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ADDRESS BY THE PRESIDENT American Bar Association

Edward W. Kuhn

MR. PRESIDENT, MR. MURANE, LADIES AND GENTLEMEN OF THE WYOMING BAR:

My wife and I are most delighted that on our first visit to your wonderful State we are having the privilege and pleasure of attending your convention. We extend the greetings of the American Bar Association and best wishes for a most successful convention. It is also a pleasure for me to congratulate your Bar upon giving us the fine services of our chairman of the House—Eddie Murane, an outstanding and most capable gentleman, lawyer and parliamentarian. He rules over the House with extreme dignity and fairness. After watching Ed Wright of Arkansas preside for two years with unusual success we were a little apprehensive regarding his successor—whoever he might be. Our fears were promptly laid at rest by the skill and fairness with which Eddie presides and he has had some tough snarls to untangle. Presiding over that group of prima donnas requires all the patience that Job is alleged to have had and much tact. We are most grateful to you for lending us a stalwart member of your Bar.

Also, I would be most ungrateful if I didn't acknowledge a debt of gratitude for your State's assistance in getting me nominated for this office in January 1964. Because Eddie and I were both candidates for different offices, we agreed to run our own campaigns separately as was proper. But both of us knew how each of our states—Wyoming and Ten-

nessee—would cast its respective vote. And it didn't hurt either of us to have graduated from the Michigan Law School—Eddie, of course, many years before me.

I am pleased to acknowledge the presence of my old friend and long time member of the House of Delegates, Al Pence and his lovely wife with whom we spent three wonderful weeks in Europe together in 1957 as members of Cook's Tour No. 12. It is always a great pleasure to see and be with them. And I congratulate Dick Bostwick upon a very successful annual meeting.

The selection of a topic for a group of lawyers at a State Bar Meeting is rather difficult. You have heard so many speeches about different matters. And you can read many more. So I thought the best thing I could do is to bring you some information on what is happening to the practice of law on a nationwide basis.

Before we consider the recent impacts upon the practice of law let us briefly consider the anatomy of a lawyer as I see it. We know that the lawyer is fiercely, and rightly so, intensely individualistic, impatient of any restraints imposed by any person, organization or government. Some even resent the organized bar. Up to now he has always believed that the practice of law was a privilege. He is his own reservoir of strength and knowledge, his own citadel of courage and only to his own God and conscience does he answer for his actions. He is independent and largely conservative. He rightly values the elements of stability and continuity in human affairs, clinging to church, wife and barber, and his love of precedent makes him look to the past for guidance in the future. So much for the anatomy of our practitioner, hairless or gray.

As everyone is well aware, the United States is now in a period of national stock taking. We are agonizing over our ideals, our aspirations, our national image. One after the other, our institutions are being reassessed. Our present institutions are being measured by the past in an effort to accommodate them to present day living, to salvage what is durable and to build for a future which contemplates a population of the United States within the next thirty-three years of 350,000,000 people when today's graduates of this school

will be in the prime of their practice. The courts and the legal profession have not escaped this critical analysis and are on trial before the bar of public opinion in the field of legal services.

Looking at legal services in broad historical perspective, until around 1900, the lawyers' activities were relatively concentrated in matters of a transactional type, that is, in drafting wills, conveyancing; preparing articles of incorporation and similar documents; handling divorces; collection suits. In a society where few people were highly educated, and indeed many were illiterate or semi-literate (the prime attributes for voters by today's proposed standards) the lawyer provided the skill of writing. In a society of fairly few and modest governmental institutions, and small uncomplicated private ones, the lawyer was a substitute for a bureaucracy. He figured out what had to be done, wrote up the papers, filled out the forms, and got the show on the road.

In the 20th Century, general literacy has diluted the peculiar value of the lawyer's own literary skill. Moreover, with the growth and size of governmental and business units there has grown up an army of managers, officials and clerks who work in the highly specialized and standardized procedures that deal with the paperwork problems that lawyers formerly handled.

To further round out the picture before discussing the impacts upon the practice of law, let us briefly study some statistics supplied by the American Bar Foundation. It estimates there are at present about 55 million individual households in the United States. If each household could use three additional hours of legal services per year, it would require 155 million lawyer hours per year. Assume that each lawyer under present arrangements can produce about 1300 chargeable hours per year. On this basis to provide three more lawyer hours per household unit per year would take somewhere in the neighborhood of 100,000 new lawyers. There are about 200,000 lawyers now in private practice, and the number admitted in the last few years is about 10,500 each year.

