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Lewis F. Powell, Jr.
House of Delegates
August 14, 1964
New York City

AREAS OF EMPHASIS FOR 1964/65

It is customary for the incoming President to indicate the areas of activity which he expects to emphasize during his term. With 19 Sections and 66 Committees, all engaged in significant work, it is almost presumptuous to suggest that some activities receive a higher priority than others. Yet, there is an ebb and flow in the work of the organized bar - as in other human endeavors - and certain subjects do seem uniquely important to our profession at this time.

The three which seem to me to merit a measure of priority relate to (i) professional ethics and grievances, (ii) criminal justice, and (iii) the broader availability of legal services to all who need them. I will comment briefly on each.

Evaluation of Canons of Ethics

The House has created, upon my recommendation through the Board of Governors, a new Special Committee charged with studying and reporting upon the adequacy and effectiveness of the present Canons of Professional Ethics, including their observance and enforcement. The Committee is authorized to make such recommendations for changes therein as may be deemed appropriate to encourage and maintain a high level of ethical standards by our profession.

The original 32 Canons were adopted in 1908, upon recommendation of an ABA Committee appointed in 1905. In 1928 Canons 33 through 45 were adopted. Canon 46 was added in 1933, and Canon 47 in 1937. The need for a general re-evaluation and perhaps revision of the Canons has often been proclaimed.* But except for certain amendments, the Canons have remained essentially in their original form.

*The ABF, upon request of the ABA Board, made a study of the need for revision in 1955-58 and by a divided vote concluded that a broad revision was needed.

As early as 1934 Chief Justice Harlan Fiske

Stone commented on the Canons as follows:

"In the new order which has been forced upon us, we cannot expect the bar to function as it did in other days and under other conditions. Before it can function at all as the guardian of the public interest committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationship of the lawyer to his client, to his professional brethren and to the public . . . Our Canons of Ethics for the most part are generalizations designed for an earlier age. . . ."*

The recent events in Dallas have stimulated a new and intense interest in the Canons - particularly those designed to prevent prejudicial publicity and assure fair trial.** But the need for a critical re-examination is far broader than may be indicated by those dramatic events.

Many aspects of the practice of law have changed drastically since 1908. It has been said that these changes "make unreliable (many) of the assumptions

*Stone, The Public Influence of the Bar, 48 Harvard L. Rev. 1, 10 (1934).

**Recommendation to the House, and action by it at this meeting, have made the Canons more explicit in this respect. See recommendations by Ethics Committee (Canon 5) and Bill of Rights Committee.

upon which the original Canons were based."* There have been striking environmental changes in government, federal and state relationships, urbanization, and in social, business and economic conditions - to mention only a few. All of these, including new laws, have caused major evolutions in the practice of law.

As remarkably flexible and useful as the Canons have proved to be, they need to be re-examined as guidelines for the practicing lawyer. They also should be re-examined particularly in view of the increasing recognition of the public responsibilities of the profession.

The Canons have been described as an articulate expression of the "conscience of the profession in the 19th and early 20th Centuries".** We must be sure that they now conform to the conscience of the bar in the mid-20th Century.

Obviously related to the contents of the Canons is their enforcement. There is growing dissatisfaction

*Report, Special Committee of ABF, June 30, 1958, p. 10.

**Hurst, *The Growth of American Law: The Lawmakers*, 329-330 (1950).

among lawyers with the adequacy of the discipline maintained by our profession.

The Missouri survey concluded that "a majority of lawyers are convinced that the public image of the profession is affected by the policing procedure of the Canons of Ethics and that policing is not adequately enforced."* This survey also indicated that some 27% of Missouri lawyers think that perhaps half of their fellow lawyers fail to live up to the Canons. Along the same lines, a study in New York City concluded that more than 20% of the city's lawyers "persistently breached Canons of Professional Ethics".**

A compilation of disciplinary action for the seven-year period ending with 1962 indicated an average of only 68 disbarments per year. The number suspended was not significantly greater. Dean Blythe Stason, with typical restraint, commented that in a country of some 285,000 lawyers "the number subjected to discipline is remarkably small".***

*Lawyers Practice Manual (Missouri Bar-Prentice Hall Survey) published by Prentice Hall editorial staff, p.16 (1964).

**Time Magazine, January 10, 1964.

***Stason, Disbarments & Disciplinary Action, 49 ABA Journal 270 (March 1963).

In somewhat the same vein Professor Jerre Williams, addressing the Association of American Law Schools last winter, is quoted as saying: "The best way to attain better ethics in the law profession is to have a few good disbarments."*

Whether this be true or not, I think most lawyers would agree from their own experience that there is a tendency on the part of many grievance committees and courts to manifest a spirit of marked lenience in grievance cases. While no one wants punitive action, it must always be remembered that the bar has the privilege of disciplining itself - to a greater extent than other professions or callings. This imposes a higher responsibility and one which the bar must discharge with greater fidelity.

