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## WYOMING STATE BAR SECTION

## IT'S TIME TO RETOOL

ALFRED M. PENCE\*

Gentlemen of Utah State Bar:

An attorney addressing other lawyers on a professional subject is indeed undertaking no simple task. That is especially true in this instance for the reason that my years in the practice are far less than many of you have enjoyed, and in many instances my experience in those years of practice has been less broad than yours. It is my sincere hope in the presentation of this paper that we can consider the thoughts expressed as being in no sense personal reflections upon anyone's practice of the law, but rather an analysis of our profession to the end that some at least may find thoughts that are useful in their offices and suggested practices that might result in benefit.

In talking to you this afternoon, I should like to cause our thinking to be directed to the legal profession, the legal profession as an association of lawyers, a living entity characterized by counsellors of those in need of legal counsel, advocates of those whose rights are deserving of a champion at the Bar. Let us stress the human element as it meets the law, rather than to dwell in the realms of the abstract as suggested by the word "profession."

Historically, the law is old. Time computed by centuries made little inroads on the complexion of the legal profession. The code as delivered to Moses on the Mount, and as refined through the Roman Code, the Napoleonic Code and the Common Law, is well recognizable in the Code as we know it today, thousands of years later, and does not reflect the changes that are evident in means of transportation, instrumentalities of communication, conventions of dress, or any of the thousands of other things affecting our lives in modern society. Procedure in the Great Sanhedrin, presided over by the High Priest Caiaphas 1900 years ago at the time of the trial of Christ, during the reign of the Caesars, differed little from our recent courtroom scenes. The law offices themselves, and the personal conduct of lawyers have followed a familiar pattern. I submit that the profession has not kept pace with the progress, the development, the change that has all but revolutionized the business, political and social lives of our people; but on the contrary, has followed a stereotype pattern.

A prominent lawyer in a recent writing has described the profession as a monopoly having the dual objectives of promotion of group welfare and public welfare.

As we so often find the truth to be, it appears to me that possibly our monopoly has in itself been responsible for failure to accomplish the dual purpose of group and public welfare. The very absence of competitive threat contributes to stagnation. We might also observe that our monopoly is rapidly disintegrating

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\*Address to the Utah State Bar Convention, Jackson, Wyoming, June 16, 1950, by Alfred M. Pence, President, Wyoming State Bar Association, 1949, '50.

and further depreciating group and public welfare. I shall dwell upon that more a little later.

In recent years, and especially since the Second Great War, the American Bar Association and many state Bars have become quite interested in the future of our profession. I suppose we might assume that lawyers as a whole are more or less skeptical and become more apprehensive than other mortals, or maybe it's just that they recognize gathering clouds as evidence of storm before the masses are so impressed. Whichever the case may be, organized attorneys are being awakened and there has developed a school of thought that conditions as evidenced do not indicate a healthy condition—to be more precise, that our conception of constitutional government and the court system as we have known it are undergoing vast changes with which our profession has lost pace; that laymen are moving in on us; that much law is being practiced before Boards, Commissions and Departments of Government rather than Courts; that there is developing a philosophy of socialization of the professions; that in some foreign countries where isms are propagated the legal profession has been considered an obstacle to ism advancement; and that it has become good manners in those political circles to eliminate or emasculate the legal fraternity as an organization, at least.

So some of the farsighted associations in the field of law have attacked this problem initially by finding out as much as they can about our weak points, and finally by laying plans to strengthen those weaknesses and go farther by building, in a reinforcing way.

As the profession took stock of itself, it found out a lot of interesting things. I shall relate some of them only—time would not permit an exhaustive recapitulation.

1. The Survey of the Legal Profession conducted by the American Bar Association has completed one phase of its work and has been busy analyzing some of the facts compiled which, among many other things, discloses that:
  - a. Two-thirds of the lawyers in America practice law alone—single lawyer offices, which are dubbed “solo” practitioners.
  - b. 25% are in firms.
  - c. 5% are associated only.
2. Available Department of Commerce figures for 1947 on incomes of lawyers, reveal:
  - a. Solo attorneys average \$5,700 per year, with more than one-half of them earning \$4,275 on the average.
  - b. Firms of two average \$8,000.
  - c. Firms of three average \$12,000.
  - d. Firms of four average \$16,000.
  - e. Firms of five to eight average \$20,000.
  - f. Firms of nine or more average \$27,000.

If you will retain these figures we will come back to them a little later. **Just**

keep in mind that two out of three lawyers practice alone and only make two-thirds as much money or much less than those who have a partnership. That will suffice in a general way.