Now let us consider the recent and present impacts upon the legal profession, forgetting entirely the question of unauthorized practice of law by every Tom, Dick and Harry.

THE SUPREME COURT DECISIONS

In 1963 in the case of *NAACP v. Button* and in 1964 in the case of *B.R.T. v. Virginia*, the Supreme Court of the United States greatly surprised the lawyers of the nation and announced principles of law governing the conduct of the legal profession that are far reaching and radical departures from formerly generally accepted beliefs. Some critics of the Court may lump these two decisions with the other decisions of the court which have found disfavor in some areas as unreal, fanciful and not well reasoned. But the fact remains, that they stand as the law of the land, alarming as they are to the profession. The importance of the *Button* case for the legal profession lies in the opinion rather than the decision itself.

In this case the State of Virginia by statute sought to prohibit this national organization devoted to resisting attempts to prevent racial segregation in education and other public activities from stirring up litigation and conducting litigation by "outsiders." In its brief the NAACP sought only to obtain equal rights and opportunities under law for negro citizens. Petitioner was not concerned with the practice of law per se except as it prohibited the activities of the organization.

Mr. Justice Brennan, speaking for five members of the Court, did "not reach the considerations of race or racial discrimination." Instead he explicitly placed the decision on the ground that the activities of the NAACP were constitutionally protected "modes of expression and association" which Virginia "may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business." Bear in mind, the NAACP was not engaged solely in soliciting legal business for its own dues paying members, but for the entire race-members it purported to represent. The protection of political rights was not the goal of the Court. In a deliberate and carefully worded aside Mr. Justice

Brennan opened wide the question of the constitutional protection by lay intermediaries that furnish legal services. After citing well known state cases that had condemned lay intermediaries, he invited a challenge to those decisions, saying "we intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed." The *Button* case is more far reaching in its implications than the better known *BRT* case.

In the last named case the Brotherhood, with whom the various state bars have warred for decades and whose practices have been prohibited in 19 states either by statute or court decisions, through its Department of Legal Counsel, maintained a list of "Regional Counsel," whom it recommended to injured Brotherhood members (and only members) and to the families of workers killed on the job, with the result that substantially all the workers' claims were channeled to the lawyers chosen by the Brotherhood. The Virginia State Bar challenged this practice as constituting unauthorized practice of law and contrary to the Canon of Ethics of the American Bar Foundation adopted by the Virginia Courts. The Supreme Court of the United States by a six to two decision reversed the Virginia Court prohibiting the above practice on the ground that it violated rights of "freedom of speech, petition and assembly" guaranteed by the first and fourteenth amendments. Mr. Justice Black declared that the state could not "Keep these workers from using their cooperative plan to advise one another." He intimated that constitutional protection extends beyond the recommendation of lawyers and includes their employment.

Some small comfort for the traditional practice of law may be found in Mr. Justice Harlan's dissent in the *Button* case when he said that it "cannot be squared with accepted constitutional doctrine in the domain of state regulatory powers over the legal profession," and cause for alarm found in Mr. Justice Clark's dissent in the *BRT* case when he said: "By its decision today the Court overthrows state regulation of the legal profession and relegates the practice of law to the level of a commercial enterprise."

The American Bar Association so far has refused to accept this invitation to open solicitation of law business by admonishing the state bars that solicitation is still unethical and subjects its offenders to disciplinary measures which the Association encourages. The Virginia Court in an effort to avoid the full impact of the decision has sought to reword and restrict its injunction.