The new Committee created by the House of Delegates to re-examine the Canons of Ethics will not deal directly with disciplinary procedure and action. But there is an obvious relationship between the contents of the Canons and the observance and enforcement

*Time, January 10, 1964.

thereof. An appropriate revision of the Canons could contribute significantly to more effective grievance procedure as well as to increasing the level of voluntary compliance.

For centuries lawyers have prided themselves on ethical standards which we have thought were the highest - self proclaimed and self enforced. One may suspect that this pride has produced a measure of complacency. It is abundantly clear that the time has come for critical self evaluation and for appropriate action.

Criminal Justice Project

The House has created a new Special Committee on Minimum Standards for the Administration of Criminal Justice. In my view, the work contemplated for this Committee will be of the greatest interest to the profession and the public.

It will be recalled that in 1938, under the leadership of John J. Parker and Arthur T. Vanderbilt, the Association adopted what became known as the "Minimum Standards of Judicial Administration". These

standards, dealing primarily with civil legislation, have been enormously influential in judicial reform and constitute one of the landmark achievements of the organized bar.

Many have thought that similar standards should be prescribed relating specifically to criminal justice. On the initiative of the Sections of Criminal Law and Judicial Administration, the Board of Governors in February 1964, authorized a pilot study of the need and feasibility of such a project, and the American Bar Association Endowment made a grant of \$25,000 for this purpose. Under the Chairmanship of Judge J. Edward Lumbard, and with the assistance of the Institute of Judicial Administration, a distinguished Committee completed the pilot study and made the report which resulted in the creation by the House of the new Special Committee.

The scope of the project to be undertaken by the new Committee is suggested by the subjects to be considered. These include (i) the police function, (ii) pretrial proceedings, (iii) the prosecution function, (iv) the defense function, (v) the trial, (vi) sentencing,

probation and parole, and (vii) appellate and other review. It will be noted that the entire spectrum of the administration of criminal justice is included.*

It is contemplated that the project will be concluded within a period of three years and is budgeted to cost about \$250,000 per year. Quite obviously, grants from outside sources will be necessary.

Now, just a word as to the timeliness of this project. Recent years have witnessed unprecedented changes, through court decisions, in criminal law and procedure.** As the pilot study states.

"Vast changes are resulting from decisions regarding indigent defendants, search and seizure, privilege against self incrimination, interrogation without counsel being

*Some of the specific subjects of particular interest currently include: Police interrogation, confessions, search and seizure, bail, the role of prosecutors, prejudicial publicity, the representation of indigent defendants, discovery, uniformity in sentencing, probation, social services in the courts, and collateral attack upon judgments.

**In the most recent decision, Escobedo v. Illinois (June 1964) the Supreme Court, by a 5 to 4 vote, held that under certain circumstances a person placed under arrest has a constitutional right to consult counsel before police can interrogate him as a suspect; otherwise, a confession obtained after denial of the right is inadmissible.

present, and post-conviction remedies. A number of Supreme Court decisions have reversed standards which the Court has reaffirmed only 'yesterday', as time is usually measured in the effect of stare decisis."

As it appears likely that this process of judicial reinterpretation, especially with respect to the applicability of the Fourteenth Amendment, is nearing the end, an exhaustive study of this vital and complex area of our judicial system is especially timely.

The two basic objectives of law enforcement are to protect the public from crime and to safeguard the rights of individuals accused of crime. The trend of decisions in recent years has been to strengthen significantly the rights of accused persons. Few lawyers would dissent from the view that the right to a fair trial, with all that this term implies, is one of our most cherished rights. We have therefore welcomed the increased concern, by law enforcement agencies and the courts alike, in protecting these rights.

But the problem is one of balance. The right of society in general, and of each individual in

particular, to be protected from crime is at least equally cherished. There is a growing body of opinion that we are approaching a state of considerable imbalance; that the pendulum may have swung too far in favor of affording rights which are abused and misused by criminals, to the serious detriment of the rights of law abiding citizens.*

There is no doubt about the fact that we have in this country a crime problem which has reached disquieting proportions. The FBI crime report for 1963, just released**, states that "more than two and one-quarter million serious crimes were reported during 1963" - a 10% rise over 1962. Since 1958, crime has increased five times faster than our population growth. The nature of crimes committed is also significant. In 1963, 147,800 cases of "aggravated assault" were reported, a 6% increase over 1962. The reported cases of burglary in 1963 totaled 975,000, an increase of 9%.

