# The Weakness of Bar Associations

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Bar associations and similar organized bodies of lawyers[1] are not only grossly inefficient, but—and this is a very different matter—they accomplish little or anything of importance. Once we brush aside the pother of busy work, chronic tub-thumping, and a haze of self-gratulatory pronunciamentos, we find an insufficient end-product.[2] What is done is largely trivial or irrelevant; what needs to be done is left unaccomplished.

I cannot document these assertions. Despite the enthusiasm for Pound's theory that professionalism and organization go hand in hand, there has been chronic and possibly understandable reluctance to go behind the form of order created and determine precisely how bar associations operate, what forces control them, and what they actually do. I am therefore compelled to rely upon subjective impression gained during the course of something like thirty years' in-and-out connection with the organized profession, some desultory research, and a great deal of talk with lawyers from all over the United States. Many of these informants have had wide experience with bar activities and they uniformally report that, although what they have individually accomplished may have been profitable in terms of professional and personal contacts, continuing education, and ego enforcement, it has not been particularly fruitful in getting done anything of substantial benefit to collective profession. Some have gone further and asserted that bar associations are of no use

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1. In this essay "bar associations" is used generically and embraces not merely what can be called technically associations but also integrated bars. It embraces organizations of lawyers in a particular geographical area, like the American Bar Association and various state bars, and also groups of specialists, such as the Federal Communications Bar and the Association of Trial Lawyers of America. It does not specifically relate to peripheral groups, such as the National Conference of Commissioners on Uniform State Laws and the American Law Institute, although the logic herein used applies to any organization in which "independent" lawyers play a predominant part.

2. This statement is made with full knowledge of the danger of overgeneralization. Admittedly on some occasions bar associations have been able to claim notable achievements. For the moment, however, I am not interested with these exceptional instances but with a general course of conduct.

whatsoever to the ordinary practitioner. I am not sure these impressions can be substantiated in every case. But, for the moment, the uniformity with which they are reported and the knowledgeability of those who have spoken justifies acceptance of their truth as the basis for a working assumption.

If we accept the conclusion that bar associations are inefficient and ineffective the immediate question presented is why they function so poorly. One answer might be that their lack of achievement is the result of forces exerted upon all human groups; another that the nature of the legal profession creates problems peculiar to itself; and a third that lawyers may be affected by certain general constraints, and simultaneously, by those of a specialized nature. I rather suspect that the third is the more tenable assumption and will attempt herein to explore some of the dynamics of association activities in terms of both general and special theory.

Unfortunately the point of departure—terms of access to the relevant facts— is more limited than I would like. Since the beginning of time man has attempted, not always successfully, to describe in objective and rational terms his political institutions. And at least since the 18th century he has sought to give an account of the economic order. He has been more tardy in going about the task of delineating a third kind of collective life which we call associations. These groups have attracted sporadic attention for at least a century but only in the last few decades have they been the subject of any serious and sustained investigation.[3] Up to now we have developed no coherent body of proved assertions about the way in which their affairs are managed nor any generally acceptable theoretical constructs suitable for analyzing what little we do know. The relatively low visibility of these organizations, the variety of their form and purpose, and in some cases their lack of importance individually, have hindered both the collection of information and the creation of theory.

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3. There is a substantial body of literature, most of it written by sociologists, about various types of associations. It has not been systematized and is not very useful for our purposes. The studies most nearly touching the subject matter of this essay are those dealing with various professions. As short a time ago as 1963 Lynn saw fit to remark that ". . . it is truly extraordinary how little we know about the professions." Lynn, (ed.) *The Professions,* 12 DAEDALUS 647, 649 (Fall, 1963). Although a good deal has been written in the interim it sheds little light on the questions dealt with herein. *See, e.g.,* R. LEWIS & A. MAUDE, PROFESSIONAL PEOPLE IN ENGLAND (1963); C. GLIB, HIDDEN HIERARCHIES (1966); W. MOORE, THE PROFESSIONS: ROLES AND RULES (1970); G. MILLERSON, THE QUALIFYING ASSOCIATIONS (1964).

Even the rudimentary form of categorization, already suggested, of the associational as distinguished from the economic and the political, breaks down upon the most cursory examination. We might say that voters' leagues are part of the political apparatus and that business partnerships are embraced within the economic order. If we do it does not solve the question whether a nature club currently committed to the ecology movement is political or non-political or a trade association economic or non-economic. Nor does the use of modifying adjectives, such as "voluntary," "non-profit" and "private" eliminate the difficulty. Membership in a labor union in a closed-shop community is hardly voluntary; a dairymen's league is dedicated to the pecuniary aggrandizement of its members, and an integrated bar becomes a sector of the government structure.

Admitting the diversity of purpose and order displayed by associations and the difficulty in categorizing them broadly, do they have any similarities which permit rational analysis? Suppose we consider simultaneously the National Association of Manufacturers, the Teamsters' Union, the Audubon Society, and the Friday Afternoon Bridge Club. Our answer to the question may be "no." However, it is my contention that *most* of what we have called, for want of better terminology, "voluntary, non-profit associations" display certain common characteristics that may serve as key determinants of their efficiency and effectiveness.