OFFICE OF ECONOMIC OPPORTUNITY

Early this year President Johnson launched his sweeping attack upon poverty in the United States and placed before Congress a vast scheme to eradicate the spectre of want, disease, and lack of opportunity. The office of Economic Opportunity was created, headed by an energetic administrator, Sergeant Shriver. Caught up in the swirl of projects was one that vitally affects the rule of law—legal services for the indigent and more surprising to lawyers the unfilled needs of middle and upper income citizens for legal services in the areas of real estate transactions, wills, estate planning, tort claims, business relations, contract formation and interpretation and all of the usual and traditional fields of lawyers' activities. If the estimates of unfilled legal needs in these areas suggested by numerous surveys are to be believed, the full-time services of all present lawyers could be fully engaged in meeting these needs during the foreseeable future. Lawyers have long recognized these needs and have attempted to do something about them. But now the legal profession is suddenly and unexpectedly confronted with the vast resources of the national government to supply the means and the fanatical enthusiasm of administrators to see that they are supplied either by the profession or outside agencies or bureaus. What a challenge to those dedicated to the rule of law.

The War on Poverty adds a new and virtually unlimited dimension to this concept of unfilled legal service needs. We know that a host of problems beset the economically underprivileged who know no lawyer, who feel that the cards are stacked against them to begin with but who are increasingly the concern of an increasingly social-conscious nation.

There is a growing awareness that a denial or limitation of legal rights may cause or aggravate numerous social ills.

More and more we are coming to recognize the necessity of an interdisciplinary approach which seeks the causes and cures of legal and social problems simultaneously or at least concurrently.

The tendency is increasing in our civilization to couch such problems in legal terms and to seek solutions through the litigating process in an adversary setting. Such an approach obviously calls for the peculiar talents and training of the legal profession. This process of seeking out the ills in a social work context and then using the law as an instrument of solution or social change inevitably casts an immense burden upon the adversary system and the legal profession.

Stop and listen to this warning. The Director of the Institute of Continuing Legal Education at the University of Michigan Law School, appearing on a Department of Health, Education and Welfare program this past November, described the problem and offered a solution in the following terms:

But, who is to represent them [the poor]? Who is to see that their rights are protected? Obviously, we will never have enough legal counsel to go around to do this job. Again, the adversary system cannot provide the answer for us. Again, we must turn to the welfare workers, the social worker.

And, if you need further warning the then Acting Attorney General of the United States said at the same meeting:

And this is a function which can and must be filled not only by lawyers, but by concerned lawyers. It does not take a lawyer to right every wrong. It does not even take professional training.

That job is too big—and, I would add, too important—to be left only to lawyers.

If our estimate of the problems is accurate, then it seems that we must begin considering a change in our outlook. Up to now our attitude has largely been one of reacting, more out of instinct than reason, to challenge the cherished assumptions. Perhaps, it is now time to admit the inadequacy of past performance and to realize that the War on Poverty presents an opportunity to improve existing and inaugurate additional facilities for making legal services available to all the people

and maybe even to create new vehicles for this purpose. The issue now to be decided is whether the Bar will take advantage of the opportunity offered. If it does, we must then begin to ask ourselves what changes and improvements we want to make and what form or forms we believe the rendition of legal services should take in the future. If we reject the opportunity offered then we must either accept continued rendition of legal services at present levels or their improvement outside our professional organizations.

HEALTH, EDUCATION & WELFARE

Prior to President Johnson's onslaught against poverty through the Office of Economic Opportunity, we witnessed another Department of the Federal Government becoming concerned about the practice of law. On October 12, 1964, the Department of Health, Education and Welfare through the National Institutes of Health conducted a meeting on urban legal services, urban legal studies, and comprehensive mental health planning. The Institute undertook this sponsorship because it views mental health as more than simply the cure of diseases. Mental Health embraces social competence—the ability of a person to cope with his environment and to realize his full potential in a complex society. This line of approach coincides with the growing interest of other social disciplines in the impact of law on the quality of life in urban areas.

The Conference began with the discussion of the impact of law on the poor in the urban environment. The areas of family law, civil procedure, property, criminal laws and juvenile delinquency, consumers protection, mental illness and welfare were discussed.

One of the conclusions of the Conference is of interest to us,—

Perhaps the most important problem of law and the poor is the pervasive sense of alienation from the legal system among the urban poor. The law is seen not as a mechanism for protecting them against the encroachment of others, for asserting and vindicating claims of right, but as a part of the very structure of power and society that exploits and victimizes the poor.

Traditional notions of practice of law may foster this alienation. The adversary proceedings, the classical lawyer-client relationships, limited concepts of standing, restrictions on the class suit . . . all in their way may limit the capacity of the poor people to get adequate lawyering. The profession bears a responsibility to think through these questions and develop changes to make the legal structure open and responsive to the needs of the poor.

