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Book Review: Verdicts on Lawyers
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BOOK REVIEW


In his introduction to this volume of twenty-three essays on the legal profession in the 1970's, Ralph Nader poses a question which, it must be admitted, is too infrequently asked at law schools and bar association meetings: "How many citizens have practical access to the legal system?" In the same paragraph Nader answers his question by stating that the essays focus on "how the legal profession has avoided squaring its duty of service to all with its monopolistic status under the law." However, despite the premature answer and despite an unevenness in the tone, temperament and quality of the essays, the volume deserves to be read, not only by those who would be critical of the profession, but particularly by those defenders of the present legal system. Although many of the issues addressed in the book have not yet significantly affected the Arkansas bar, the Arkansas attorney concerned with the future of the profession should also read the volume.

Portions of the book are so intemperate that one is tempted to disregard the entire work. Justice Ravitz, a self-proclaimed radical judge from Detroit, suggests that Chief Justice Burger's questioning the need for juries is an attempt to prevent equality among races. Former Attorney General Ramsay Clark denounces the handling of the Justice Department during the Nixon Administration in such a repetitious fashion that his specific suggestions for removing politics from Justice are overlooked. Defense attorney Victor Rabinowitz argues that "most prosecuting officials appear arrogant, aggressive, overzealous and unscrupulous." His examples of failures to disclose favorable evidence, illegal wiretapping, use of informers, the chilling effect of the grand jury, and broad conspiracy indictments may be true. But since the author does not attempt to present both sides of the conspiracy, the prosecutors deserve a fuller hearing.

The most emotional and one-sided chapter is former Senator Fred Harris' "Class Actions: Let the People In." In uncritically defending all uses of the class action, he condemns defense
counsel who utilize discovery techniques in class actions, who demand separate jury trials, who question contingent fee arrangements and who report plaintiffs' attorneys for possible ethical violations. He condemns the judges, who are "drawn primarily from the propertied classes," for dismissing class actions by using "legal sophistries" such as required notice to members of the class and the concept of manageability. Harris denounces "Chief Justice Burger's jurisprudential nihilism that the federal courts exist for a 'limited purpose.'" Unfortunately, the author does not give us his interpretation of what the Founding Fathers intended in 1798. Finally, Harris includes a chart of twenty-four injuries to the public that might be rectified by a class action suit. One injury is maturity—onset diabetes, which harms perhaps five percent of the population; the defendants in that class action suit would be the sugar industry and food manufacturers. What is the "present legal obstacle to a class action damage suit?" "No state or federal cause of action." Similarly there is a potential claim of billions of dollars against labor unions for featherbedding and wage inflation; but the present legal obstacle is that unions are exempt from the antitrust laws. Harris fails to explain why the legal profession should be indicted for these shortcomings when Congress, even during Mr. Harris' tenure, was unable or unwilling to create an appropriate cause of action. Mr. Harris' few specific suggestions on fluid recovery, the class as a separate entity and controls on the legal fees for the attorney for the class are lost in his rhetoric.

Despite the one-sidedness of such chapters, the overwhelming strength of the volume is apparent. One theme that pervades the book is the duty of the profession to provide legal services for the public. To ensure that the profession does perform this ethical duty, Marna Tucker suggests an internship program in which the clients of the intern would be the poor and disadvantaged. She suggests, more radically, that the profession be treated as a public utility; like other regulated industries, the license to practice law would only be renewed upon a showing that it has been used for the "public good." Finally, she advocates a titthing or taxing system requiring that each lawyer devote a percentage of his time or income to representing those who need, but cannot afford, legal representation. Based on a plan adopted in the District of Columbia, the attorney would

1. See also Tucker, Pro Bono Publico or Pro Bono Organized Bar?, 60 A.B.A.J. 916 (1974).
perform "public service" without fee or at a substantially reduced fee in one of five areas: poverty law, civil rights law, public rights law, charitable organization representation and administration of justice. This fair and expansive definition of public service would permit a large number of attorneys to satisfy the tithing requirement, but one wonders whether such a requirement is adaptable to a less urban state and how such a requirement would be enforced or supervised.

