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Barlow F. Christensen: *Lawyers for People of Moderate Means: Some Problems of Availability of Legal Services,* Chicago, American Bar Foundation, 1970. Pp. 313. $7.00.

In this valuable study sponsored by the American Bar Foundation, Barlow Christensen undertakes a "modest analytical task": the identification and preliminary examination of basic issues involved in the marketing of legal services. Such an analysis would provide necessary background for planning an attack on what may be the most important problem facing the legal profession today, namely the inaccessibility of its services to the great mass of the population.

To be sure, in the last decade or so, under increasingly heavy pressure from the public and stimulated by the resources of the Legal Services Program of the Office of Economic Opportunity, the profession has concerned itself almost feverishly with the problems of providing lawyers for the poor. The results of this concern have by no means satisfied all needs, but they establish the existence of a substantial reservoir of public spiritedness in the bar, and seem to have struck some spark of renewed appreciation in the public of the usefulness of lawyers. However, these efforts have largely ignored the needs of that much larger portion of the population whose income is sufficient to disqualify them for free legal services but not enough to allow substantial use of such services at current fee levels. Christensen tentatively adopts the income range of $5,000-15,000 as encompassing this group, and notes that in 1963 this range included 60% of the nation's families.[1]

Is it true that this segment of the population is not being adequately served? Do they really have a substantial need for legal services? Are they really unable to obtain or to pay for such services when they need them? At first blush, these would seem to be factual questions, to be answered with extensive empirical and statistical study. Christensen does not offer such a study, and laments the lack of such information from other sources. He concludes, however, perhaps out of desperation, that he does not need to answer them for his purposes. Instead, he assumes (1) that the current coverage of this market by lawyers is "far from optimal,"[2] and, more importantly, (2) that the need is largely a subjective concept which is elastic and susceptible to influence by the supplier. For the latter conclusion he cites the experience of legal aid and the more recent legal services programs

1. For 1968 the figure is even a bit higher: 62.9%. AMERICAN ALMANAC (Statistical Abstract of the United States) table 486 (1971).

2. B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES 5 n.4 (1970) [hereinafter cited as CHRISTENSEN].

for the poor, which have found that availability and demand were closely related.[3] In short, the problem is one of marketing.

Further, Christensen assumes that the function which legal services might be performing—the solution of problems involving law—is now being performed by default by other (unidentified) agencies or by the individuals themselves, so that the problem of marketing legal services is one of competition with other sources. He then proposes an analytical framework for evaluating the current system, or any proposed new systems for marketing legal services, in terms of four factors which are likely to influence demand: (1) the quality of the service offered, (2) its price, (3) its accessibility to the public, and (4) public knowledge and attitudes about it and about its supplier.[4] To this analytical framework a basic value position is added: The public interest should be the primary concern in evaluating existing or proposed systems.[5] The profession's claim to a legal monopoly on the provision of legal services cannot otherwise be sustained. The public interest, generally, is in high quality, low cost, easily accessible legal services.

From this general vantage-point, which is most emphatically not the traditional one in the profession, Christensen proceeds to re-evaluate not only the established rules governing the marketing of legal services, but also the various schemes and proposals currently being used or considered for increasing the availability of such services. It should be emphasized here that he fully recognizes—indeed he insists upon—the variety of social contexts in which the issues arise and the necessity of evaluating the marketing scheme in its social context. He finds the traditional values of the profession most appropriate, for example, to the solo practitioner in the small-town and rural context, in which reputation may well be sufficient to make a lawyer and his availability known to his potential clients. He speaks rather to the urban and metropolitan context, which he finds to be more typical of the present and of the immediate future of America:

> The nation's population is instead now predominantly urban, anonymous, heterogeneous, rootless and mobile. . . .
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> . . . .
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> [T]he traditional small-town lawyer is becoming increasingly atypical of the profession. . . .[6]

In this context, he finds many of the traditional rules inappropriate or at least inadequate as marketing devices.