3. Last year, the Iowa State Bar conducted a survey to find out what the laymen thought of the profession. Some of their disclosures were very enlightening—for instances,
  - a. 51% of the citizens contacted never had employed an attorney.
  - b. 40% of the same group would settle a case for one-half rather than go to court.
  - c. Of those who needed help with a real estate transaction, only 60% went to lawyers.
  - d. Of those needing help with a tax matter, only 34% went to lawyers.
  - e. Many who were having a will drawn went outside the profession for the drawing of the instrument.
  - f. The clients' most frequent complaint of the profession was *delay*.
  - g. That in real estate, wills, insurance and tax law, the lawyers were in direct competition with accountants, real estate brokers, and bankers.

Might we not pause here to inquire, "Where is our monopoly?" When untrained, unlicensed competitors for our professional work are taking care of the title to our clients' homes, are passing judgments on the law which raids their paychecks, and are providing for the disposition of their legacies to their widows and children, might we not also inquire concerning the group and public welfare?

There are gradually coming to light some of the reasons for these things. Robert B. Norris, a freelance writer and a member of the faculty of State Teachers College of Cortland, New York, writing in the June *Good Housekeeping Magazine*, gives us the layman's view as he found it. He says.

"It seems to me that far too many members of your noble profession are sitting around on your ethics and letting your public relations take care of themselves."

He goes on to point out that the average citizen knows nothing about the law and lawyers; that they do not know how to approach us; that they are uninformed on the pitfalls of the law and guards available to them against these pitfalls; that they have absurd misconceptions concerning our charges for our services; and generally, that the law is a clouded and feared mystery to them. He submits, by inference at least, that the profession owes the public a duty to counsel and advocate, and that it naturally follows that we owe that same public a duty to acquaint it with the service which we hold available. The argument makes sense to me, doesn't it to all of us? The question remains then that if this is our duty, our responsibility and our problem, what are we going to do to provide the solution?

Before tying all these data and knowledge together in a summary of some fashion, I believe we can concede one further point, namely; that from the completion of the average lawyer's formal education to his retirement from practice he does nothing in the way of furthering his legal education except making some

effort to keep up with new legislation, recent decisions, and learning by his own personal experience. Permit me to quote from the poet, Robert Burns: "Oh wad some power the giftie gie us to see oursel's as others see us!"

In the field of Ancient Greek Drama a slogan or motto of a sort prevailed and was expressed as: "holding the mirror up to nature." I have been endeavoring to hold the mirror up to the legal profession so that we might see therein a reflection of ourselves as others see us, and here is the picture presented:

We see lawyers engaged in a general practice as an individual enterprise in a business world where emphasis is placed on assembly line production; lawyers content with an income for the most part which is, many times, less than that earned by railroad trainmen, skilled craftsmen and a host of others whose preparation and training requires much less in cost and effort; lawyers who fail to make the nature, need, and price of their services known to the public in a world where competition is keen and solicitation a profession in itself; lawyers who are many times unprepared to counsel their clients on modern legal matters, and in some instances at least actually refer clients to laymen for advice; lawyers who conduct their business without a well defined plan of their time, their client's business, or their court calendars; and lawyers who, generally speaking, are doing business on a basis entirely out of time with a rapidly changing and fast moving economic, social and political world.

Well, that is rather a sordid picture and one that needs a real job of retouching. In order to illustrate my thinking to you, I should like to set up and organize a so-called "model office."

First we will look about the profession in our town and determine upon an harmonious association of lawyers as the nucleus for either a partnership or an officing arrangement of mutual benefit, this because I am firmly convinced that the day of a general practice is gone and the day of specialization is here. Thus, an office to care for all the needs or most of the needs of a clientele must be an organization of specialists insofar as the size of the community and the abilities of its available lawyers are concerned. Once the personnel of the office is selected, we will arrange for the renting, remodeling or building of a suite of offices to meet modern requirements—an office with adequate space, proper ventilation, efficient lighting, and a modern atmosphere designed for efficiency of work, comfort for all, and possessed of some eye appeal. We will, while the office is being made ready, hold a conference of the members of this new firm and determine those subjects in which each attorney will make a sincere effort to become specialized. This may, and undoubtedly will, require further legal education by way of attending courses of study, participation in law institutes and by self preparation in order that our office is currently advised on new and current legal subjects such as tax law and rules of the Treasury Department; minimum wage and hour acts, labor relations acts and rules of the administrators; laws pertaining to interstate commerce and transportation in general and rules of the Interstate Commerce Commission and the Public Utilities Commissions; laws and rules pertaining to communications and the rules of the Federal Communications Commission; laws pertaining to aviation and the rules and regulations of the Civil Aeronautics

Board ; and many more subjects, new and undergoing changes, which are vital in modern business life, but about which the general practitioner has had little if any time to learn.