While the Tucker article praises Justice Lewis Powell for his role in single-handedly persuading the American Bar Association to approve the legal services concept in 1964, Representative John Conyers reviews the difficult history of federally-funded legal assistance programs since the mid-1960's; attacks by state officials, Congressional attempts to amend the program, and the long gestation period of the semi-independent Legal Services Corporation, with its legal resources and remedies limited. The Legal Services legislation raises an interesting ethical question. The Code of Professional Responsibility places a duty upon the attorney to represent the client zealously and to use every technique available within the bounds of the law. But Congress has now said that a Legal Services attorney representing his client may not engage in lobbying and may not bring some types of public interest lawsuits.² Does Congress have the power to deny these devices to the attorney? Will the courts, in exercising their assumed complete supervision of the profession, permit this type of legislative intervention?

The relationship between the courts and the legislature in controlling and regulating the legal profession has been an issue in Arkansas. The adoption in 1938 of Amendment 28 to the Arkansas Constitution gave the Supreme Court power to “make rules regulating the practice of law and the professional conduct of attorneys at law.” Despite specific statutory provisions to the

². Under the Legal Services Corporation Act of 1974, 42 U.S.C. § 2996, the Corporation is not to interfere with any attorney in carrying out his professional responsibility to his client, see § 2996e(b) (3). But an attorney who receives more than half of his annual professional income from the Corporation is barred from engaging in or encouraging others to engage in any public demonstrations, see § 2996e(b) (5), from undertaking a class action suit without the approval of a project director, see § 2996e(d) (5), from legislative lobbying in general, see § 2996f(a) (5), from the "persistent incitement of litigation," see § 2996f(a) (10), from providing legal assistance with respect to desegregation, see § 2996f(b) (7), nontherapeutic abortion, see § 2996f(b) (8), draft evaders or military deserters, see § 2996f(b) (9).
contrary, since 1938 the Supreme Court has adopted rules for admission to the bar, for the admission of non-resident attorneys, and the grounds and non-jury procedure for disciplinary proceedings. On the other hand, the Supreme Court has also stated that some of the rules are to be treated not as exclusive, but as supplemental to the statutes. In an action currently pending in Chancery Court attorneys have challenged the validity of a 1975 statute that restricts their ability to practice law. The underlying issue is the scope of legislative, as opposed to judicial, power to control the profession.

Continuing on the theme of providing legal services for the public, two articles deal with the problems of middle class. In "How to Avoid Lawyers," Jethro Lieberman reviews the attacks of bar associations on real estate brokers and other lay persons on Norman Dacey for How to Avoid Probate and similar how-to-do-it kits, and on labor unions and civil rights organizations for providing legal assistance. The point Lieberman makes is valid. The bar has a duty to see that legal services are available at a fee that the lower and middle classes can afford. If the bar is unable to charge financial fees that the lower income groups can afford, then other alternatives must be available.


8. 1975 Ark. Acts 569 § 17, p. 628-A provides that: "It shall be unlawful for any person employed by the School of Law of the University of Arkansas, who is employed as a professor, associate professor, or instructor . . . to handle or assist in the handling of any law suit in any of the courts of this State or the federal courts . . . ." Twenty-one faculty members of the University of Arkansas Law School at Fayetteville have challenged the validity of the act in Atkinson v. Bd. of Trustees, No. 76-1444 (Chancery Ct. of Pulaski County, filed April 2, 1976). On December 30, 1976, Chancellor Murray O. Reed held the act valid.

9. For a recent article expressing concern with the rise of unauthorized practice and a suggested remedy, see Schieffler, Laymen Practicing Law, 9 Ark. Law. 134 (1975).
For example, for the client with a $50 consumer claim who cannot pay a $100 attorney fee, the bar should see that effective small claims courts exist, that the public is informed of such alternative access to the courts (perhaps by informational advertising conducted by the bar association), that the procedure in such courts is simplified, and that the courts are staffed with personnel willing to spend the time necessary to deal with lay persons. Without such a system access to the courts does depend, in William Douglas' words, "on the length of a person's purse."  

In the most effective and balanced chapter Jim Lorenz discusses prepaid legal plans or group legal services for the middle class. After reviewing the four Supreme Court cases that have approved group legal services and the gradual amendments to the Code of Professional Responsibility, Lorenz reviews plans in existence: open panel plans, closed panel plans and bar sponsored plans. Despite the absence of constitutional or ethical objections to such developments, the bar has been slow in developing group legal plans. While bar associations sit on the side lines, consumer groups, labor unions and educational associations are establishing plans. A committee of the Arkansas Bar Association is analyzing the potential benefits of plans and proposing legislation for legal insurance.

