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Chesterfield Smith*

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Abstract

Does an ethical lawyer have an obligation to give some portion of professional time for free public service?

KEYWORDS: Ethical Lawyer, Obligation, Professional Service

The old lawyer said: "I look out for my paying clients." The young lawyer responded: "But good lawyers must also do some free public service."

CHESTERFIELD SMITH*

Does an ethical lawyer have an obligation to give some portion of professional time for free public service? Is a lawyer required to render free professional service with the same professional dedication as is owed to a lawyer's paying client? Is it time for an evolutionary progress in lawyer ethics by now imposing peer pressure on those who unreasonably ignore that lofty obligation of lawyers? Should those lawyers who after notice and hearing repeatedly refuse to assume their part of that professional obligation henceforth be chastised by the organized Bar? I would answer each question with a qualified "Yes".

Many individual lawyers do not discharge, in any substantial way, what I perceive to be an existing professional obligation to improve the law, to enhance the administration of justice, and to make better the services of the legal profession. The grandiose legend often voiced at Bar meetings that local lawyers, as needed, will roll up their sleeves and give unselfishly of their time to do that which lawyers ought to do, unfortunately, is a mere fantasy.

A good lawyer, as a member of a learned profession, quite clearly should cultivate knowledge of the law beyond its use for paying clients, and a good lawyer should employ that added knowledge in the betterment of the law. Indubitably, that truism long has been a part of lawyering. Indeed, a good lawyer almost by definition must be continually mindful of current deficiencies in the administration of justice and without personal reward continually work for better courts, more qual-

* Past President, American Bar Association. Presented before the Conference on Public Interest Practice in Florida; "Practicing Law for Love and Money," Nova University Center for the study of Law, Ft. Lauderdale, Fla., November 16, 1979.

ified judges, and fairer and more expeditious legal procedure. A good lawyer must, too, be cognizant that many people still cannot afford adequate legal assistance and that the good lawyer should now, as in the past, devote professional time in their behalf. Today a good lawyer must be equally aware that there are many other areas which cry out in equally loud voices for the lawyer's distinctive talents, places where societal legal requirements presently are not fully met.

The fact that some good lawyers have provided legal services to the poor at no compensation, as in legal aid, or for reduced compensation, as in government sponsored legal service programs, cannot validly be used by the mass of lawyers not so participating as a shield against the rendering of free public service themselves. The indigent client, while significant, is only a part of the problem; a part in which the government recently, and quite properly, has assumed a far greater responsibility than the legal profession.

Working free part-time is admittedly not the best way to achieve lasting economic success, even if such free work be labeled "public service." Many magnificent lawyers over the years have rendered to the public substantial service without receiving pecuniary compensation. But we must acknowledge that not all, or even most, have. Thus, it seems to me suitable, proper, seemly, and timely, that the organized legal profession formally recognize that each lawyer presently has an obligation for some free public service which, if unreasonably ignored, warrants professional sanctions.

Heretofore it perhaps has been professionally acceptable for some lawyers to serve only paying clients. But, if that is so, a new professional standard is aborning. 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 old lawyer, or the young, look out only for paying clients. No longer can the legal profession merit public approbation under a random and haphazard standard that lets some lawyers do good and some do not so good. The fact that some lawyers still majestically do what good lawyers of a different day and time did as a complete discharge of their professional engagements cannot exonerate today's lawyers from providing free public service. Lawyers who work with no compensation or with substantially reduced compensation in order to mitigate the

problems of the indigent are, and always will be, rendering valuable public service. Even so, the entire legal profession has a duty to do those essential, but now often neglected, societal activities best performed by lawyers which do not result in pecuniary benefit.

The parameters of lawyer free public service henceforth must be as broad and flexible as the minds of those who will discharge that responsibility. That obligation extends to fulfilling essential legal needs of all Americans, rich or poor, young or old, male or female, black or white, happy or sad, gracious or surly, individuals or groups, all people whoever or for whatever reasons. If that obligation is to be met, each lawyer must help.

A lawyer's contribution to the public interest through free public service can never be judged by what was achieved or by the monetary value of the service contributed. In all events, that priceless and unique measure of professional devotion, contributed time, must be a prime factor in the determination of whether a lawyer fully has discharged those obligations of free public service. Each lawyer must perform that individual duty, no one else can. Financial contributions, no matter how extensive, cannot discharge the individual lawyer's professional obligation for free public service. The legal profession is not an elitist one in which the economically successful can buy amnesty for not doing what all lawyers are obligated to do. Indeed, if the law truly is to remain the very special and unique profession that it historically has been, those obligations must be non-transferable.