When our office is ready to open, we will hold another conference at which time we will discuss and determine upon reasonable charges for our service, and we will make it an inviolate rule that our standard of fees be adhered to; that we discuss fees with each client in advance and, wherever possible, a definite arrangement will be made respecting fees including the amount and method of payment; we will see that all clients arriving in the office are properly announced to the attorney of their choice, and that he either sees the client without delay or makes a definite appointment for a later hour—always keeping in mind that conservation of our clients' time is protecting one of the valuable business assets.

Shortly after our office is open to the public we will hold a third conference at which it will be made a definite policy that all members of the firm be actively associated with the local and state bar association and we will, as active members, encourage the association by all means within our power to elect strong leaders and appoint hard working committees to launch a program of public relations and progressive association policies along the lines of: streamlining court pleadings and procedure resulting in simplified service of process, abbreviated pleadings, pre-trial conference, direct and rapid appellate procedure, and all other means to avoid delays wherever possible; we will encourage the bar in taking its rightful position in the administration of justice by being alert to the appointment and election of competent judges and court officials; through our position as officers of the court we will be insistent upon timesaving measures to avoid unduly wasting the time of litigants, witnesses and jurors, and thus bringing to a speedy but just conclusion all business before the court; by insisting that the professional conduct of our members be such as to inspire the confidence of the citizenry, and yet be so human as to invite the intimate confidences of our friends, neighbors and business associates; by refining our personal conduct to the extent necessary that we would never mitigate the esteemed position of the court, nor so conduct ourselves as to discourage clients, witnesses, spectators and other prospective litigants from a repetition of their experience in court to the end that they will not settle claims for one-half rather than repeat their court experience. We would take a position favoring a program of public relations wherein we would by all means at our command inform the public of the need in modern society for the services of an attorney specialized in their problems, the method of contacting the lawyer best equipped to serve the particular need, the fees which might be reasonably charged for the service solicited, the time which would probably be required to dispose with the business and the individual benefit to be derived from the service rendered; a program of information concerning the proper role of the lawyer and the accountant, the lawyer and the real estate broker, and the lawyer and the banker; a program so comprehensive in nature that an informed public no longer need be in the dark as to which of its problems should go to an attorney, at what stage they should go, how much it will cost, and what benefits will be realized; a program which would give the profession an opportunity to discharge its obligation to public welfare and to group welfare, and

keep sacred the trust of a monopoly; a program which at least offers the possibility of bringing to the lawyer the 51% of the people who now go without his services or substitute his services for one less qualified. Thus we would endeavor to create in the Bar Associations vehicles to effectively transport the cause of the profession, but always in the public interest.

Not all of you will agree with my philosophy of the need for specialization, and I do not want it inferred that specialization should be carried any further than to include a policy in each office that one attorney be especially prepared to handle the highly technical matters requiring special effort.

John E. Mulder, a member of the Philadelphia Bar and director of the Committee on Continuing Legal Education, writing in a recent edition of a legal periodical has said:

"The first obligation of a lawyer is to his clients. He must handle their affairs as well as they can possibly be handled. This is a duty to his clients, his profession and to himself. What do these private responsibilities involve? They involve a knowledge of changes in the law, both substantive and procedural. They involve brushing up on techniques, on 'how to do it' aspects of the practice of the law. For example, when a substantial innovation takes place in legislation, such as the Revenue Act of 1948, the practitioner must learn about it as much as a doctor must understand everything about a new cure for the common cold. How else can he prepare income tax returns, or plan estates?"

That is one of the very things I have been talking about, and one of the things I believe requires some degree of specialization. Let me give you a specimen case.