With limited exceptions—like the family and the social club—at least some of the objectives of associations are externalized, in the sense that the design is to persuade and exercise power over outsiders. A small group of individuals sharing clearly defined and strongly adhered to convictions can sometimes—as in the case of a religious sect—best accomplish associational ends. But, associations are power oriented, and there is a general assumption that power is in direct ratio to numbers. It follows that an association should attempt to gather together a maximum body of adherents—even nominal adherents—if it pretends to operate with optimal effectiveness. A large membership gives the outward indicia of power which in many cases is the equivalent of power itself. At the same time, where there is an increase in the size of the membership there is almost universally a decrease in what may already be a tenuous commitment and motivation. At best, the members of an association are not held together by the force of strong and relatively simple objectives, as for example are employees of a business corporation. At worst their ties may be little more than nominal. To

counteract the dangers of indifference, diffusion of purpose, and schism among a large, undisciplined, and poorly motivated group of adherents a number of devices may be resorted to. These devices can be discussed in terms of the several challenges they are designed to meet; those which I will refer to as The Challenge of Purpose, The Challenge of Leadership, and The Challenge of Activity.

By the Challenge of Purpose I suggest that the probability of agreement is in indirect ratio to the number of persons who must concur. In large organizations the need for concurrence means that the overt purpose for which the members are associated must be stated in language sufficiently non-specific and hortatory to permit all sorts of people to swallow their reservations and unite under a common doctrinal umbrella without intolerable discomfort. A classic example of this sort of thing is the creed of a world church. These pseudo-agreements are necessary and useful at many levels of the human enterprise, the political and economic as well as the associational. However, they are particularly important in the case of associations, for without them the associations would not be able to attract and retain a sufficient number of adherents. At the same time, if agreements as to purpose become too amorphous it is impossible to mobilize the membership behind specific measures. The Challenge of Purpose, therefore, is the challenge to state an objective sufficiently broadly to attract a large membership and sufficiently specifically to provide a common ground. As a matter of fact, in practice the purpose of most associations is stated over broadly, and it is generally difficult to rally the membership in support of clearly defined programs. The result is a congenital weakness in all associations, a weakness it has been difficult to overcome.

The Challenge of Leadership is even more complex. Nebulous purposes and the lack of a strongly committed membership prevent clear-cut tests of legitimacy and success. Real democracy is impossible and associations are notoriously clique governed. If the governors are a succession of volunteers, little continuity of policy will result and limited dedication to collective purposes can be expected. The special interests of individuals will override those of the group as a whole, and the leaders will inevitably come from among those vigorous and self-serving individuals who want for their own ends the power which comes from the collective body.

An alternative to volunteer leadership is a paid secretariat, but as soon as we create a bureaucracy new problems arise. The primary objective of a paid employee is to prolong his employment. Ordinarily he has no personal commitment to the objectives of the organiza-

tion on which he feeds. He is essentially politically rather than ideologically oriented in the sense that his task is to keep down dissension. His ideal is a non-controversial program which gives him personally enough of a track record to justify his salary. He instinctively becomes the promoter of the kind of good-enterprise, make-work activities which we shall now consider as part of the Challenge of Activity.

All associations engage in some activity. If they do not they cannot attract membership. However, if they launch upon projects from which a substantial number of members dissent they cannot retain the dissidents on the rolls. As a consequence, associations have a strong tendency to spend most of their time in good enterprises unobjectionable in themselves but essentially trivial. This tendency constitutes the Challenge of Activity. The good enterprises drain off excess energy, give the body a visible and ostensible purpose, and satisfy the neurotic need, characteristic of our society, to get something done without regard to basic utility. They may be classified as part of the "Junior Chamber of Commerce Syndrome," a phenomenon best illustrated when 100 of the most vigorous young businessmen in a miserably conducted community engage in a "no-jay-walking" campaign. Good enterprises are used by all leaders of associations but are particularly acceptable to a paid secretariat which, as we have seen, is primarily interested in an uneventful continuum rather than concrete achievement.

Although the good enterprise has the short range effect of creating an illusion of united and effective effort, its larger consequence is the trivialization of work to that point where the association cannot be and is not expected to be a vehicle for serious and important action. When this consequence is realized the organization declines because externally it fails to generate effective power and internally it alienates its own membership.

The adoption of a bland program will generally distort to a greater or lesser extent the overt purpose of the association. There exists also the possibility that covert purposes of powerful individual members or cliques will also produce affirmative distortion. To employ a crude example, a fraternal society may be used to further the political ambitions of its president. Another such case is where a bribed business agent for a labor union enters into a sweetheart contract with an employer. This kind of thing happens, particularly where the membership is either indifferent or is subject to practical coercion. However, such affirmative distortions of purpose are much less common than the use of the association for purely negative

ends. In an ideological society it is understood that a primary ostensible *raison d'être* of most associations is the propagation of ideas. It is less well understood that these organizations may be used to suppress thoughts deemed to be dangerous. The logic of the technological society is that we defer to the expert. If we can control whole bodies of experts in a given field we can, at the same time, dictate what is acceptable and unacceptable. Although it is not always easy to induce the highly skilled or highly informed to adopt the new, it is relatively simple to persuade them to reject it. Most experts have vested interests in the status quo and are professionally conservative. Furthermore, the tendency of any group, be it a committee, a trade union, or the United States Congress, is to sink to the lowest common denominator of its membership. That common denominator will ordinarily be stupid, slothful, unenterprising, and opposed to change. Departures from the ordinary are the work of individuals free of the hag-riding anxieties obsessing the ordinary man. But seldom does innovation appear as the result of working in concert.