Since July 1, 1975, the Arkansas Bar Association has operated a state-wide Lawyer's Referral Service to assist clients in locating attorneys. But that service has been limited in that only a small percentage of attorneys participate, and in some counties no attorneys have elected to participate. Additionally, there is no control on the ultimate fee charged after the initial half-hour consultation and the client has no choice as to the attorney. An

11. United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Va. State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). While all four cases involve a pre-existing organization assisting in providing legal services for its members that directly relate to the goals of the organization, it is now commonly assumed that any group is free to provide legal services of virtually any type to its members. See the comment of Justice Black in United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585: "The common thread running through our decisions ... is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."
alternative approach would expand a lawyer referral service into the ultimate prepaid legal plan. Those citizens wishing to participate would pay an annual fee and then be entitled to certain benefits from any participating lawyer in the state. The lawyer would simply be reimbursed according to a benefit schedule by the state bar association for the services rendered.  

Lorenz does not ignore the potential dangers as bar associations become involved in group legal plans. By opposing closed panel plans, the bar may be limiting competition and violating the anti-trust laws. In addition, the impact on the legal profession is unclear. Some have worried that the ultimate results will include the loss of solo practitioners and small firms and consequential harm to consumers of the law. Finally, Lorenz suggests that various consumer groups form a non-profit corporation, survey all group legal services programs, analyze data and fees, and distribute information to all potential users. Perhaps this type of surveying and informative type of analysis should be done by the bar rather than by outside groups. But if the bar is unwilling or unable to take the initiative and to provide the leadership, then objections to plans established by lay organizations carry less weight.

Discussing attorneys' fees in "The Gross Legal Product," co-editor Mark Green is at least fair in criticizing the pricing procedures of all segments of the profession. He condemns the fee schedules in the real estate field banned in Goldfarb v. Virginia State Bar, recommends that attorneys be removed from probate proceedings, and criticizes the fees of corporate firms and plaintiffs' attorneys. In addition to the use of group legal plans and paralegals to perform routine work, he suggests greater use of fee arbitration and a change in the Internal Revenue Code to permit the deductibility from personal income tax of attorneys' fees.

14. For example of the variety of prepaid plans available, see generally Murphy, Buy Now, Receive Later—A Vision of the Future, TRIAL, March-April, 1975 at 12.
16. 421 U.S. 773 (1975). Both the holding and the language in Goldfarb would permit certain types of "fee schedules"; those decreed by a state supreme court, those covering legal services not affecting interstate commerce, those that are "purely advisory" and not backed up by ethical opinions, and those that merely are an exchange of price or fee information.
Green’s suggestions must be examined along with the former Senator John Tunney’s. After superficially concluding that the federal power to regulate has resulted in only “benign neglect,” he calls on Congress to undertake steps to reduce the need for lawyers in routine transactions and to reduce the cost. Tunney leaves open the possibility that self-regulation will work, even according to his standards, and that it may be unnecessary for the federal government to step in to the extent envisioned.

Continuing with the theme of the duty to provide legal services for the public is the article by Jerome Hochberg that concludes that de facto specialization better serves the public than any of the developing forms of certification, specialization or even mandatory continuing legal education. The danger is that just as licensing attorneys has created a monopoly, licensing specialties will create an even more inclusive and dangerous monopoly. The concerns are that specialization will result in controls on who can practice, say, criminal law; who can be appointed in criminal cases; who can try criminal cases; that the courtroom may be closed to non-trial specialists; that fees will increase and that specialists for the low-income client will never develop. Certainly these dangers are not present in the plans now being developed. The author does not deal with plans that specifically try to avoid these problems, nor does he emphasize the benefits that might result from the plans. But the existence of these dangers, a decade or two in the future, cannot be blithely ignored. For these reasons a committee of the Arkansas Bar Association has suggested that Arkansas delay implementation

17. Despite the Supreme Court’s language in Goldfarb regarding state control over the legal profession, an example of recent federal intrusion is found in the Employee Retirement Income Security Program, 29 U.S.C. § 1001 et seq. (1974), which treats prepaid legal services as an employee welfare benefit plan. Id. § 1002(1).