Clearly the most noticeable barrier between lawyer and potential client is the cost of the lawyer's services. Christensen notes three possibilities for meeting this problem: reducing the cost of production, lowering the price, and spreading the cost. Only the first seems really promising. He believes

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3. *Id.* at 21.
4. *Id.* at 23.
5. *Id.* at 293.
6. *Id.* at 6.

that a great deal could be done in the typical law office to increase efficiency and therefore lower cost of production—greater specialization and routinization of lawyers' functions, greater use of paralegal or non-lawyer personnel for tasks which they are capable of performing, and generally more efficient management. The barrier here is the tradition of the lawyer-client relationship, which many feel would be impaired by too much organization. He assumes, on the other hand, that a reduction in the current profit margin of the lawyer—in particular for services rendered to persons of moderate means—would be "unrealistic." Cost-spreading schemes which are currently being discussed, such as legal expense insurance, tax deductions, or direct subsidies, promise some help, although they present considerable difficulties. Legal expense insurance, for example, would be difficult to market, since most people are less likely to envision themselves in future need of substantial legal services than of medical service. It would also be subject to abuse in that the insured would be able to select, in many instances, the occasions of his need and would be tempted to overuse the service and inflate insurance costs. The system would have to be carefully and closely controlled to be of advantage.

The chapter on specialization concentrates on the arguments which have been put forward against it; little time is spent concluding that there would be considerable social utility in fostering specialization in the legal profession. The arguments are fairly straightforward: Specialization threatens the economic position of the general practitioner, and it runs counter to the professional ideal of the Renaissance man. Christensen recognizes the economic objection as valid, but considers the public advantage to be great enough to overcome it. On the other hand, he dismisses the notion that every lawyer should be competent to handle any legal problem. He also dismisses the accompanying notion that one lawyer, properly trained and examined, is as competent as another, as no longer consistent with the realities of modern law practice. The law is too complex to be mastered *in toto* by even the most gifted of lawyers, and most legal problems now call for some degree of familiarity with the products of other disciplines such as medicine, engineering, economics, political science and natural science. Moreover, the nation's law schools turn out lawyers with a very broad range of abilities, so that insistence upon the theoretical equality of lawyers can result in the injustice of actually unequal battles. Indeed one can only doubt the charitable assumption that omnicompetence was ever an achievable goal. On the other hand, Christensen sees no inherent weakening of the lawyer-client relationship following from specialization, since the individual lawyer is still working within the personal context, while drawing from resources outside of himself. The chapter includes a discussion of specialization in England and in the American medical profession, as well as the practical problems in sanctioning and administering specialties.

The problem of advertising and solicitation ("Bringing Lawyers and

Clients Together") is dealt with in a chapter separate from those devoted to specific mechanisms for law service marketing, such as lawyer referral, special law offices, and group legal services. In general, Christensen finds the traditional limitation to obtaining clients by reputation alone appropriate for the small town lawyer, and perhaps also for the large-firm business lawyer. Each of these works in a small, well-defined community in which reputations are effectively communicated. He does not find the traditional limitation applicable to the lawyer seeking to serve persons of moderate means in an urban setting. He proceeds to analyze the values which are at stake in the prohibition against advertising, and concludes that a general relaxation is in order so as to permit "dignified efforts to reach and service the public." The primary concerns behind the prohibition he finds to be four: protecting the public against misrepresentation and overreaching by lawyers, discouraging the "stirring up of litigation," protecting the profession from "commercialization," and preserving the present competitive pattern. He finds each of these concerns in some sense legitimate, but still insufficient to justify a blanket prohibition against advertising in the face of the obvious public interest in greater distribution of legal services. Existing professional standards of preparation and training are higher now than ever before, and should afford protection against incompetence greater than that of the reputation-building process. The notion that litigation is inherently bad, and that meritorious claims can properly be left unvindicated in order to inhibit the assertion of spurious ones, is open to serious question. Equally open to question is the corollary assumption that the truly meritorious claim will find its way. Commercialization in a limited degree would not necessarily lower the profession's current image among the public, nor is it clear that the anti-commercial tradition is an essential inducement to a lawyer's adherence to the profession's other ethical values. Finally, there is no social utility in preserving for its own sake a rule which tends to favor certain classes of lawyers over others and which operates to inhibit the servicing of certain classes of clients. Recognizing that this position is unlikely to win favor within the bar, he posits as a minimum reform the elimination of the rule precluding a lawyer from advising the former or occasional client of subsequent changes in the law or conditions making further legal services advisable,[7] as well as the rule precluding statements of qualification in offers of service to other lawyers.[8]