If bodies of experts are organized into trade and professional societies they are increasingly listened to when matters of public importance are debated. Moreover, they are permitted to act as spokesmen for all those engaged in a particular kind of work. If they can be controlled by proponents of the status quo—ordinarily an easy matter—they can serve as the strategic apparatus for subverting novelty. The extent to which this principle is known and has been consciously acted upon is not clear. What is apparent to any observer is that the leadership of many associations has fallen into the hands of those whose primary objective has been to block change without too much regard for the ostensible purposes for which the body has been established.

Like other associations, organizations of lawyers have sought a large,[4] voluntary[5] membership. And they have faced the challenges

4. Membership is no problem where integrated bars embrace all the members of the profession in a given geographical location. Where membership is not compulsory the search for members goes on unceasingly. For example, the American Bar Association, which was founded in 1878, only reached a membership of 100,000 in 1961, but by October 31, 1976, it embraced 213,449 members. Traditionally, it has been stated that the A.B.A. counts as members less than half of the bar. This statement is difficult to prove or disprove, in part because of our inability to state precisely how many lawyers there are in the United States and in part because of a lag in the availability of statistics. Martindale-Hubbell, which has access to the

of purpose, leadership, and activity. Their reaction to these challenges have been similar in many respects to those of other professional societies. Their statements of principles have not risen above the level of pseudo-agreements,[6] their officers or paid secretariats have misused the associations for their own purposes, they have been clique-ridden, and they have been chronically used to suppress notions considered unacceptable by those in control. It can be argued, therefore, that the ineffectivenss of bar associations is not a unique phenomenon occasioned by special circumstances. From this argument, I would dissent for two reasons. The first is that there are strong justifications for contending that bar associations ought to be much more effective than other professional bodies. Lawyers are, on the average, well educated and well trained. They are men of affairs and are used to getting things done. They either have positions of power or are close to those who do. The second is that the impotence of bar associations is so great as to constitute a matter of kind rather than simply of degree. We may legitimately ask, then, if there are special reasons for this sterility. It is my thesis that, without forgetting them entirely, we must look beyond the common disabilities suffered by associations qua association and

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most authoritative data available, states that its most recent statistical report, based on information contained in the 1971 edition of its *Directory*, indicates that in 1970 there were approximately 350,000 practicing lawyers in the United States. The five year gap, during a period when there was a large influx of new members into the ranks of the bar, leaves us with no accurate statistical base for use in comparing A.B.A. membership with the total membership of the bar. (This information was obtained by correspondence with the American Bar Association and Martindale-Hubbell, Inc.)

5. In the case of integrated bars the expression "voluntary" may seem inappropriate. It is true that all lawyers within a particular area must belong to such an organization. However, compulsory duties do not extend beyond the payment of dues. That is to say, all the activities of the bar are engaged in on a purely voluntary basis.

6. For example, "The purposes of the [American Bar] Association are to uphold and defend the Constitution of the United States, and maintain representative government; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of bar organizations in the nation within these purposes and in the interests of the profession and of the public." 97 A.B.A. REP. (unnumbered front matter).

seek to determine the special reason or reasons why lawyers are unable to act together effectively.

By vocation and training the lawyer is a paid advocate employed to represent the interest of his client, not those of the public nor even of his profession. Simply to state this proposition causes a sense of unease in a society such as ours where the adoption of at least the outward pretensions of disinterested conduct in matters of public concern has become the order of the day. But it is the heart and soul of the lawyer's commitment and is the cornerstone of every code of professional ethics. The classic and most extreme expression of this commitment was made by Lord Brougham when he said:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequence, though it should be his unhappy fate to involve his country in confusion.[7]

Those who have criticized Brougham's statement have sometimes taken it out of context. In the first place, at the time it was made Brougham was a barrister employed in the defense of Queen Caroline. The sordid controversy between George IV and his consort was occasioning scandal and public disturbance. Brougham was under severe pressure to trim his sails. He was being told that he should sacrifice the interests of his client to the public good and, incidentally, to his own. To his great credit he resisted these urgings and obtained for his client what was in effect a vindication. Taken in this context alone, therefore, his statement of principle, however oratorical it may seem by modern standards, expressed a brave, proper and professional standard.

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7. Quoted in D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 189 (1973). More recently Marks has restated the principle somewhat less oratorically: "The traditional view of the lawyer's role in society with a legal system based on the common law relies heavily on the adversary method. A single interest—a single side of any conflict—is represented by the lawyer. He is an advocate in the true sense of the word. He is neither judge nor jury; he is not even a social conscience. He is simply an advocate. Accordingly he does not relate his conduct to the social rules produced by the cases he handles." THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 9 (F. Marks and others ed. 1972).

