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REDUCING THE COSTS OF LEGAL SERVICES:

Possible Approaches by the Federal Government

A REPORT

PREPARED FOR AND PRESENTED TO THE

SUBCOMMITTEE ON REPRESENTATION OF CITIZEN INTERESTS, NOW MERGED WITH THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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REDUCING THE COSTS OF LEGAL SERVICES: POSSIBLE APPROACHES BY THE FEDERAL GOVERNMENT

A Report to the Subcommittee on Representation of Citizen Interests, Now Merged With the Subcommittee on Constitutional Rights, U.S. Senate Committee on the Judiciary

By Thomas Ehrlich* and Murray L. Schwartz*

INTRODUCTION

The subcommittee is seeking ways to reduce the costs of legal services to the public. The search is rooted in a basic concept of distributive justice. That concept mandates a choice for all Americans of use or nonuse of legal services—a choice that realistically is not now available to many citizens within the present price structure. The purpose of this report is to suggest possible approaches by the Federal Government to meet the problem.

The subcommittee has made two basic judgments that are followed in this report: (1) reducing the costs of an array of legal services, traditionally provided by lawyers, would increase utilization of those services; and (2) such increased utilization would be a social good.

Several considerations militate against these judgments, particularly the second. For example, the judicial system is now overburdened in many ways. Adding more litigation will exacerbate this problem. It is not always desirable—because of premature polarization of social and business relations—to introduce the realistic prospect of litigation as a vehicle for resolving disputes at an early stage; much can be said for keeping conflicts in nonvisible and amorphous states. Overall costs of transactions will likely increase as the costs of lawyers' services are added, no matter how much these costs may be reduced on a unit basis.

However forceful these considerations may seem, they are outweighed by the concept of distributive justice stated at the outset. With the two judgments as a starting point, therefore, this report explores categorical ways of reducing the costs of legal services with these points of emphasis: (1) the costs of legal services to the average, middle-income American; (2) the potential Federal role with respect to those costs; and (3) the relationship between the training of persons who provide the services and the costs of the services themselves.

These are the principal questions considered in this report:

(1) To what extent is deregulation of the legal-services industry a realistic and desirable method of reducing the costs of legal services?

(2) To what extent can the costs of legal services be reduced by lessening the needs for those services?

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(3) To what extent can the costs of legal services be reduced by a major expansion of the use of legal assistants and machines to perform services traditionally reserved for members of the bar?

(4) To what extent can the training of members of the bar be altered to reduce the ultimate costs of legal services?

(5) What effect will reduction in costs have on the quality of legal services?

Each of the questions is considered in turn. There is, however, no attempt to develop a detailed blueprint for subcommittee proceedings. Rather, areas that seem worth exploration through research studies and hearings and the types of concrete proposals for Federal action that might emerge as a result of those inquiries are discussed.

I. To what extent is deregulation of the legal services industry a realistic and desirable method of reducing the costs of legal services?

In terms of the costs of legal services, the present system of licensing lawyers and regulating their conduct has, in gross, two aspects. The first is that members of the bar within each State are given an exclusive license to provide certain types of services. Thus, although access to the bar itself does not appear to have been arbitrarily limited, there is no lawful possibility of an industry arising to compete on a service or price basis with lawyers. The second is that, as among lawyers, there are anticompetitive restrictions, principally those pertaining to solicitation and advertising and some efforts to maintain minimum prices. Thus, within the legal profession itself, certain ordinary competitive forces are largely absent.

The most extreme form of effecting change would be to abolish all such restrictions. Were this done, anyone could do what lawyers now do. This approach to providing legal services would leave as controls only traditional criminal and civil remedies for fraud, negligence, and the like.

Such an approach would not necessarily do away with lawyers. One who was trained in a law school or who had passed a bar examination would have the presumed advantage of being able to advertise those facts, and, so the argument goes, would provide the consumer—the client—with a range of options. The client could then deliberately choose to purchase a higher quality service from the lawyer or a lower quality service from the nonlawyer at a lower price. Moreover, lawyers could compete against other lawyers on a service or price basis.