*Lumbard, The Administration of Criminal Justice, Some Problems and Their Resolution, 49 ABA Journal 840 (September 1963).

**Crime in the United States (1963), Federal Bureau of Investigation, July 20, 1964.

It is common knowledge that in certain sections of many of our larger urban areas, citizens are warned to stay off the streets and out of the parks at night. A leading authority on crime has recently said that if crime continues to increase at its current rate "every street will become a jungle".*

It is not suggested that the rising rate of crime is caused or stimulated by the manner in which criminal justice is administered. Causes of crime are far more complex and fundamental. But certainly the effectiveness of law enforcement is related to our criminal laws and to the standards applied by the courts in administering justice. We must have laws and standards which do not unduly handicap the law enforcement process.

Our Bill of Rights, as well as legal and ethical concepts of Anglo-American justice, require a vigilant concern for protecting the rights of persons

*Chicago Daily News, July 9, 1964, quoting Police Superintendent O. W. Wilson. The editorial further stated, in commenting on the decreasing rate of convictions that "the ratio of convictions to gambling arrests is about 1 out of 70 . . . To the prospective transgressor, these are almost irresistably attractive odds".

Availability of Legal Services

For many years, a major concern of the Association has been the providing of legal services for indigents. Although the problem is one of our oldest, it has recently received renewed attention and in the coming year this must be re-emphasized and our work expanded.

Defense of Indigents Accused of Crime:

I will comment first on the criminal side. The Special Committee on Defense of Indigent Persons Accused of Crime, created two years ago in San Francisco, was notably successful in its work. The federal legislation which it backed (assuring compensated counsel for indigent defendants in the federal courts) passed the Senate in one form and the House in another, and the differences now await resolution in conference. If this long overdue legislation is not enacted before the Congress adjourns, the Association will back it vigorously at the next session.

The American Bar Foundation study of the situation in each of the states, initiated by the Committee, has been completed. A comprehensive national report will be published early in 1965. An excellent Summary has already been distributed to members of the House of Delegates.*

The magnitude of this problem is indicated by the Summary Report. Each year approximately 300,000 persons are charged in the state courts with major crimes. As fully half of these are classified as indigents, there is a responsibility - on the public

*The standards recommended by the House include (i) establishment of either a public defender or an assigned counsel system or some variation thereof; (ii) where there is an assigned counsel system in populous areas, there should be a competent administrator; (iii) counsel should be compensated at public expense, so that the entire burden does not fall on the bar; (iv) counsel should be provided no later than the first arraignment and before the defendant is required to plead; (v) counsel should also be provided for appeals and on writs involving deprivation of life or liberty; (vi) counsel should also be provided in all cases where a serious penalty (involving deprivation of life and liberty) may be involved (including misdemeanors, commitment of the mentally ill, etc.); and (vii) continuing legal education programs should assist in training lawyers to represent indigent defendants.

and the legal profession - to provide counsel free of charge to at least 150,000 persons each year in the state courts alone.

On the basis of the Committee's work, the House has now approved recommendations for a broad program at the state level to meet this massive problem. The implementation of this program will require the cooperation of state and local bar associations, working with state legislatures and state appellate courts.

The Special Committee, under the Chairmanship of Whitney North Seymour, has completed its assignment, and the Association's Standing Committee on Legal Aid and Defense of Indigent Persons will carry this work forward.*

In my view the legal profession has no more urgent or pressing responsibility than seeing that this program, so essential to the realization of our goal of equal justice under law, is accomplished in the state and federal courts throughout our country.

*Although the Standing Committee on Legal Aid has had jurisdiction in criminal as well as civil needs, the By-Laws of the Association have been amended to make this explicit in the title of the Committee.

Legal Aid for Indigents:

On the civil side, the bar has no less responsibility to see that legal services are available for those who cannot afford them. For years, the Association's Standing Committee has been a leader in this effort, working with the National Legal Aid and Defender Association. There are now 246 legal aid offices across the country, but there are still some voids as well as areas where the quality and scope of established legal aid service must be improved.

The importance which the officers and Board of Governors attribute to the work of the Standing Committee is evidenced by a budget appropriation for the new year of \$39,000. This is more than double that of last year and is the largest single net appropriation for any one Committee.

Legal Services for Persons of Modest Means:

Even more difficult than providing legal aid for indigents is the making of legal services more generally available to persons of modest means. These

are people who cannot be, and who would not wish to be, classified as indigents. Yet, because of limitations of resources or educational opportunities or both, there are many thousands of persons who experience frustration and despair when confronted with legal problems. Often they do not know where to seek counsel, and they may not be able to pay normal fees.