In the second place, it is easy to misconstrue what Brougham had to say unless we recognize that the peculiar relation of the English barrister to his client automatically imposes practical limitations upon what would be otherwise an exaggerated theory. In the American sense the barrister has no clients. He may not act without being "instructed" by a solicitor.[8] That is to say, for all practical purposes, he is employed by the solicitor to prosecute or defend in a litigation in which the solicitor's client is a party. He generally cannot even interview the client except in the presence of the solicitor[9] and he is paid by the solicitor, not the client.[10] He has no continuing relationship with either the solicitor or the client and must be briefed anew each time he accepts a piece of business.[11] He has no personal views as to the merits of a controversy or the morality of the parties. While a case is pending the barrister owes the client the highest degree of loyalty in all matters relating to the particular litigation. But his loyalty extends no further than this and ends with the litigation. He has no general commitment. For that reason, he can without embarrassment, represent the British Petroleum in the morning and the Trades Union Conference in the afternoon. His position is best epitomized in the "cab rank" principle, which, in short, requires any barrister to accept any brief presented, provided only that he has the time to devote to the matter and is proffered a proper fee.[12] When he has accepted the brief his loyalty to his client

8. W. BOULTON, CONDUCT AND ETIQUETTE AT THE BAR 4, 6 (4th ed. 1965).

9. *Id.* at 10.

10. In theory, the client pays the barrister's fee by delivering it to the solicitor, who then passes it on to the barrister. Practically, the rules of professional etiquette require that the solicitor pay the barrister whether he has been paid by his client or not. T. LUND, A GUIDE TO THE PROFESSIONAL CONDUCT AND ETIQUETTE OF SOLICITORS 72 (1960); M. ZANDER, LAWYERS AND THE PUBLIC INTEREST 109 (1968).

11. BOULTON, *supra* note 8, at 5, 43, 45; B. ABEL-SMITH & R. STEVENS, IN SEARCH OF JUSTICE 107 (1968); MONOPOLIES AND MERGERS COMMISSION, BARRISTERS' SERVICES: A REPORT ON THE SUPPLY OF BARRISTERS' SERVICES IN RELATION TO RESTRICTIONS ON ADVERTISING 17 (1976).

12. BOULTON, *supra* note 8, at 4. It is said that the underlying principle goes back at least to the 18th Century. MONOPOLIES AND MERGERS COMMISSION, BARRISTERS' SERVICES: A REPORT ON THE SUPPLY BY HER MAJESTY'S COUNSEL ALONE OF THEIR SERVICES, 7, 32 (1976). Although the theory of the "cab rank" principle is firmly established in practice, a barrister may evade it by putting up his fees or pleading other business. M. ZANDER, *supra* note 10 at 282-83; C. WICKENDEN, THE MODERN FAMILY SOLICITOR 15 (1975); Cohen, *Lawyer Certification, Civility, "Good Moral Character," and Pressure for Conformity*, 1 J. LEG. PROF. 59, 73 (1976). Symptomatic of the impersonal nature of representation in the English courts is

is, within a prescribed area, intense and unequivocal, but outside that area he has no obligation and no special loyalty. For this reason the problem of conflict of interest is much less severe in England than in the United States. And it also accounts for the fact that although the barrister may be accused in his public life of representing class interests, he cannot be labeled as a partisan for his clients.

The American lawyer is situated differently. If he is successful in a worldly sense he will be employed to represent large corporate interests on a continuing basis.[13] His employment will be general and not special. His businessman client will demand from him the same 100 percent loyalty he asks from his employees. If this demand is frequently covert, it is nonetheless real. Employment will carry with it, either expressly or tacitly, the condition that upon all occasions, he maximize the welfare of the client. And his client will be able to supply sufficient business to make the loss of employment, if this condition is not met, a catastrophy. The higher up the professional ladder we go—the more prestigious the lawyer appears—the more this principle is true. The lawyer is bought and paid for on a twenty-four hour basis and is expected to act accordingly. For all practical purposes he has ceased to be an independent professional and has become a well-paid dependent.[14] If he can be said to have any remaining professional life, it has absorbed his public life; he has ceased to be a citizen but remains a partisan.

As soon as we understand the practical situation of the American lawyer it becomes apparent why the conflict of interest problem

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the advice to counsel always to "make a submission," rather than "express an opinion." H. CECIL, BRIEF TO COUNSEL, 90-91.

13. It has been deemed the mark of the "lower-echelon lawyers" that they suffer "from a non-repeating, relatively poor and fluctuating clientele." Cohen, *Confronting Myth in the American Legal Profession: A Territorial Perspective*, 22 ALA. L. REV. 513, 529 (1970).

14. C. Wright Mills speaks of the corporation lawyer as "a high legal strategist for high finance and its profitable reorganizations, handling the affairs of a cluster of banks and the companies in their sphere in the cheapest way possible, making the most of his outside opportunities as an aide to big management that whistles him up by telephone; impersonally teaching the financiers how to do what they want within the law, advising on the chances they are taking and how best to cover themselves. The complications of modern corporate business and its dominance in modern society, A. A. Berle, Jr. has brilliantly shown, have made the lawyer an intellectual jobber and contractor in business matters, of all sorts. More than a consultant and counselor in large business, the lawyer is its servant, its champion, its ready apologist, and is full of its sensitivity." C. WRIGHT MILLS, WHITE COLLAR, 123 (Gallaxy ed. 1956).

is so severe in this country. In England the barrister is an advocate only in the overt sense. In the United States the lawyer is overtly an advocate, but, perhaps even more, he is expected to act covertly in his client's interest. If he is employed by the United States Steel Company his membership in the Sierra Club will be tolerated by the Company only so long as he uses it as a basis for sabotage of the Club's purpose. And when he addresses Rotary he must espouse free enterprise and the value of a docile labor force.