A lawyer has completed his study of the 1948 Revenue Act and is now ready to counsel his clients concerning the effect of its many innovations. One of the things that he has given special note to is a rule of the Treasury Department to the effect that in those cases where the testator has willed his surviving spouse one-half of his estate, which is exempt for estate tax purposes as community property, and in making the bequest has caused it to be contingent upon the survival of the spouse for a given length of time, that if that period of time exceeds six months then it is not a deductible item for estate tax purposes. The lawyer feels an obligation to go over his office copies of wills drawn for clients in the past to see if any of them need changing. He finds two wills in large estates of prominent clients whose objectives were tax savings in which the will wording is as follows:

"one-half of my estate to my wife if she survive the probate of my estate, otherwise to blank and blank"

In his jurisdiction it is impossible to probate an estate in six months. The two clients are called to his office at once; the provisions of the law are explained to them and codicils are recommended. The clients are most grateful to an alert attorney; execute the codicils in accordance with the advice of counsel; and leave the office assured that their selection of a lawyer has in one instance at least proved wise, and that their interests are being constantly guarded. Could this attorney possibly represent his clients in their estate planning had he not studied the Rev-

enue Act and Treasury Department rules as he did and taken the action indicated? Does this not come within the meaning of John Mulder's words, "this is a duty to his clients, his profession and to himself"? How many of us have done what the attorney in my example did? If there are any of us who haven't, then it behooves us to make a note of it now, and when we return to our offices make that action a first item of business.

Well, I have given you one example of diligence on the part of an informed attorney which was proper representation of a client. Now permit me to give you an example where our attorney did not properly educate himself on the Revenue Act or perform his duty. This time our attorney is not interested in tax law; he hasn't time to handle these matters; he is too busy with his general practice and especially his probate practice; if tax matters come up he will send them down the hall to the accountant—"that is all the accountant has to do anyway."

A rancher friend comes into the office who has reached retirement age and advises the attorney that he is a widower with an adult son and daughter who have been with him on the ranch since their mother's death many years before; that he realizes he has only a short time to live and that he wants to plan his business to the best advantage of his children. Is there any reason why he cannot make a gift of his ranch and cattle to his children and thus avoid the trouble and expense of probate? They will get everything anyway, he reasons. The attorney turns the matter over in his mind, sees no reason to quarrel with the client's reasoning; calls in a stenographer; dictates a deed and bill of sale; and the elderly rancher leaves the attorney's office for the office of the recorder at peace of mind, feeling that he has done well by his loyal children who have given him their service and devotion since the death of his wife. Two years later the old rancher dies; estate tax is assessed on the property subject of the gift as a gift in contemplation of death just the same as if the property had been probated, thus effecting no tax saving; two years later the son and daughter decide to sell the ranch and cattle and do so, but they have heard something about income tax on a sale of capital assets so they ask their banker how they should handle the matter. They are advised by the banker to see Attorney Jones who has recently handled such a matter for one of the bank's customers and seems to have especial knowledge of these matters. So the young man and woman arrive at Lawyer Jones' office and explain their problem to him. Well, most of you at least know the result—Jones has the sad duty to advise them that their tax base is the acquisition cost to their father, plus improvements, less depreciation; and when he figures the matter out on this ranch acquired in 1902, he has no other choice than to explain to them that almost the entire sale price is taxable gain. Answering their inquiries, he then is forced to explain to them that had their father willed the property to them or permitted them to take it as his sole heirs at law, their tax base would have been the value at the time of their father's death, and land having appreciated only slightly in the intervening two years, the tax would be nominal. Who is responsible for this kindly old rancher failing in his purpose? Who is to blame for the large tax paid by his children? The lawyer who was too busy with probate work to study tax law. What has happened to his obligation to his client, his profession and himself? I submit that it will take a good many years of good service by



some attorney if this young man and woman ever have their confidence in the legal profession restored.

Gentlemen, the two cases which I have cited to you are not fictional. They are only two among many thousands of like cases representing good and bad work on the part of the profession, but they do illustrate, forcefully, I think, one of the major points of this paper: that this is a day of specialization in the practice of law, and that only continuing legal education can prepare us for our duty to modern society.

In the Iowa State Bar Survey to which I have previously referred, 17% of those clients interviewed stated they would not again employ the services of an attorney, and 19% said that in their opinions they were charged too much.

All of us at some time during our practice have known that a client was unhappy about the fee charged, and it is reasonable to guess that in 99 out of 100 of those cases we had failed to reach an understanding concerning fees before the conclusion of the business at hand. I cannot help but agree with the conclusion of Mr. Norris in his *Good Housekeeping Magazine* article when he says that if an attorney hedges on the probable cost of your litigation or is entirely indefinite about his charges for his services, you had best pay him for the call and select another lawyer. When we cannot quote a fee with certainty, which will many times be the case, we can at least give our prospective clients a formula by which they can with reasonable certainty calculate the charge. Pursuing such a policy will materially reduce the 19% who think they are charged too much.

