were unworkable. Repeatedly, people turned to the next best thing: tight controls on lawyers' income to prevent the gatekeepers from getting rich off a gate that was common property.

Controlling the Cost of Legal Services

There is an ancient lineage to price controls on legal services. As noted above, the Greeks tried to ban fees altogether. In Rome, the *Lex Cincia* in 204 B.C. prohibited the acceptance of money or gifts for legal representation. This worked — to a point. Most lawyers were upper-class gentlemen of independent means who engaged in legal advocacy to gain status through public service; they didn't need the money.[19] Furthermore, in the Roman system a "patron defended his client... without fee or reward, for it was part of the general system of protection."[20]

Because lawyers could not charge for their services, they gradually came to receive honoraria instead. Other service workers would be paid for contracting out their time. Not a lawyer — he voluntarily undertook a mandate (not a contract) to work for his client, and the client was expected voluntarily to give the attorney a present constituting the honorarium. A legal scholar named Quintilian wrote:

> Even a lawyer whose poverty obliges him to receive fees will not take them as a debt due ... but [will] receive them as an acknowledgment ... for in truth the services of counsel ought not to be sold, nor, on the other hand, go unrewarded.[21]

Nevertheless, a few Roman advocates

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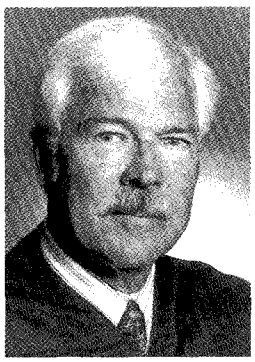

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For State Supreme Court, Position 9

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were amply rewarded, becoming wealthy from the hefty honoria they accepted. Things seemed to be getting out of hand, so the Emperor Claudius put a cap of 10,000 Sesterces on honoraria. (Today we can think of this as the equivalent of $10,000.) That cap lasted a long time. Charlemagne issued an edict to the effect that if lawyers (clamatores, or clamorers), were discovered to be influenced by undue eagerness for money in the causes they undertook, they were to be banished from the society of honorable persons, and to be disbarred.[22]

In the late Middle Ages, a French statue of St. Yves, the patron saint of lawyers, shows him carrying a bag marked "10,000," i.e., the maximum fee originally imposed by the Emperor Claudius.[23]

The aversion to fees — or at least high fees — continued in the Anglo-American legal experience. For centuries, English lawyers had no legal claim for payment, and to demand fees would damage one's reputation.[24] A Virginia law passed in 1657-58 prohibited the charging of fees, but the statute was unsuccessful and was repealed 36 years later.[25] So statutes (and later, bar associations) set maximums on fees for lawyer services. This practice continued until 1975, when the United States Supreme Court ruled that fee caps, seen by many lawyers as a form of consumer protection, were in practice an unlawful mechanism for price-fixing by the legal profession.[26]

For at least 2,500 years in our legal tradition, there appears to have been an ongoing tension between 1) lawyering as a public duty, bringing access to justice to the citizenry and status to the practitioner versus 2) lawyering as a business venture. Law is everyone's birthright, yet specialists seem necessary to navigate through its complexity. Bench and bar leaders constantly emphasized the public duty aspect. The public and political leaders often tried to improve access by controlling fees, or by minimizing the role of attorneys altogether. But like the tide that King Canute could not roll back, the lawyers would always return. Competing demands for their special knowledge led inexorably to higher fees for the best representation. Modern communist states were just as unsuccessful in producing equal, low-cost access to legal services. In 1982, I chatted with a young curator at a Prague museum who mentioned that her father had a successful law practice. I asked how this was possible, given that law offices were supervised by the state and fees were strictly regulated. She answered: "He receives a lot of high-quality scotch."

Social Class, Money and Professionalism

In a 1933 opinion upholding Washington's business and occupation (B&O) tax despite an exclusion for lawyers and other professionals, Justice Warren Tolman wrote:[27]

> [T]he reason for the exclusion of professions seems equally clear. While there may be those who commercialize the professions, the rule to the contrary is very strict, and it is, we trust and believe, generally obeyed by those in the professions. A profession is not a money getting business. It has no element of commercialism in it. True, the professional man seeks to live by what he earns, but his main purpose and desire is to be of service to those who seek his aid and to the community of which he is a necessary part. In some instances, where the recipient is able to respond,

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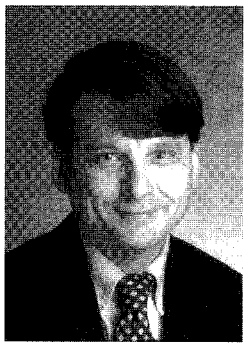
seemingly large fees may be paid, but to others unable to pay adequately, or at all, the professional service is usually cheerfully rendered.

This statement could as easily have been written by a first century Roman legal scholar as by a 20th century American judge. That is because the concept of the lawyer as servant, providing access through an ordered system of norms belonging to all, has been demanded by the public, and much of the time, heartily endorsed by lawyers themselves. But why not all of the time?