This is the pressure which, some sixty years ago, lead Brandeis to say:

> It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the "corporation lawyer," and far too little of the "people's lawyer." The great opportunity of the American bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.
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> For nearly a generation the leaders of the Bar have, with few exceptions, not only failed to take part in any constructive legislation designed to solve in the public interest our great social, economic and industrial problems; but they have failed likewise to oppose legislation prompted by selfish interests. They have often gone further in disregard of the common weal. They have often advocated, as lawyers, legislative measures which as citizens they could not approve, and have endeavored to justify themselves by a false analogy. *They have erroneously assumed that the rule of ethics to be applied to a lawyer's advocacy is the same where he acts for private interests against the public, as it is in litigation between private individuals.*[15] (Emphasis added.)

Brandeis had in mind the conflict between the lawyer's role as citizen and as advocate. What he deplored was the chronic resolution of this conflict in favor of the client rather than the community. When we attempt to translate the conflicting loyalties of the lawyer

15. L. BRANDEIS, BUSINESS—A PROFESSION 321, 323 (1914).

into terms of his professional organizations, we find a situation which is probably unique to the bar. In most occupational groups some conflict exists between the interests of the members and those of the persons they serve. If a local medical association agrees to increase the fees charged for office visits, it can be said that the individual doctors will profit and their patients lose. The conflict of interest is direct and apparent. The resolution in favor of higher fees will immediately affect every doctor favorably and every patient unfavorably. By contrast, a resolution against higher fees will affect every doctor unfavorably and every patient favorably. In casting his vote the doctor is attempting to resolve an issue in a fashion in which his own relations with his clients and those of his fellow practitioners with their clients are directly affected. In other words, the decision operates within the immediate system of relations between the parties. In contrast, the decisions reached by the bar in most part relate to systems outside the profession, systems by which the individual lawyer may be only indirectly affected or not affected at all. More often these systems are simply of interest to his clients, and not infrequently of very large concern.

By way of illustration, consider the problem presented in 1975 to the Alabama Board of Bar Commissioners. The Alabama bar is gradually losing its title practice to title insurance companies. Legislation proposed by the Alabama Law Institute was designed to promote the public interest and, in particular, to permit lawyers to compete with title companies on a more than even basis. The Law Institute asked the Commissioners to lend the backing of the organized bar to these proposals. Ultimately the Commissioners complied but the vote in the meeting was too narrow to command legislative credence. In the end the proposals were defeated in the legislature. This is not the place to consider the merits of the land title acts. What is important is the reason for which they were opposed when presented to the Board. It was never contended that they would be ineffective. To the contrary, it was generally admitted that they would be highly effective. The objection to them was raised by lawyers representing mining companies, and title insurance companies and some abstractors. The former felt that the acts would cause them expense and inconvenience and the latter that any such legislation would adversely affect the monopoly enjoyed in some counties by those maintaining title plants. The objection, notice, was not that lawyers would be adversely affected. To the contrary it was admitted that lawyers would be benefited. What the complaining

lawyers were saying was that their clients would be adversely affected and that their duty was to their clients rather than to their fellow practitioners.

A somewhat similar case arose during the last few years, also in Alabama, although with a somewhat different outcome. The Alabama rules of civil procedure had long been outmoded. Practice under them had become antiquated, time-consuming, and expensive. They were a threat to the professional welfare of every practicing attorney. However, reform was blocked by a coterie of influential lawyers representing large corporations who admitted that they resorted to pleading to succeed in cases which were otherwise indefensible. In the course of the controversy it was extremely difficult to obtain strong support for reform from the organized bar because of internal sabotage practiced by the opposing lawyers. In the end the rules were adopted, but only after years of arduous and discouraging work.

These two illustrations, taken almost at random, can undoubtedly be duplicated nearly anywhere in the United States. Their importance has nothing to do with the merits of the controversies. Rather it arises from the fact that the machinery of the organized bar was being used by lawyers to block measures beneficial to the profession as a whole but harmful to individual lawyers' clients.[16] More important, this conduct was considered in no way exceptional or discreditable. It was what any lawyer would have done. If, in the course of the debate, a protagonist had said either that he was disqualified because of a conflict of interest or that he was taking a position favorable to the bar but unfavorable to his client it would have excited attention. But the fact that those involved actively supported their clients against the interests of their fellow practitioners was considered too routine to call for comment.

The Challenge of Purpose requires that an organization's objectives be stated sufficiently broadly to attract a numerous membership and sufficiently specifically to provide a common ground. As applied to bar associations this principle must be modified to some extent. Those organizing such an association know that members will be attracted not so much by stated objectives as by the practical opportunity afforded to benefit clients. At the same time no lawyer

16. *See, e.g.*, the complaint that the Chicago Bar Association is used by large firms to advance the interests of their clients rather than those of the collective profession. J. CARLIN, LAWYERS ON THEIR OWN 178 *et seq.* (1962).

wants to admit that his own organization may be used by his fellows to foster measures inimical to him. As a consequence the overt purposes of associations are stated in terms maximizing the professional position of the bar and emphasizing the enhancement of the public good. These statements conflict with the real, covert purposes for which the association functions. The resulting tension inhibits effective action and is a primary reason for the inability of lawyer organizations to function adequately.

