Lawyers Who Take Must Put—At Least a Bit

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The occupation of lawyer generally encompasses at least four fundamental and basic concepts: making a living; maintaining specialized knowledge; working with other lawyers collectively; and giving to society through public service. Obviously, the first of these concepts is a pragmatic necessity which counteracts the last. It is hard to make a living by working free, even if such work is labeled “public service.” Nevertheless, the time has come for a recognition by the organized bar that every lawyer has an obligation for public service which if unreasonably ignored warrants professional sanctions.

Such ethical progression by the organized bar is obtainable. In my own time, I have seen disciplinary measures for particular ethical violations evolve from clucking disapproval to disbarment. Initially, in my experiences as a bar official, I joined with others in refusing to discipline lawyers for negligence. The professional incompetence of a member of the bar was not even discussed then as grounds for disciplinary sanctions. Indeed, it was rationalized that to do so would be contrary to the Supreme Court order certifying that lawyer as one competent to sell legal services to the consuming public. All of that has changed, for me and for the organized bar, or at least it is rapidly changing.

The ethical codes of lawyers, being aspirational standards of professional performance at the top and being disciplinary rules governing lawyer conduct at the bottom, have developed traditionally to require ever more of those persons who wear the legal mantle. In most jurisdictions, repeated or gross negligence by a lawyer now warrants the severest censure. No longer do we as a collective profession allow marginal lawyers repeatedly to accept legal matters which they cannot competently and proficiently handle.

It is clear that most lawyers acknowledge some responsibility for public service both individually and collectively, but the type or extent of activities that will discharge that obligation have yet to be demarcated by the organized bar. Perhaps that lack of affirmative guidance is one reason many of our more economically successful and honored lawyers have done little or no public service. Con-

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ceivably, up to now it has been professionally acceptable to serve only paying clients. But the substantial recognition which has been afforded in years past to those lawyers who have ground away at their clients' demands day after day and year after year, tending to the store, never leaving the office, minding what has been traditionally styled "their own business," is undergoing substantial change. No longer can the legal profession merit public approbation under such a random and haphazard standard.

The collective responsibility of lawyers must be, and I suggest easily can be, translated in a defined professional duty that each lawyer tithe his share of public service. If that ethical goal is enunciated, the decisional process now universally utilized by the organized bar in establishing ethical boundaries will in time evolve definitive guidelines for its application. Through trial and error, through experimentation, lawyers ultimately can incorporate into decisions interpreting the Code of Professional Responsibility the who, how, what and when of public service that society should receive in exchange for the exclusive privilege to practice law.

Certainly, lawyers have individual characteristics and practice demands which will prevent them from being "equal" in all professional contributions. Lawyers of necessity must be judged on their subscriptions to public service with a full recognition of differing circumstances under general aspirational goals outlined by the organized bar. In some cases, public service activities may embrace extensive work within the organized bar, such as disciplinary activities or law reform. In others, it may mean working with a public interest law firm, rendering legal services to the poor, or representing charitable organizations. To some lawyers, perhaps mandatory public service will only mean that all lawyers will have to do what so many lawyers have done so lustrously in the past, participate in the public discourse as citizens with the unique skills they have developed in their professional capacity. To others, it might well involve maintaining and enhancing the legal competence of other lawyers, working to improve the availability and delivery of legal services, helping with civil rights law or poverty law, working as a defender of those charged with crime who are unable to secure competent counsel, or representing diffused interests in adversary proceedings involving the public at large. Almost certainly, ethical recognition of public service will encompass at least a modicum of activity designed to improve through constitutional or statutory revision the justice system as a unit. Many interests in fields such as the environment, consumer protection, civil liberties, privacy, and
the poor either are not represented or are under-represented before legislatures, executive agencies, and courts. Lawyers who work to eliminate those deficiencies undoubtedly are rendering valuable public service.

The circumstances of such public service activity never can be exclusionary. The perimeters must be as broad and flexible as the minds of those who will discharge that responsibility. As a prime component of the legal system, lawyers have an overriding obligation to insure continuous access of all segments of the public to that system. A lawyer’s contribution to the public weal can never be judged by what was achieved, or by the monetary value of the service contributed or obligated to be contributed. In all events, that priceless and unique measure of professional devotion, contributed time, must be the only currency fully acceptable in discharge of a lawyer’s obligations for public service.

The best way for the organized bar to measure the individual service required of a lawyer will vary from area to area and perhaps from branch of the law to branch of the law. Additionally, there will be multiple areas of public service other than those few that I have suggested, which as alternatives or supplements, are better suited to both society and the legal profession. Only a lawyer’s peer group should determine whether various activities performed on a recurring and substantial basis are among those things which a particular lawyer freely should contribute to society. In all such determinations, diversity and experimentation must be fostered and supported. There is no single approach. Rather, through variety, through experimentation, through evolution, the organized bar best can gain a proper understanding of the ways in which individual lawyers most meaningfully may render public service.