A major difficulty in lawyers contributing to the public free professional service is in striking the proper balance between that professional time devoted for public service and that professional time needed for the economic necessities which face all professional people. Up to now, those many lawyers who long have acknowledged some responsibility for free public service, both individually and collectively, have had no organizational guidance as to the type or extent of activities that will discharge that obligation.

The collective responsibility of lawyers must be translated into a defined professional duty such that each lawyer, individually, can render a share of the needed free public service. If that ethical demand is plainly enunciated, without equivocation or ambivalence, the decisional process now universally utilized by the organized Bar in establishing ethical boundaries will, in time, evolve definite guidelines for its application. Through trial and error and through experimentation, law-

yers ultimately can develop a revised code of professioanl responsibility which incorporates the who, how, what, and when of the free public service that society should receive in exchange for its grant of the exclusive privilege to practice law.

There are, of course, inherent difficulties in an adjudication of professional performance involving such subjective considerations as work habits, job requirements, organization and self-discipline, intelligence, employment restraints, public responsibilities, integrity, personal character, and professional know-how. However, perplexity in enforcement has never prevented the organized Bar from adopting ever stricter standards.

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 free public service with a full recognition of their differing circumstances. In some cases, those free public service activities might embrace extensive work within the organized Bar itself, such as disciplinary activities or law reform. In others, it might mean working with a public interest law firm, rendering legal services to those who are unable to obtain those services through the normal means of delivery, or representing charitable organizations. To some lawyers, perhaps free public service 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 must encompass at least a modicum of activity designed to improve, through constitutional or statutory revision, the justice system as a unit. Many legitimate legal interests in fields such as the environment, welfare, consumer protection, civil liberties, privacy, and the poor remain either not represented or underrepresented before legislatures, executive agencies, and courts.

The best way to measure the individual free public service required of a lawyer will vary from area to area and perhaps between different branches of the law. Additionally, there will be multiple areas of free 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 reported to the organized Bar as having been performed by a particular lawyer on a recurring and substantial basis are among those things which freely should have been contributed to the public weal. In all such determinations, diversity and experimentation must be fostered and supported. There is no single approach. Through variety, through trial and error, and through evolution, the organized Bar best can gain a proper understanding of the ways in which individual lawyers most meaningfully may render generous public service.

Society long ago made a determination that a fiercely independent and unshackled legal profession is essential to our system of government and to the individual 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. The grant of monopolistic privileges by society to a limited number of people to render specialized professional services always creates an obligation to make available to society those special skills nurtured by that monoply.

The legal profession can best perform if its mores, customs, standards and offices are self-determined. If a legal monoply is a viable societal institution, lawyers, in order to support that monopoly and to preserve self-regulation, must fill those essential public needs which will not otherwise be met, including the rendering of those distinct services which the monopoly itself makes lawyers peculiarly qualified to perform.

Some ethical restructuring should occur soon. Otherwise, the multiple ways in which lawyers presently render professional services will perhaps 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, or para-professionals, share in at least some of the work which traditionally has been performed only by lawyers.

While lawyers do owe other individual lawyers courtesy and integrity in their dealings, lawyers owe individual lawyers who are professionally unworthy absolutely nothing. The organized Bar is not an exclusive club and its members cannot be mutually protective. Those who do their professional part can no longer preserve those who do not. The organized legal profession is not and cannot be merely a trade guild. It must be an organization of learned professionals banded together more

effectively to serve the public as a whole. Those who do not do, as lawyers, what they ought to do, harm those lawyers who do what they ought to do, and they should no longer be tolerated.

The ethical progression by the organized Bar which I here suggest 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 competent. All of that has changed, for me and for the organized Bar. In most jurisdictions, repeated or gross negligence by a lawyer now warrants the severest censure. No longer does the profession allow marginal lawyers to repeatedly accept legal matters which they cannot competently and proficiently handle.

What is now needed is, in essence, a contribution of free public service. Each lawyer, for the first time, must be required to contribute in a definite, prescribed, and recurring amount, as fixed from time to time by the lawyer's peers, an amount somewhat in the nature of tithing professional time but not to exceed one-tenth. Such a commitment by the legal profession, while substantial, inevitably would result in distributing the ever-burgeoning burden of free public legal service more equitably among all members of the profession. That required free public service can be provided by the highly diversified legal profession in the multiple forms referred to above. But quite obviously, the overall obligation must be shared by each individual lawyer if the job is to be well done.

My thesis is a simple one: 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 essential public service. It does not now.

The public should know that each 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 long ago when the lawyer, by governmental edict, was given the monopoly for legal services. They

should know that the Bar, as a quasi-public institution is stalwart and not supine, that it is willing to eliminate from its ranks those lawyers who do not do their part.

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 by usage to require ever more of those persons who wear the legal mantle—and so they should. Lawyers always should, indeed they must, as they traditionally have, live nobly in the law.