18. He suggests more intensive citizen education about the law, simplified, inexpensive and accessible systems of consumer redress, the use of nonlegal personnel in workmen’s compensation, simplification of forms in real estate and consumer transactions, and the elimination of the fault concept.

19. He would have the federal government take a positive role in lowering the cost of lawyer services by promoting the increased use of computers, standardizing client interview forms and nonlegal personnel, controlling attorneys’ fees by statute, requiring a certain degree of pro bono activities for admission to the federal courts and permitting non-fraudulent advertising.

of any specialization plan while seeking input from the bar and analyzing those presently in effect elsewhere.\textsuperscript{21}

A subsidiary theme in the book, and one far more controversial, is that the profession needs more competition. The argument for competition is based primarily on \textit{Goldfarb v. Virginia State Bar}. Dean Monroe Freedman goes a step further and applies \textit{Goldfarb} and the duty to make legal counsel available to the traditional ban on legal advertising. His arguments are the familiar ones: the rules are directed against competition, the rules do not protect the public interest, the rules have built-in exceptions for certain groups of attorneys, the ban on solicitation and advertising is only enforced against public interest attorneys and those representing lower socio-economic classes. Dean Freedman discusses the Supreme Court cases holding that "ethical" restrictions must give way to constitutional rights.\textsuperscript{22} But those cases and \textit{Goldfarb} do emphasize that the states retain considerable power to regulate the legal profession. In light of prior decisions permitting restrictions on misleading advertising by professionals,\textsuperscript{23} it is unlikely, even if the Supreme Court would rule against the present ban, that all restrictions on advertising would be invalid. Dean Freedman's article would be more effective\textsuperscript{24} if he also discussed the abuses of solicitation and advertising on all classes of society, the different types of advertising and the need for increased informational advertising by the bar. For instance, when the Arkansas Bar Association prepares and distributes public service advertisements on the need for estate planning, the assistance of an attorney in the purchase of a house or similar preventative legal care, such positive approaches both educate the public and reduce the impact of advertising permitted by law-related professions.

Another minor theme of the book is that self-regulation has failed. In addition to those instances previously mentioned, and the closing threat of Senator Tunney, the conclusion is most apparent in the chapter on sanctions for attorneys who have violated the ethical standards of the profession. Authors Martin

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\item \textsuperscript{21} Recognition & Regulation for Specialization in Arkansas, 10 Ark. Law. 29 (1976).
\item \textsuperscript{22} See footnote 11, supra.
\item \textsuperscript{23} See Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935).
\item \textsuperscript{24} For a more comprehensive discussion of advertising and other contemporary ethical issues by the same author, see M. Freedman, Lawyer's Ethics in an Adversary System (1975).
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Garbus and Joel Selignas praise the Clark Committee for its analysis and discussion on the general shortcomings in discipline, but fail to emphasize that the Clark report was issued in 1970, and that many changes have occurred since then. For instance, Justice Tom Clark himself has complimented the Arkansas Supreme Court for the disciplinary procedure and machinery adopted.  

But one wonders whether Justice Clark would today praise the actual operations of the disciplinary machinery. The 1975 report of the Supreme Court Committee on Professional Conduct reports that two Arkansas attorneys voluntarily resigned and one was disbarred. In addition, there were twenty-two private letters of reprimand, reproval or caution. One is at least tempted to conclude that this discipline rate of less than one percent indicates that the disciplinary procedure is not functioning adequately.

The authors make a number of specific suggestions: the creation of a public reprimand as an intermediate punishment, automatic suspension after criminal conviction, disciplinary hearings open to the public, lay persons on the disciplinary board, initiation of investigations by the board rather than waiting for the client to formally complain, pursuit with equal vigor of corporate law firms and poverty law firms that violate the Code of Professional Responsibility. Although these suggestions are not now included in the Arkansas machinery, they should be considered for adoption. In essence, the authors, feeling that self-regulation is failing and that attorneys on and off the bench are unwilling to move against their fellow attorneys, call for more


26. But see Louisiana State Bar Ass’n v. Ehmig, 277 So. 2d 137 (La. 1973), which held that ex parte suspension of a lawyer upon conviction of a “serious crime” denies due process.

public control. If the Arkansas attorneys do not discipline their own house, similar calls for public control may be heard in this state.