Still another agency of the U.S. Department of Health, Education and Welfare, Welfare Administration, Office of Juvenile Delinquency and Youth Development convened the Conference on the Extension of Legal Services in Washington on November 12, 1964. It was convened with the awareness that the effectiveness of traditional social welfare work might be tremendously augmented through utilization of law and advocacy. Underlying this awareness was the perception that the introductions of lawyers into a low-income community prior to those terminal points where, for example, a crime has been committed or a debtor has been evicted or his wages garnisheed, might prevent these conditions from arising.

GROUP LEGAL SERVICES

On July 30, 1964, the Committee on Group Legal Services of the State Bar of California, the second largest bar organization in the world, filled a progress report of 64 legal size pages. It is the most thorough study of its kind ever done. While no action by the State Bar is requested and further study is recommended let us briefly look at some of the conclusions and recommendations.

1. There is an unfilled need for legal services of such a substantial degree as to cause serious concern to the State Bar of California.

2. There is a present substantial public demand for group-type legal services. They predict, particularly in the light of the *B.R.T.* case, a far greater use of groups in the immediate future to arrange for the performance of legal services.

3. That it is in the public interest that the State Bar of California meet the need which this demand for group-type legal services reflects. It is recommended that the Rules

of Professional Conduct of the State Bar should be amended accordingly.

4. Such groups may actively attempt to channel legal problems of their members to certain designated attorneys if the legal problems are of a type that are common to all or most members of the group.

5. Conversely, an attorney may be permitted to enter into an "arrangement" with such groups stating the terms on which he agrees to accept employment from members of the group, where the attorneys are paid by the individual members, if the legal problems are of a type that are common to all or most members of the group.

6. That five restrictions, set out in the report, on group-type legal service plans be vigorously enforced.

PROFESSIONAL CORPORATIONS

In 1962 the ABA created a special committee on Professional Corporations primarily to study and improve the economic condition of lawyers. The committee was primarily concerned with the tax discrimination against lawyers as individual practitioners as compared with lawyers employed by corporations. Many states, including Tennessee, have laws having for their purposes the extension to the professions the privileges of achieving corporate status accorded to non-professional persons, so that adequate provision could be made for retirement and pensions. Aside, from these advantages and in line with our discussion of the future of the practice of law, we observe that not only the committee itself but also the Standing Committee on Professional Ethics of the ABA have concluded that Lawyers can carry on the practice of law as a professional association or professional corporation possessing certain characteristics of limited liability, centralized management, continuity of life and transferability of interests without being in violation of any of the Canons of Ethics, provided, appropriate safeguards are observed.

In the event the present unfavorable rulings of the Treasury Department can be overturned, I predict the formation of many legal corporations and their engaging in the practice of law provided they observe the Canon of Ethics as now

formulated or as modified by the present re-evaluation committee. At the present time the Association takes no position for or against professional corporations for lawyers.

Without discussing them, let's include the problem of the house counsels of corporations advising employees as part of the fringe benefit program of the corporation, the continued encroachment upon the practice of law by lay organizations of all kinds, the effect of *Gideon v. Wainwright* calling for the additional services to represent an additional 150,000 accuseds, the question of legal costs, prepaid insurance for legal services, the question of allowing specialists to so advertise and many others.

WHAT THE ORGANIZED BAR IS DOING

Confronted by these sudden and unexpected developments what has the organized bar been doing? It has two choices—to ignore them and proceed along present courses or to accept them, deal with them and find ways and means by which the traditional bar, clinging to its illustrious past can serve the nation under changing conditions. The obvious and reasonable choice is the latter. The ostrich approach is out. What has the bar done?

1. In 1964, the A.B.A. House of Delegates authorized the appointment of a special committee, under the leadership of Ed Wright of Arkansas, to re-evaluate the Association's Canons of Professional Ethics, the first such study in fifty years. The ethics review, expected to require at least two years, is intended to effect such changes as are needed to make the Canons comport with modern conditions of law practice. In outlining the dimensions of the project, President Powell, said it doubtless would be found that many of the existing Canons are adequate. But he said that marked changes which have occurred in law practice since the original Canons were adopted in 1908 have made unreliable the assumptions on which some of the Canons were based.