The deprofessionalization of the legal profession in the United States is not a new idea. It has in fact occurred several times; the Colonization era; the period immediately following the American Revolution; and the Jacksonian populism era. Roscoe Pound has written that one can find similar patterns in other societies. According to Pound, the development of a legal profession passes through a series of stages. The first is a prohibition against representation of another. As these restrictions are relaxed—initially by permitting family members, friends, or guardians to appear representatively—a second stage develops in which an informal group of representatives (Pound calls them pettifoggers) begins to appear, usually associated with particular tribunals. The third stage is the regulation by those tribunals of the pettifoggers—the imposition of certain types of requirements as a condition to representation of another before the tribunal. The fourth and final stage is the development of a universal system of licensing before all tribunals in a particular jurisdiction.

It now appears that we may be on the threshold of a national licensing system of lawyers—what might be called a countrywide fourth stage in the development of the American legal profession. Many signs point in this direction.

Each State currently establishes, by statute or judicial ruling, standards for admission to the bar. But these standards are virtually uniform across the country. They include two main components: a legal education requirement and a bar examination requirement. (A third prerequisite—moral character—is invoked to disqualify an applicant for admission in extremely few cases.) All but a handful of States look to the American Bar Association for the content of the first requirement. The American Bar Association accredits law schools and in almost all States graduation from an accredited law school is required before one can sit for a bar examination. Although each State administers its own bar examination, a majority of States now cooperate in using a single, multiple-choice test for half or more of the examination. There is good reason to believe that the multistate bar examination will play an even more dominant role in the future.

Once a lawyer is admitted to practice in one State, he or she is generally entitled to practice on a *pro hac vice* basis and to be admitted permanently to the bar of another State with a change of residence, as a matter of reciprocity. Again, there are exceptions, but reciprocity is the dominant rule. Further, the professional conduct of lawyers in almost all States is governed by a common code of professional responsibility. The American Bar Association developed the code, and it has been generally adopted throughout the country with only minor variations from State to State. As a practical matter, therefore, the rules of professional conduct are national rules, though their enforcement is through State agencies. In addition, at least the large law firms handle legal transactions that extend beyond the boundaries of the State, in which their offices are located.

These and other developments are signs of the emergence of a national bar. They are also signs that the "states rights arguments" against the involvement of the Federal Government in matters of concern to the legal profession are of increasingly questionable validity.

Assuming that the fourth stage of the progression suggested by Dean Pound is upon us, is it time to turn full circle? Should the subcommittee consider Federal means to eliminate or reduce unauthorized practice rules on the ground that this step would reduce the costs of legal services?

The response to this question must take into account the distinction between litigation and other lawyer tasks. One of the consequences of the lack of a formal separation at the American Bar between the trial lawyer (barrister) and the office lawyer (solicitor) is that the doctrine of unauthorized practice covers not only representation before tribunals but also the drawing of legal instruments and other types of representation and counseling.

The possibility of permitting anyone to represent another before a tribunal poses more difficulties than does permitting anyone to draft a document. The hypothesized deliberate choice by a client of a nonlawyer for advice whether to sign a lease may result in economic loss to the client through improper counseling, but in most instances it will be loss to the client alone. However, the choice of one not trained to

appear before a tribunal involves costs that must be borne by others—costs to the tribunal itself and to the other litigants. At a time when many are calling for a specialized trial bar because of allegedly inadequate lawyer performance, a move in the opposite direction to permit anyone to try cases for others seems of dubious viability.

The abolition of the doctrine of unauthorized practice with respect to other types of lawyers' activities presents a different set of problems. Again, the ultimate step would be a freely competitive environment in which both those who have special credentials, like formal education or a license, and those who do not would advertise and compete for clients with respect to nonlitigation matters. Fundamental to the success of this development is the concept that the consumer can choose a desired level and quality of service on the basis of the information obtainable once the restrictions on solicitation and advertising are removed.