What about the 17% which Iowa found would never employ a lawyer again? The percentage is far too high. There is something radically wrong. A mortality rate of that size is ruinous. Isn't it time we stop and take stock of our profession?

Well, their biggest complaint was delay, and not one honest lawyer can quarrel with that. Delay is present far too often; delay is wasteful—wasteful to our clients and wasteful to us. It is our biggest enemy. How many times do clients come to your office for work which has been promised and you fail to have it ready and say, "Come back tomorrow" or "Come back next week"? That sort of thing does not compliment the profession. I don't like procrastination when I deal with others, and they shouldn't like it when they deal with me. Is there any mystery in the fact that 17% become unhappy? Well, let's stop it!

There are some who hear or read my remarks who will not be convinced of the merit of the suggested program of public relations. Some will feel, I am sure, that we are soliciting and thus, in spirit at least, voiding one of our canons of professional ethics. Others will feel that we are going into the field of advertising and thus again violating our code. Still others will feel that fee schedules are confidential and that to publicize them is approaching professional services from a merchandising standpoint.

Let me make my position clear in this respect, at least. I do not advocate that any of these matters be indulged in by individuals or firms, but only by duly constituted Bar Association activities as a result of approval of its members. I

do not suggest the soliciting of business by the profession, but only the dissemination of information which will culminate in mutual benefit to the public and to the Bar. I would not have us put price tags on our services because I know too well the many considerations that go into the matter of fixing fees, but I would suggest such general information concerning fees as to dispel the school of thought that our fees are prohibitive, disproportionate to the services rendered, or beyond the reach of those people who find themselves in a position to use our services profitably.

I like these words of Professor Norris and I'd like to see our behavior exemplify them:

"Law and lawyers should not be thought of as something apart from the life of honest, respectable citizens; the legal profession, like other professional servants, is ready to help us. Our American legal system, including the lawyers, who are just as much sworn officers of justice as the judge on the bench, has grown up as a part of the life and needs of a free people."

In bringing this paper to a conclusion, I should like to quote at length from the report of the Iowa State Bar Committee to its Board of Governors. By my own words I could not more ably express the sincerity I hold in the thoughts and conclusions therein expressed.

"In the program above, we have suggested activities to be undertaken by the county bar associations which will be of inestimable direct value to the citizens of their communities, and ultimately will give to the organized bar and its members the place that appropriately is theirs in the life of their county and state.

"It is our belief that whether through false modesty, or wrong understanding of their duty the members of the bar, both alone and as an organized group, have been silent when they should assert themselves. The effect we believe is that we are derelict in providing a leadership which your committee regards as a duty. This applies to our relations, not alone to the public whom we serve, but also to the court whose officers we are by our membership in the bar.

"The extent to which the public will recognize, accept and later solicit the opinion and expression of the bar will be in direct relation to the confidence which the bar will have created in the public mind. When the public believes that the primary interest of the bar is the public interest, we are confident that not only will it respond, but also will solicit the expression of the organized bar on matters of public interest.

"This whole program presupposes that we will create, not by word but by deed, not by precept but by example, in the public mind the confident belief that men of the bar have these three qualities—that they are men of high character, that they are skilled and expert in their professional field, and that the service they render will be rendered for a free commensurate with the service.

"Until we ourselves demand these qualities of our brothers in the profession, the public will be skeptical, doubtful and unconvinced. They will turn to their detriment, to others not learned in the law, but in whom they have confidence whether or not misplaced. And the sad

effect will be that if we are derelict in failing to demand these three requisite qualities we will have dishonored a noble profession and will have failed in our duty to the public.

“The program we have suggested and now if the organized bar will recognize that each lawyer, in his everyday relationship with each client, is responsible for the relations of the bar with the public. What he does or fails to do, he does for or against his client and for or against each member of this Association. We recommend that each lawyer regard himself as a member of this committee in all that he does professionally in or out of court, and in his everyday relations as a citizen of the community.”

That, I think, effectively sums up the thoughts which I have tried to bring to you in this paper, and I urgently suggest that we dedicate ourselves from now on to serious thinking concerning this problem, and to earnest endeavor for an effective solution. I submit that if we fail we relegate ourselves to a position of lack of trust and one of positive insecurity.

You have honored me by your invitation to attend and speak at this meeting and I shall always cherish the many new friends whom I have met here. Wyoming is proud to have had the opportunity of affording one of its natural beauty spots for your meeting, and to have had the pleasure of being host to the Utah State Bar. Gentlemen, I thank you.