The ineffectivensss of bar associations is magnified by the fact that only occasionally can lawyers induce the associations to take affirmative action wanted by clients. A special interest is almost by definition a minority interest. Lawyers are reasonably intelligent and ordinarily do not see much point in their organization's picking chestnuts out of the fire for another lawyer's clients. As we have already seen, however, the natural conservatism of groups of experts makes it simple in these bodies to block acceptance of novel proposals. The blocking tactic is especially easy in a body composed of professional advocates. For this reason when we examine what actually goes on in bar associations it appears probable that most of what is done is negative rather than affirmative. That is to say, it consists in preventing the adoption of anti-client measures rather than obtaining the adoption of pro-client measures. But for obvious reasons no one wants to admit this fact. As a consequence, in order to appear effective the associations have a strong affinity for laudable and innocuously good enterprises. The result is congenital weakness.

Where volunteers are employed to direct an association the Challenge of Leadership arises out of limited dedication to collective purposes and overriding personal interests of the chosen leaders. These forces are important in the case of bar associations but have a peculiar twist because of the advocate status of the lawyer. A unique characteristic of the legal profession is that the leaders of its associations are paid openly by outside interests to engage in sabotage. When the lawyer engages in the collective work of the profession he may do so out of a sense of duty or of vocational dedication. More probably he will be motivated because he is employed by particular clients who want their interests protected beyond the limits of the judicial forum and are willing to pay handsomely for representation.[17] The abler and more prestigious the lawyer the

17. Elizabeth Drew quotes one lawyer as saying that a client considered his

more his services will be in demand by private clients and the greater the probability that he will assume leadership in a bar association.[18] Writing in 1973 about the annual meeting of the American Bar Association, Elizabeth Drew described some rather typical results of the demand for special representation:

> The antitrust section has opposed consumer class actions. The Section on Corporate, Banking and Business Law fought the "truth-in-lending" bill some years ago. And now it is pushing in the House of Delegates a proposal to make class-action suits more difficult. At the end of the resolution there is appended the statement: "The section believes that it has no conflict of interest in formulating its foregoing recommendation."
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> That might depend on the eye of the beholder. The sections which deal with questions of concern to major economic and corporate interests are dominated by lawyers who represent those interests. According to Jonathan Adler, a Los Angeles environmental lawyer and student of the A.B.A., the chairman of the Corporate Section's class-actions committee, which made the proposal, represents corporations which would benefit from it. In a paper delivered to a "counterconvention" staged by Ralph Nader at the time of the A.B.A. meeting, Adler examined the connections of some of the section's officers, as listed in the 1972-73 A.B.A. directory:
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> The chairman of the Corporate Section's environmental controls committee, Adler pointed out, was with a Richmond, Va., law firm which represented Humble Oil, three power companies, three railroads, General Motors, a gas pipeline company and a chemical corporation. Officers of its consumer bankruptcy committee included the general counsel of Beneficial Finance and the attorney for Household Finance, Crocker National Bank, Afco Credit and CIT Financial. The Chairman of

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work with a section of the American Bar Association so valuable the client offered to compensate the lawyer for the time spent. Drew, *The Rule of Lawyers,* N.Y. TIMES MAGAZINE, Oct. 7, 1973, 16, 54. Most practitioners would consider this a crude approach. Although corporations give their house counsel and other paid employees time off and expense money to engage in bar association activity, the "independent" lawyer will not charge his client directly but will assume an item of overhead in fixing compensation. This approach reminds us of the barrister who, in days past, had a pocket in the back of his robe so that his clients could insert therein a fee without contaminating him with vulgar ideas of gain.

18. It is generally conceded that the leadership of the bar associations, at least in the large cities, comes from the most prestigous law firms. Cohen, *supra* note 13, at 523. *See generally,* CARLIN, *supra* note 16.

> the National Resources Section's coal committee was house counsel for the Consolidation Coal Company; the vice chairman was the general counsel to the National Coal Association. The chairman of the oil committee was general counsel for Cities Service, and the vice chairmen were general counsel for Humble Oil and a private attorney who represented Getty, APCO and Union-Texas Petroleum. The two officers of the natural gas committee represented utilities; officers of the hard-minerals committee represented mining companies; the chairman of the public lands and land use committee represented contractors and realtors. And the marine resources committee was chaired by the house counsel for Chevron. (The section has come out in favor of extending rights to drill for offshore oil and minerals, and limiting rights to sue polluters.)[19]

It is apparent to anyone familiar with the organized bar that Ms. Drew, if anything, understates the case. Not only is the machinery of the profession used to promote directly the interests of a client in a particular measure but the machinery itself may be so structured as to work contrary to the needs of lawyers. Possibly the best illustration of this sort of thing is the notorious Section of Real Property, Probate and Trust Law of the American Bar Association. The Section was originally organized as a Section of Property and an advocate of the Torrens system was installed as chairman. The Torrens system is a direct threat to title insurers. Thereafter, in a ploy which has never been adequately documented but is sufficiently well-known to permit further publicity, the title insurance company representatives entered an arrangement with representatives of the banks whereby the Section was reorganized as a Section of Real Property, Probate and Trust Law. It is important to note that both the title insurance companies and the banks are in compe-

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19. DREW, *supra* note 17. Others have pointed out similar cases in which lawyers representing particular client interests have taken over posts in the American Bar Association and used their positions to direct Association policy. For example, Morton Mintz has quoted Senator Hart to the effect that the Association's committee to study the Truth-in-Packaging bill contained several top members affiliated with the food industry. M. MINTZ & J. COHEN, AMERICA INCORPORATED 316 (1971); and Julius Duscha has said that the Association's committees concerned with credit problems are made up for the most part of lawyers with close ties to lenders. He points out, in particular, that the Consumer Bankruptcy Committee had as its chairman the general counsel of one of the largest small-loan companies in the country. Duscha, *Your Friendly Finance Company and Its Friends on Capitol Hill,* HARPERS, Oct., 1962, at 75.

tition with lawyers.[20] The understanding, express or implied, was that the institutional members would join forces in the new body and prevent anything adverse to their interests from going forward. This understanding has been followed without deviation and has resulted in entire ineffectiveness of the Section. The Section is structured to prevent anything hurtful to title insurance companies and banks.[21] By the same token it is structured to prevent the accomplishment of anything helpful to lawyers.