The tension between law as a service profession versus law as a business goes back as far as recorded history. The interesting thing is that whether we like it or not, the periods of the strongest "service" emphasis have corresponded with periods during which the bench and bar were dominated by members of the upper classes with independent means; in other words, periods during which lawyers could afford to cheerfully provide free service. Until the first century B.C., almost all Roman advocates were moneyed gentlemen who appeared in court to support family dependents and/or to gain fame to assist later bids for public office.[28] As the society and economy became increasing complex and the demand for lawyers grew, law provided new opportunities for wealth. Men of middling social status, such as Cicero, used the profession as a stepping stone to higher class standing and financial independence.[29] The combination of a fluid class structure and the greater need for lawyers of all kinds caused a breakdown in the old system of noblesse oblige lawyering. This is evidenced by the repeated attempts by emperors such as Augustus and Claudius to control the practice of law and the fees charged.[30]

We can observe the same sort of thing in English legal history. In the 1500s, the Inns of Court, "like Oxford and Cambridge, were fashionable finishing schools for the sons of the nobility and gentry."[31] The work of these well-to-do lawyers no doubt reinforced the political and economic establishment. But there was also a strong noblesse oblige about their endeavors. They often did not accept fees for their services; their interests, like the early Roman lawyers, "stretched from jurisprudence to participation in government."[32] Although the practice of law never achieved social exclusiveness, the large numbers of gentry "added lustre to...the image of those who practised law for a living."[33]

But the combination of social, political and business opportunity attracted a broader range of young men to the law. In the late 16th and early 17th centuries, as in late Republican Rome, law was a place where young, ambitious people could move up in public affairs, status and wealth.[34] England's economic expansion led to a rapid increase of lawyers, including many who were not particularly well trained and who were more interested in money than public service.[35] During the revolutionary 1600s, lawyers wound up on both sides of the struggles between King and Parliament, and between High Church and Puritans. In doing so, they represented litigants who took advantage of a tumultuous political situation and a labyrinthine legal system "for many kinds of double-dealing and underhand gain."[36] Some lawyers were viewed as toadies for the King and the wealthy, others as catalysts for the increasing commercialization of society, and still others as dangerous



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(POSITION 2)

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Barrie Althoff is a nationally-recognized and widely-published legal scholar. You have probably read some of his more than 40 published articles on law, and you have probably attended some of his more than 140 CLE presentations. He has lectured at all of Washington's law schools. He knows the law and what it means to be a lawyer. Barrie graduated from Fordham University (B.A., *summa cum laude*, M.A.; Phi Beta Kappa), from Cambridge University (B.A., M.A.), and from Columbia University (J.D.), where he worked on the African Law Digest and African Law Review.

Born in Spokane, Barrie has devoted his 26-year professional life to serving the public. In private law practice for 13 years, he helped preserve Seattle's historic Arctic and Alaska Buildings and bring the first Costco stores to Seattle and Spokane. He then spent seven years prosecuting cases with the U.S. Securities & Exchange Commission. Since late 1994 he has served as the State Bar's Chief Disciplinary Counsel, where under his direction a large backlog of disciplinary investigations has been eliminated and the consistency, quality and timeliness of investigations and prosecutions improved.

A Supreme Court Justice should be fair, impartial, courageous, and compassionate; should know, interpret and apply the law, not make it; should reason and write clearly; should have common-sense judgment and wide legal experience; and should treasure our individual Constitutional rights. Above all, a Justice should be wholly dedicated to equal justice under the law and to the rule of law. Barrie has these qualities.

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revolutionaries.[37] But whatever the role, the dislike of the legal profession "knew neither sectarian nor class boundaries."[38] One wag in 1659 invoked her readers to:

Behold the learned lawyers! Void o'th fears,
Of fifty one, and the two succeeding years,
Have lined their Crowns, and made them pistol proof,
And Magna Charta clad in Coat of Buff.
And with a bolder confidence can take,
A larger fee, for Reformation sake.[39]

Once again, the expansion of the bar to include social and economic climbers led to less emphasis on public service and greater dislike for lawyers. This is not to say that there had not earlier been resentment of the upper-class legal profession. Indeed, the 17th century evidenced a great deal of hostility toward all three "learned professions."[40] But that period saw an overall increase in revulsion toward both law and its practitioners.

America witnessed some of the same swings between an elite, service-oriented profession and a broader, upwardly mobile bar dependent on fees for its livelihood. The American legal historian James Willard Hurst summarized the resulting dilemma as follows:[41]

> The historic concept of a profession includes the ideas of organization, learning, and public service, to which making a living is incidental. This concept translates the abstractions of morals into far more tangible terms than frail human nature is usually asked to meet....We should not be surprised, therefore, to discover that — failing to rationalize even the plain economics of its operations — the bar achieved a somewhat less than satisfactory working relation between its charter as profession and as business.

When I began work on this essay, I thought I might find that at some point in history there existed a golden age when all lawyers were high-minded, did not care much about money, and were beloved by the populace. But it turns out that lawyers have never been loved. And there always was and always will be a tension between the lawyer as servant (yet viewed suspiciously as a member of the establishment) and the lawyer as business person

(yet disliked for making money from the law that belongs to all).