Unfortunately, this type of person is more likely to encounter legal difficulty than persons in higher income brackets. Garnishment of wages, repossessions resulting from default on installment purchases, evictions for non-payment of rent, bankruptcies, the failures of husbands and fathers to provide support and maintenance - these are but a few examples of the type of legal involvement, familiar to every lawyer, so commonplace to the citizen in the low income bracket. In too many instances such persons also fall into the hands of the least responsible elements of the Bar.

It has been correctly said that respect for the law is at its lowest with underprivileged persons. There is a natural tendency for such persons to think

of the courts as symbols of trouble and of lawyers as representatives of creditors or other sources of "harassment". It matters little that these critics, through ignorance and poverty or for less excusable causes, are often responsible for their own difficulties with the law. They badly need competent counsel, at reasonable cost, who will provide the advice and assure the just treatment that will engender increased respect for the law.

Our profession must face up to this problem and find more effective solutions. Unless we do so others - far less interested in the profession of law and also less competent to devise reasonable solutions - will undertake this for us.

The Association's Standing Committee on Lawyer Referral has done notable work in this field, as have committees in many state and city bars.* The Association now has a qualified staff lawyer at the Bar Center

*For a discussion of Lawyer Referral, see the special issue of the Journal of American Judicature Society, May 1962. See also the "Statement of Policies and Standards for Lawyer Referral Offices", published by the ABA Committee in 1963.

devoting full time to this Committee. The Lawyer Referral Bulletin, designed to stimulate a broadening of this service is published and distributed quarterly to some 6,000 bar leaders. More than 200 communities have established formal referral services and some 60,000 clients were brought into lawyers' offices last year through these services.

This is, indeed, commendable progress. But a broader and more imaginative program may be required by the organized bar. There are some who think that the present concept of lawyer referral needs to be re-examined. There should, at the very least, be a careful study of all possible methods of making legal services more readily available, through responsible lawyers, to persons of modest means. This, I hope, will be a priority task of this Committee during 1964/65.

Reform of Bail Procedure:

The subject of bail deserves special mention. The spotlight was focused on this at the Attorney General's Conference last May attended by more than 400

persons. It is now widely recognized that major reforms are probably overdue in our system of requiring bail and of professional bondsmen.

The Criminal Law Section of the Association has an important study project underway. This subject is also within the scope of the new Criminal Justice Project, which I have discussed. The Standing Committee on Legal Aid and Defense of Indigent Persons also has an obvious interest, as indigents have suffered most from a system which arbitrarily requires bail.

The Association has here both a responsibility and an opportunity for leadership. The first task will be review and coordination of work of existing Committees and Sections. If it appears that a special committee is desirable, an appropriate recommendation will be made at a later date.

Conclusion

In summary, it seems to me that for the next year our top priorities should be (i) to commence a serious re-evaluation of the ethical standards of our profession; (ii) to accelerate and broaden the efforts - already having high priority - to assure the availability of legal services to all who need them; and (iii) to finance and support the newly created Criminal Justice Project, which it is hoped will formulate standards for the Administration of Criminal Justice which rank in importance with the notable work in civil procedure two decades ago under the leadership of the great Judges Parker and Vanderbilt.

While our priorities may appropriately be assigned to these projects, this does not mean any lessening of emphasis upon the myriad of other worthwhile activities of this Association.

In discharging a primary responsibility of the organized bar, namely, maintaining and improving the professional competency of our members, the Sections of the Association carry forward each year -

often unheralded - programs of the utmost importance both to the profession and the public.

In areas of public service and responsibility, as distinguished from purely professional interests, other Sections and Committees have programs of commendable merit. While all of these cannot be mentioned, one thinks - depending upon his interests - of our Law Day Program, of Education on the Contrast Between Communism and Liberty Under Law, of the essential work of the Federal Judiciary Committee and the Committee on Judicial Selection, Tenure and Compensation, and of our expanded activities with respect to federal legislation. It is certainly to be hoped, for example, that the Association's support of a Constitutional Amendment on Presidential Inability and Vice Presidential Vacancy will come to the fruition of Congressional approval during the next year.

In these and many other ways, the useful work of the Association will move forward.

Before closing, may I say just a word about our Headquarters in the Bar Center. Having spent

considerable time there recently, I can testify personally that we have a staff of which the entire profession can be proud. It is manned in greater depth and quality than ever before, and is far better prepared to render the services which the profession and the public are entitled to receive.

It hardly need be said that it is truly inspiring - as well as a little bit frightening - to come into the Presidency of this great Association at this particular time. The challenges to the organized bar have never been greater. But, happily, in my view, the profession has never before been as broadly conscious of its responsibilities or as willing to undertake them.