The special committee's study will be concerned with the enforcement of the Canons as well as their content.

There is a growing dissatisfaction among lawyers with the adequacy of the discipline maintained by

our profession. The study will not deal directly with disciplinary procedure and action, but will carefully evaluate the extent to which departures from high ethical standards and lapses in strict enforcement are related to the content of the Canons. Appropriate revisions or additions could contribute significantly to more effective grievance procedure, as well as to increasing the level of voluntary compliance.

2. At an exploratory conference held in New Orleans on February 7, 1965, preceding the Midyear Meeting of the House of Delegates attended by representatives of four ABA Sections and seven Committees most directly concerned with the legal services problem the following developments were considered:

a. The Supreme Court decisions in the *Brotherhood* and *Button* cases.

b. The report of the State Bar of California recommending that group legal services by private organizations be extended and legitimized under state bar code of ethics.

c. Proposals advanced at a national conference on "Extension of Legal Services to the Poor" convened in November in Washington under auspices of the federal Department of Health, Education and Welfare.

It should be mentioned here that the full impact of the activities of the Office of Economic Opportunity as they pertain to the furnishing of legal services were not before the conference. The War on Poverty was to come later. This development may give you some idea as to how fast we are moving in this field.

The House of Delegates approved a resolution which, among other things, called for the creation of a special committee to study the problems. At its spring meeting the Board of Governors created this committee, designated the Special Committee on Availability of Legal Services, with authority to study and make recommendations with respect to the adequacy and availability of legal services to all who need such services. The Committee will consider (1) the extent of unfilled needs for legal services; (2) the adequacy of existing

methods for providing legal services; (3) means of improving such methods; (4) whether new methods are needed; (5) whether group legal service plans are needed and may be established with appropriate safeguards to preserve ethical standards of the profession and protect the public.

3. The Association Committee on Lawyer Referral Services launched a stepped-up program to encourage local bar associations to expand significantly Lawyer Referral Service facilities. The referral system, managed by local bar organizations, is designed to extend legal services to low income persons within the framework of traditional ethical standards.

4. With organized bar support Congress passed the "Criminal Justice Act of 1964," which provides, for the first time, a system of compensated counsel for pauper defendants in the federal courts.

5. The Ford Foundation announced in July an additional grant of \$2,000,000 for the "National Defender Project," bringing to \$4,300,000 the total of grants designed to broaden and strengthen defender services throughout the country.

CONCLUSION

The Bench and Bar live today in the greatest period of intellectual challenge since the long, slow establishment of constitutionalism was accomplished at the hands of John Marshall in the last century. Rapid, unforeseen and startling social and economic changes, a continuous succession of scientific break-throughs, unprecedented and sustained economic growth, skyrocketing and shifting population outbursts, the most important revolution in communication since the printing press—television—all of these changes are transforming the society which the law serves and for whom we practice.

As a live and breathing thing the law must be profoundly concerned with these pervasive changes. You will recall Dean Pound's admonition, "The law must be stable, but it must not stand still," which today has greater force and relevance than ever.

We must look to the Bench and Bar to give meaning, substance and direction to social change, and be willing to accept it, which is to say, to relate it to the past and to recon-

cile it with our continuing experiences and objectives as practitioners. There must be a spirit of change and a spirit of conservation.

I emphasize change because it seems to me that, like it or not, help it or not, we are headed for a volume and degree of change in the fabric of our life and our profession wholly without precedent. We must be equipped with legal usages, with legal vision and in the breath of our reference to deal with them. We must deal with them far more speedily than we have ever done before. We must be more than students of the law. We must be students of society, historians before history has happened. For the substance of our lives is not the law. We only use it. The substance of our life is the society in which we function, restless, aspiring full of good intentions, full of errors, incredibly active, driven by the will to get things done.

The perpetual challenge is to accommodate the law to changes. In Sir Frederick Pollock's words, "To keep the rules of law in harmony with the enlightened common sense of the nation."

This restlessness for change is prompting a thorough re-examination of the objectives and purposes of our profession in the light of the impacts upon it as outlined above. And in closing let us dwell upon the words of Mr. Justice Harlan in his dissent in the *Button* case that "at this writing it is hazardous at best to predict the direction of the future."