What do we learn from all this? If you want to be a lawyer (or a judge for that matter), be prepared to make less money than you might make in pure business endeavors. A few lawyers earn extraordinarily high incomes, but as the saying goes, it's hard to get rich working for hourly wages. I tell my students that if they do want to get rich, they should not have bothered to enter law school, but should have gone directly to a dot.com company. People who choose to serve as lawyers must be prepared to suppress their greed and to work to ensure that law continues to be accessible to all. It is difficult to say whether access to justice is currently improving or not. The increase in egocentric behavior and disinterest in community institutions is reflected in lawyers who put their noses to the grindstone and assume that someone else will bother to serve poor and lower middle-income people. Except in limited areas involving the potential loss of rights or property by government action, attempts to mandate access to justice have not been particularly successful.

Improving access to justice takes personal commitment as well as collective action. If it helps, let me suggest that lawyers have a self-interest in making those commitments.

In particular, those who earn a big income practicing law had better spend some time and resources giving back to the community and providing access to justice to those who cannot ordinarily afford their services. Otherwise, they're likely to be faced with the same anti-legal establishment revolution that Rome saw in 451 B.C. and with the fee limits that recurred throughout the next 2,500 years.

Finally, because judges and lawyers, especially in court, are tools of the community's legal order rather than individuals, they will have to content themselves with wearing robes (plus dickeys in Canada), ties and suits in court, while everyone else is allowed to be casual.

Hugh Spitzer is an affiliate professor at the University of Washington School of Law, and practices with Foster Pepper & Shefelman PLLC in Seattle. He serves on the Jurisprudence of Access to Justice Committee of the Access to Justice Board.

NOTES

1 Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History*, 144 (2nd ed. 1973, J.M. Kelly, trans.).
2 The pre-Norman Anglo-Saxons chose law-speakers or doomsmen to declare the law and to officiate at community legal proceedings. W.J. Windeyer, *Lectures on Legal History*, 11-12 (2nd ed., 1957).
3 Table IX.3, in Johnson, *Ancient Roman Statutes* 12 (1961); see also, J.A. Crook, *Law and Life of Roman*, 270 (1967).
4 "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients." Lindstrom v. Ladenburg, 136 Wn.2d 591, 609, 963 P.2d 869(1998), quoting Hickman v. Taylor, 329 U.S. 495, 510 (1947).
5 J. H. Baker, *An Introduction to English Legal History*, 179 (3rd ed. 1990).
6 Wilfred Prest, "The English Bar, 1550-1700," in Prest, ed., *Lawyers in Early Modern Europe and America*, 69-73 (1981).
7 H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 12-14 (3rd ed., 1972).
8 *Id.*
9 *Id.* at 91.
10 A humorous but revealing compilation of popular attitudes toward law, lawyers and judges can be found at Andrew Roth & Jonathan Roth, *Devil's Advocates: The Unnatural History of Lawyers* (1989).
11 Robert J. Bonner, *Lawyers and Litigants in Ancient Athens*, 206-209 (1927).
12 *Id.*
13 Roscoe Pound, *The Lawyer from Antiquity to Modern Times*, 85-87 (1953); Paul Brand, *The Origins of the English Legal Profession* 10-13 (1992).
14 Stephen Botein, "The Legal Profession in Colonial North America," in Prest, *supra*, at 132.
15 *Id.* at 131.
16 Pound, *supra*, at 141-42.
17 James William Hurst, *The Growth of American Law*, 251 (1950).
18 *Id.*
19 Pound, *supra*, at 52-53. Bruce Frier, *The Rise of the Roman Jurists: Studies in Cicero's Pro Caecina* 257 (1985).
20 William Forsyth, *Hortensius, An Historical Essay on the Office and Duties of an Advocate*, 362 (3rd ed. 1879).
21 Quoted in Forsyth, *supra*, at 370-71.
22 Quoted in Forsyth, *supra*, at 373.
23 Pound, *supra*, at 53-54.
24 Forsyth, *supra*, at 371.
25 Pound, *supra*, at 138.
26 Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
27 State ex rel. Stiner v. Yelle, 174 Wash. 402, 411, 25 P.2d 91 (1933).
28 Forsyth, *supra*, at 362-64; *see, generally*, John A. Crook, *Law and Life of Rome*, 87-92 (1967). Although Roman "patrons" were duty-bound to defend the interests of their adherents, including protecting their legal rights, Frier, *supra* at 273-77, points out that the great majority of Roman citizens probably had little or no access to anything besides courts of limited jurisdiction. The legal processes equivalent to our superior courts were primarily the realm of the middle and upper classes.
29 Crook, *supra*, at 90.
30 See footnotes 23-24, *supra*, and accompanying text.
31 C.W. Brooks, "The Common Lawyers in England, c. 1558-1642," in Prest, *supra*, at 54.
32 *Id.*
33 *Id.* at 55.
34 Wilfred Prest, "The English Bar, 1550-1700," in Prest, *supra*, at 70.
35 *Id.* at 72.
36 *Id.* at 74.
37 *Id.* at 73-77.
38 *Id. at 73.*
39 Quoted in *id.* at 76.
40 *Id.* at 73.
41 Hurst, *supra*, at 305-06.