There is little or no evidence that a paid secretariat creates leadership problems peculiar to bar associations. To the contrary, it can be speculated that because client representation gives lawyers a much more direct concern in the affairs of their professional organizations the secretariat exercises less practical control than would otherwise be the case.[22] What is important is that busy work can be used as a device to distract the attention of the membership and so create opportunities for misuse of the organizational machinery. Because it is in the interest of the secretariat to direct the association's activities into busy work, the existence of a secretariat therefore plays into the hands of those who seek to use the association.

The Challenge of Activity arises from the tendency of assocations to engage in good enterprises (and so trivialize their work) and from the constant threat that the purpose of the associations will be distorted by positive or negative measures. If we consider what have been the accomplishments of bar associations up to this time we cannot avoid the conclusion that the activities of these bodies have been marked by pettiness[23] and distortion of purpose. The objectives

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20. Bar association journals are probably unique in that they carry the advertisements of economic competitors of the members.

21. It would be hard to overestimate the pervasiveness of bank influence on the course of the law. The prompt ratification of an obviously defective Uniform Commercial Code by all the states except Louisiana is probably the best modern illustration. In a related field most of the work done on the law of trusts has been done at the instance of corporate trustees while little has been done in areas in which these trustees take no substantial interest. *See generally,* J. HOGG, RESEARCH IN TRUSTS AND THE TAXATION OF TRUSTS, 1930-1961 55 (1963).

22. GLIB, *supra* note 3 at 131.

23. A foreign observer has remarked contemptuously that, "[T]he American Bar Association supports many projects and activities which would not be countenanced by a country solicitor in Northern Ireland." Montrose, *The Academic Lawyer's "House of Intellect,"* 14 J. LEG. ED. 127, 131 (1961). Although good enterprises have been defined as innocuous measures they may, in some cases backfire. For example, Johnstone and Hopson have pointed out that the support given the

of organizations of lawyers should be the enhancement of the welfare of members, the increase in professional efficiency, and the improvement of the legal structure. They should not be the maximization of the interests of the lawyer's clients. In matter of fact, the machinery of the bar has seldom been used to benefit lawyers but is normally used to benefit their clients.

I assume that bar associations have, up to now, been ineffective and that their failures can be traced to certain forces affecting all associations and to others peculiar to the legal profession. Of primary importance is the fact that lawyers feel impelled to take their role of advocacy with them when they engage in bar association work. Some of my readers may feel that I have, in some respects, overstated the case. As opposed to those who habitually act as client representatives they will point, at the other extreme, to those dedicated laywers who spend a lifetime advancing the interests of the profession and the public. Perhaps the truth is that few lawyers fall into either of these stereotypes. Lawyers, like other human beings, are not all of a piece. A lawyer may, in those matters which affect his clients, remain an advocate and, without inconsistency, act disinterestedly in other matters. However, we are here concerned with collective conduct rather than that of individuals. And our task is not to label or to blame but bring a problem into the open. Traditionally the organized bar has been something of a sacred cow.[24] It has masked itself behind self-serving rhetoric which has clouded the issue and stood in the way of effective action. Until we sweep aside this cloud and come to grips with the real question there is little hope that the bar can improve the quality of its organized activities.

It would be naive to think we can eliminate entirely client representation in bar associations. We can consider realistically how the effect can be minimized. A first step must be to reorient our thinking about what is expected of the corporate profession. In recent years the service ethic has come to dominate, superficially the avowed purpose of bar association activity. It is assumed that law-

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Bricker amendment and internal security measures by the American Bar Association alienated much of the liberal segment of the bench and bar and resulted in the resignation of some influential members. Q. JOHNSTONE & C. HOPSON, THE LAWYER AND HIS WORK 42 (1967).

24. This does not mean that the leadership of the bar has been immune from criticism. For a particular vigorous attack from a highly knowledgeable critic, see, Ernst, *The Need for Reappraisal of the Leadership of the Bar*, 47 A.B.A.J. 959 (1961). *See also*, CARLIN, *supra* note 16.

yers are capable of engaging in broad programs of public service and are under a duty to do so. As a consequence bar associations are engaging in a wide variety of good enterprises ranging from the promotion of international order to the reform of the patent system. This sort of activity has distracted attention from more needed measures and has played into the hands of those who want to make the associations impotent.

Bar associations unquestionably should devote primary attention to measures which will directly promote the welfare of lawyers. They also have some responsibility for improving the machinery of justice. The extent to which they should consider improvements in the substantive law is more questionable. At one time the organized bar may have been the only source which could be relied upon to furnish the expertise needed in law reform. Its judgment, clouded by client interest, may have been defective, but it was the only informed judgment available. This is no longer the case. I suspect, therefore, that the time has come for us to look elsewhere when we are considering measures freighted with broad impact upon important interests in society and outside the bar itself.