There are of course inherent difficulties in an adjudication of professional performance involving such subjective considerations as work habits, organization and self-discipline, intelligence, integrity, personal character, and professional know-how. However, perplexity in enforcement has never prevented the organized bar from adopting ever stricter standards, nor should it. The public traditionally demands higher and higher standards from all professionals, including lawyers, and the organized bar has generally responded. Yet, enough has not been done. Imaginative lawyers can, and indeed must, without delay design bar structures to enforce and maintain even more demanding levels of professional conduct.

The legal profession owes to society as a whole a greater return for the grant of a personal service monopoly than has been made
heretofore. Admittedly, there are lawyers who disagree, who
sincerely contend that the legal profession has little fault, and that
changes are not needed. They earnestly proclaim that lawyers who
seek professional restructuring are agitators creating more problems
than they solve. Quite often complacent in their own practice, they
sometimes assert that all who do not cherish the law as it is should
leave. Love it, they say, or go.

Bunk! No lawyer should accept the legal profession as it is.
Lawyers must aspire for the elimination of imperfections in their
chosen profession and in the law itself. Those lawyers who cannot
overlook the social ills of the justice system, the legal profession's
deficiencies, its failure to make adequate legal services available to
all, its inability to render justice and fairness alike to rich and poor,
seem to me to be the good guys—the white hats. It is those lawyers
who placidly accept the inequities, the perversions, the injustices,
the corruptions, the inefficiencies, and the unfairnesses in the law
who do not honor and cherish their chosen calling. They love only
their status and special privilege and security, not the law itself.
They seem to me to be the bad guys—the black hats.

My thesis thus is a simple one: the public who grants a small
segment of the populace the exclusive privilege of making a living
practicing law has the right to demand that those so favored accept
public service as one of their prime responsibilities. If the legitimate
aspirations of society in creating the profession of lawyer are to be
realized, the title "lawyer" must denote to all people integrity,
unity, courage, specialized competence, and unselfish involvement
in public service. It does not now.

Why should lawyers be among the members of society called
upon to render public service without compensation? Society long
ago made a determination that an independent and free legal pro-
fession is essential to our system of government and to the individ-
ual rights of its citizens. It placed lawyers in a posture to be both
free and independent by establishing a monopoly for those who
practice law. In granting to lawyers that privilege, the nurturing of
certain skills utilized extensively in the practice of law, such as
advocacy, counseling, negotiating and drafting, were chilled and
perhaps denied to non-lawyer members of society. Monopolistic
privileges granted by society to render services creates an obligation
to make available to society those special skills nurtured by the
monopoly. If that obligation is not met, the public as a whole inevit-
ably will permit encroachment by others.

The question "why lawyers" then can be answered simply by
saying—self interest. If a legal monopoly is a viable societal institution, lawyers in order to maintain that monopoly must fill those essential needs which will not otherwise be met unless lawyers meet them, including the rendering of those special public services which the monopoly itself makes lawyers peculiarly qualified to perform.

It seems to me that ethical restructuring must occur soon, or the multiple ways in which lawyers presently can be of public service will be curtailed. Lawyers' patrons, the populace as a whole, may already be near a conclusion that their interest will be best served if other professionals share in the work which traditionally has been performed only by lawyers. Admittedly, further examination of all possibilities by the organized bar is warranted before substantial revisions of the ethical canons of the legal profession should formally be undertaken, but clearly the time for re-analysis and re-examination is here.

What is important initially, as I see it, is the simple recognition by the organized bar of the proposition that every lawyer should contribute a substantial portion, perhaps a minimum of one-tenth, of professional time to the betterment of society in general and of the justice system in particular. That obligation cannot be in lieu of the individual obligation of lawyers to serve clients effectively or to discharge professional assignments with fidelity, nor should it diminish our ever increasing efforts in those areas, but it is and should be recognized as an equally important part of lawyering.

In summary, it is in my judgment important now that the public know that each and every lawyer is interested in more than making money, in more than personal aggrandizement, in more than achieving public recognition. They should know that the least of lawyers is interested in serving well the public good, in filling the partial void in special skills created in society when the lawyer was given the monopoly for legal services by society. They should know that the organized bar, as a quasi-public institution, is willing to eliminate from its rank those lawyers who only take and do not put. In my opinion, timely actions by the organized bar recognizing that each and every lawyer must do some public service are essential if substantial self-regulation by lawyers is to continue.