A related theme is the duty of the attorney to the legal system: to educate the public, to reform the courts, to ensure that competent and qualified judges preside. Journalist Jack Newfield describes in fascinating fashion "The Ten Worst Judges" in New York City: a judge "with the judicial temperament of Leo Durocher," a judge who "took his name from an Errol Flynn movie," "the meanest man I ever saw in my life," and the judge who was a "nut." He finds judges misusing bail, insulting lawyers and witnesses, helping personal friends, and approaching decisions with a predisposed mind.

In favoring the appointment rather than election of judges, the author does not demand the traditional blue ribbon panel of prominent and visible bar officials; instead he calls for a panel that includes legal aid attorneys, public interest attorneys, all segments of the profession and perhaps even lay persons. Second, the bar should see that the American Bar Association approved Code of Judicial Conduct is adopted in each state as a guide for judges comparable to the Code of Professional Responsibility. The Arkansas Supreme Court has not adopted this 1972 code, but has continued with the Canons of Judicial Ethics. Finally, the author calls for a permanent disciplinary commission with investigative and enforcement powers to supervise judges. An alternative approach would expand the powers of the Supreme Court Committee on Professional Conduct to include judges in their judicial capacity under the applicable ethical standards.

One article discusses a Chicago Bar Association evaluation of all sitting Federal judges. Bar Associations are increasingly offering opinions of candidates for judicial office, and evaluation of incumbent judges, not merely through an appointed committee, but through a poll of all bar association members. Committees of the Arkansas Bar Association have an unofficial voice, but attorneys have no means of giving collective guidance to United States Senators, the Governor or the electorate. In accord with its duty to improve the legal system, the profession should consider an increased role for all attorneys in the selection of judges comparable to the 1976 evaluation of sitting judges.

One final theme in the book is the attorney's broader duty to society. For instance, Health, Education and Welfare Secretary Joseph Califano, writing on "The Washington Lawyer—When to Say No," concludes that "a lawyer has an obligation to argue with his client when not to do so would jeopardize the client's interest or put the client in significant conflict with the public interest." The author does not make it clear who determines what is the public interest. Other than saying the lawyer should present alternative approaches, Califano is not explicit in determining how far the attorney should go in "arguing with his client." Is the attorney expected to threaten to resign, or to resign? On the other hand, is the Legal Services attorney expected to "argue" with his client and present alternative approaches before bringing an action to seek additional financial benefits from a hard-pressed government? Is such an action in the public interest?

Other authors would apply this same broader social duty to attorney lobbyists, in-house corporate counsel and prosecutors. Alan Morrison discusses the ethics and tactics of government defense attorneys. He accuses the government attorney of relying on defenses of standing, lack of subject matter jurisdiction, sovereign immunity and various delaying tactics. Although arguing that these devices interfere with the basic assumption that even officials are not immune from the law, he admits that "on rare occasions" these devices do have merit. But what are the "rare occasions?" Who decides? Are we to presume that the plaintiff's attorney, even a Legal Services attorney, files a complaint in good faith, while denying a government attorney that presumption?

Together with the legal services and public interest lawyers, the clearest enunciation of the broader duty to society is by Detroit Judge Ravitz. He criticizes the courts for refusing to rule on the constitutionality of the Viet Nam war; he praises himself for imposing a jail sentence on a meat cutter at a Piggly Wiggly food store for misrepresenting the weight of meat. He denounced lawyers who seek and judges who issue injunctions

29. See, e.g., Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), rev'd sub nom. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), where the majority concluded that the plaintiff's action to delay construction of the Alaskan pipeline was protecting the environment and thus in the public interest, while the dissent wondered how denying the public and the country needed oil could possibly be in the public interest.
against unauthorized strikes which then result in brutal police attacks on the strikers. He condemns a legal system that protects and covers up for policemen and National Guardsmen who kill and murder. Throughout the volume the profession, and the vast majority of attorneys, are condemned. But perhaps, as David Riley wonders earlier, the profession is only reflecting society in such decisions, and Judge Ravitz's criticism, and that of Senator Harris and others, is misdirected.

The book certainly is an indictment. But some counts can be dismissed, some have been brought against the wrong defendants, some have not been proven. Yet the authors have in places made a strong case, even against the profession in Arkansas. But the profession has not yet offered its defense; there has been no verdict. To conclude the figure of speech, the time for filing a defense is rapidly approaching. It is only so long until legislators like Senator Tunney conclude that self-regulation has failed and enter a default judgment against the profession.

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