If the organized bar can thus limit its purpose it can drastically reduce the amount of busy work it performs. It can then concentrate its attention on activities of importance. Any such course may be obnoxious to those who contend that all people should at all times support all laudable purposes. But it will greatly increase the effectiveness of bar associations and, at the same time, will reduce the opportunity for their misuse in furtherance of the ends of clients. In making this suggestion I realize that I am swimming against the tide. The popular judgment is that anything that can be done must be done. But it is only realistic to accept the principle that limited objectives are the key to success in any form of activity and that there are peculiar and special reasons why this axiom is true in the case of bar associations.

A prelude to the elimination of busy work is the reduction to an absolute minimum of the number of paid employees of the associations. The secretariat has a vested interest in innocuous activity. In large organizations paid employees cannot be completely eliminated. But they should be viewed with suspicion. They should be considered not as a necessary adjunct to effectiveness but as a potential source of impotency.

In terms of leadership three measures are of utmost importance. The first is for lawyers to impose on themselves, as a part of

their system of ethics,[25] the principle of disclosure in all bar association work. If we cannot eliminate advocacy we can eliminate covert advocacy. For a lawyer to say that he favors or opposes a particular measure because it is right or wrong is one thing; it is a very different matter for him to say that he acts as he does because the measure will help or hinder a client. When the measure is being considered by his fellow practitioners, special reasons indicate why he should be compelled to state the nature of his interest. This proposal would be practical and effective. The basic fact of representation is difficult to hide in the narrow context of the bar. Although most of one's fellows may not be aware of such representation, some will be, and these few can police disclosure. The effectiveness of disclosure lies in the fact that it will make client interest clear to everyone and thus greatly reduce the influence of action which, under present conditions, can be passed off as disinterested. The great danger of disclosure is that it may encourage ad hominem debate and may discourage the expression of honest opinion. These dangers may be recognized, but I do not think they are sufficient to overweigh the advantages to be derived.

The second measure required to improve leadership is to eliminate from bar associations all full-time employees of corporations. The lawyer engaged in private practice has a divided loyalty, that to his profession and that to his clients. The employed lawyer is not so encumbered. His exclusive loyalty is to his employer. He is given time, money and encouragement to engage in bar association work. He performs all sorts of tasks and insinuates himself into the hierarchy. As a reward he asks that he be permitted to participate in decision making in a fashion favorable to his employer. In the chummy environment of the association this demand is difficult to resist. Admittedly, some corporate employees have served in bar associations faithfully and well. But essentially the corporate employee is an infiltrator who must be eliminated if the associations

25. The ABA *Canons of Professional Ethics*, Canon 26 provides, "A lawyer openly, and in his true character may render professional services before legislative and other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to reason and understanding, to influence action." ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS, No. 73 (1967). Is it ingenuous to ask why the same rule should not apply to activities within the organized bar?

are to function properly. It may be argued that it is unrealistic to bar house counsel while admitting the abler, more powerful general counsel who practices "independently." This objection can be answered pragmatically by saying simply that it is practical to bar the house counsel but impractical to exclude the general counsel.

A third measure designed to impove leadership is to simplify the structure of the associations. In 1936 the American Bar Association, with the ostensibly laudable purpose of increasing rank-and-file participation, decentralized its structure by setting up a number of semi-autonomous sections. This form of organization has been adopted by many state and local associations. The result has been a reduction in responsibility and control. A number of independent fiefdoms have been set up, each with its own heirarchy. These fiefdoms have a low level of visibility and attract limited interest from most association members. As a consequence they are ideal vehicles for those who wish to use the organized bar to promote the interests of private clients.[26] The answer to this difficulty is to return control of all parts of the association to the principal officials and then make these officials responsible for the proper functioning of each of these parts. Such a measure is not a panacea. It will not eliminate the evils of client representation. But it will make such representation more visible and will thus reduce its importance.

Will these measures make bar associations more effective? In all candor, it is impossible to answer this question unequivocally. Client representation cannot be eliminated completely. Can it be reduced to a minor role? I suspect that much less important than the measures adopted will be the spirit in which lawyers conduct themselves. Lawyers are by training and experience highly tolerant of the opinion of others. In the adversary situation they learn especially to refrain from questioning the motives of their fellows. When they take these attitudes into their professional organizations they permit unlimited abuse. Special pleaders are influential in bar associations because they are listened to and followed. They will lose that influence when their fellow lawyers say to them bluntly that the welfare of the collective bar transcends that of the individual lawyer's clients and that the intrusion of client-based considerations into professional deliberation is an intolerable nuisance. It may be a long time before lawyers can be induced to take such a stance. The

26. I have already elaborated on this theme elsewhere and will not attempt to repeat. *Sections for the Alabama Bar—A Second Look*, 25 ALA. LAW. 121 (1964).

custom is that of the other way, and lawyers will not be persuaded overnight to look upon a habitual course of action as unprofitable. The difficulty is enhanced by the fact that the individual lawyer must not merely insist that his brother refrain from representing clients while engaging in bar association activity; he must lay the same inhibition upon himself. A plenary self-denying ordinance is in order. Until something of the kind is adopted, bar associations will not be very effective. And they should not demand to be taken seriously.