Christensen devotes his final three chapters to three specific mechanisms for achieving a wider distribution of legal services among persons of moderate means. One, the lawyer referral service, is a common phenomenon across the country. A second, the special office for low-cost legal services, has been widely discussed but is now in operation only in

7. *Id.* at 162. This change has been adopted in ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-4, DR 2-104 (*A*) (1) (1969).

8. CHRISTENSEN at 163.

Philadelphia; its vital signs do not promise to quicken. The third, so-called group legal services, is in the author's view at once the most promising and the most controversial of the three. It is currently receiving considerable impetus from decisions of the United States Supreme Court which accord to the members of some groups a constitutional right to benefit from legal services provided by the group.[9]

Christensen is not impressed with the performance of the typical lawyer referral service, although he thinks that it is potentially a very useful marketing device. A plan which does not advertise itself more widely than any individual member of the bar,[10] makes no attempt to select lawyers on the basis of their competence to handle the particular problems at hand, makes no attempt to evaluate its own effectiveness, and makes no effort to control the costs of the services made available, is clearly inadequate. He calls for an all-out commitment by the bar to the success of lawyer referral.

The use of special law offices designed to provide legal services at minimum cost shows less practical promise, in Christensen's view, despite the apparent logic of the idea. Non-subsidized offices such as the Philadelphia Neighborhood Law Office program have not significantly reduced overall costs, and thus have primarily served those who can afford to pay.[11] Subsidized offices, if legal aid is any indication, would tend to come into conflict with the interests of a substantial segment of the bar. There seems little interest in bringing the neighborhood lawyer into a branch-office relationship with the downtown firm.

The book's longest chapter, and in many ways its most carefully reasoned one, is devoted to the phenomenon of group legal services, which Christensen prefers to call generically "intermediary arrangements." Traditionally, the bar has prohibited participation by lawyers in any such arrangement, with the exception of established legal aid societies or bar-sponsored lawyer referral programs. Recently, however, the Supreme Court has begun to elaborate a constitutional protection for such arrangements as a right of the group, based upon first admendment freedoms. In *NAACP v. Button*,[12] it was held that the NAACP has a right to hire lawyers to represent Negroes (whether members or not) in litigation concerning their civil rights, without charge to the individual client. In *Brotherhood of Railroad Trainmen v. Virginia*,[13] the state bar was held not entitled to an injunction against participation by its members in a union plan where-

9. *See* United Trans. Union v. State Bar of Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, *rehearing denied*, 377 U.S. 960 (1964); NAACP v. Button, 371 U.S. 415 (1963).

10. A telephone directory listing is often the only attempt.

11. CHRISTENSEN at 210.

12. 371 U.S. 415 (1963).

13. 377 U.S. 1, *rehearing denied*, 377 U.S. 960 (1964).

by union members who had claims against the railroads arising out of accidents on the job were referred to preselected counsel. The union members' rights of free speech, petition and assembly were said to include mutual assistance in asserting rights given them under acts of Congress, and advice concerning the need for legal services is an inseparable part of such assistance.[14] In *United Mine Workers v. Illinois Bar Association*,[15] this protection was extended to an arrangement whereby the union retained the lawyers on a salaried basis. In *United Transportation Union v. State Bar of Michigan*,[16] the protection was applied to a scheme whereby the union referred its members' claims to lawyers who made advance agreements with the union to charge less than the prevailing contingent fee percentage.

These decisions have caused the bar to rethink its position with respect to intermediary arrangements. The American Bar Association's Code of Professional Responsibility, adopted in 1969, attempts to limit liberalization to that required by the Supreme Court's interpretation of the Constitution: Non-profit organizations whose primary purposes do not include the rendition of legal services, to whose primary purposes the intermediary arrangement is reasonably incidental, which do not receive any portion of the lawyer's compensation, and which recognize the member or beneficiary as the client in the particular matter, may qualify, but *only to the extent required by "controlling constitutional interpretation."*[17] California, on the other hand, takes a more liberal view, opting for bar supervision of the particular arrangement based on information furnished regularly by the attorney. The rule states as evils to be prevented (1) control by the group over the lawyer's performance of his duties to his client, (2) profit by the group from the lawyer's services, (3) practice of law by unlicensed persons, and (4) advertisement and solicitation beyond "simple, dignified announcements" which do not name the participating lawyers.[18] Missouri has added to the ABA's formulation a general requirement of initial disclosure and periodic reporting to the bar by attorneys participating in such arrangements.[19]

Christensen's main contribution in his discussion of group legal services is his analysis of the *reasons* for the prohibition against intermediary arrangements, and his discussion of the various forms of arrangement in relation to the legitimate concerns behind the rule. He begins with the proposition that the public has a presumptive right to make such provision for obtaining legal services as is convenient and useful, and that the

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14. *Id.* at 5-6.
15. 389 U.S. 217 (1967).
16. 401 U.S. 576 (1971).
17. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103 (*D*) (1969) (emphasis added).
18. CAL. BAR R. 20, CAL. BUS. & PROF. CODE foll. § 6076 (West Supp. 1971).
19. Mo. R. CIV. P. 4, DR 2-103 (D) (5) (e).

organized bar has the burden of proof with respect to limitations it wishes to have imposed on such arrangements. He concludes that the primary public interest argument against group legal services is that the role of the intermediary group may tend to impair the lawyer's independence of professional judgment and action in his relationship with the individual member client. His position is simply that each such arrangement should be tested by this criterion, rather than attempting in advance to define in detail the kind of arrangement which will or will not be permitted. The blanket prohibition subject to specific enumerated exceptions tends, in short, to throw out some babies with the bath by emphasizing the use of labels such as "intermediary" or "practice of law by a corporation" rather than inquiry into the actual threat to the public interest involved. Christensen points out with justifiable scorn that the simple characterization of the relationship between client and intermediary as one of "agency" has permitted arrangements such as the preselection of lawyers by lay claims investigation companies on behalf of individual insurance companies.[20] Further, he notes that the intermediary arrangement in liability insurance contracts whereby the insurer provides the defense has been accepted, despite the very real risk of conflict of interest between the insurer and the insured (for example, in the event of potential liability in excess of the policy limits).[21] He finds no legitimate private interest of the bar which is better protected by the blanket prohibition than by careful case-by-case regulation. At least one particular feature, in any case, seems so likely to impair the lawyer's professional independence that Christensen seems inclined to have it categorically prohibited: the sharing by the intermediary in the lawyer's compensation from the client, or otherwise making a profit from the lawyer's services. This is equally condemned by the Code,[22] the California rule,[23] and apparently the Supreme Court.[24]

Christensen's book must be regarded as a valuable addition to the literature. It brings together in readable fashion the entire range of issues which have been raised and the problems faced by any system for the distribution of legal services. It contains a comprehensive if not exhaustive bibliography on the American system, and contains a number of comparative references. It makes a serious attempt to bring calm, rational, yet forward-looking judgment to questions which have all too often seemed to drown in a sea of rhetoric. It issues a call for self-examination to a pro-

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20. CHRISTENSEN at 268.

21. *Id.* at 270 *et seq.* *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-14, 5-15, 5-16; DR 3-102, 5-101 (*A*) (1969).

22. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 3-102 (1969).

23. CAL. BAR R. 20, CAL BUS. & PROF. CODE foll. § 6076 (West Supp. 1971).

24. *E.g.*, United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971), in which injunction provisions prohibiting fee sharing went unchallenged. See, however, the opinion of Mr. Justice Harlan, which takes the majority to task for overlooking the evidence of this abuse by the union in the particular case. *Id.* at 586 (opinion of Harlan, J., concurring in part and dissenting in part).

fession whose services are more than ever in demand but whose image and public standing are in need of substantial repair. It deserves and should receive wide attention among all those interested in the future of the legal system.

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