Whether that would in fact be the case is uncertain. The types of transactions for which assistance would be sought are in the main infrequently recurring events for middle-income Americans. The relevant information that would be provided through advertising is difficult to foresee; most likely, it would relate to price only. Legal services are peculiarly difficult to evaluate; that is, the consumer or client has little capacity to determine whether the service provided has been good, bad, or indifferent.

Another relevant factor is the impact of open competition on the structure of the current legal profession. Suppose that there were no barriers to competition with lawyers. Which segment of the bar would be most adversely affected? The answer seems clearly the individual and small-firm lawyers who now principally service middle-income Americans. The large law firms are unlikely to be very much affected, for most such firms do not now service that sector of the community. Preservation of individual and small-firm practice may not be worth the cost, but the issue is certainly not free from doubt.

A good deal of rhetoric has been devoted to extolling and decrying unauthorized practice rules. There is relatively little research, however, on the actual impact of those rules on the costs of legal services. The subcommittee could perform a useful service by sponsoring a series of research projects in this area. On the basis of these projects, informed policy judgments could be drawn as to whether some unauthorized practice restrictions should be revised or eliminated and, if so, whether the action should be on a State or Federal level.

A number of other inquiries should be pursued, but the research should be coordinated, for all of the questions are related. The following are illustrative:

(1) Title insurance is frequently suggested as an illustration of the benefits to clients of permitting nonlawyer competition. It has been maintained that the mass processing of title-insurance policies by lay groups is a more efficient and economical service than that of lawyers providing title abstracts. Some have maintained to the contrary, however, asserting that lay corporate title insurance policies insure fewer risks than do lawyers, and that, therefore, the true costs of title insurance are higher. Some have suggested that a monopolistic title-insurance industry has replaced a monopolistic legal profession in several States, with no economic gain to the consumer. A relatively simple study should produce important data on these issues.

(2) Another valuable inquiry would be to compare costs in other fields where competition between nonlawyers and lawyers is permitted. Examples include processing of claims before the Patent Office and other administrative agencies such as the Interstate Commerce Commission and State Workmen's Compensation and Industrial Accidents Commissions. Nonlawyers are permitted to represent clients before these agencies if they satisfy rules for admission to administrative practice. A modest study could indicate the relative costs and benefits of lawyer and nonlawyer representation, and a comparison of lawyer costs for services in fields where "lay" competition is not permitted could shed light on the price-reduction impact of this type of competition.

(3) Another major area of anticompetitive restraints affecting the legal profession relates to advertising. In essence, lawyers are prohibited from all but the most circumspect advertising of their existence, let alone their abilities. Again, there have been extended arguments on the advantages and disadvantages of these restrictions, but there is little evidence concerning their economic impact. For example, a recent study concluded that prescription eyeglasses cost substantially less in those jurisdictions that permit than in those that prohibit advertising.[1] As the author of that study points out, prescription eyeglasses may be very different from other goods and services, but additional comparative studies of this kind might well reveal useful information of relevance to the legal profession.

(4) Several legal clinics have employed a variety of advertising techniques, some allegedly in violation of bar association rules. No objective study of the economic impact of these devices has yet been published. At a program sponsored by the American Bar Association during its 1974 annual meeting, the argument was made with great force that such advertising provides a vehicle for the mass delivery of low-cost services to those who otherwise could not know about the services or, if they knew about them, could not afford them. A study by some neutral group, other than the organized bar or the clinics themselves, is needed.

In this area, like that of unauthorized practice by nonlawyers, the possible choices are not limited to current regulations on the one hand and no regulations on the other. The spectrum of in-between possibilities is substantial. Studies such as those proposed could lay the basis for sound judgment in choosing within the spectrum.

Two recent trends of change in the structure of the legal-services delivery system give promise of mitigating the impact of the anti-competitive restraints. These are group and prepaid legal services. The subcommittee has already examined these developments, and a substantial body of literature exists concerning both mechanisms. It is likely that with respect to middle-income Americans, these developments have great potential to lower the costs of legal services. For these programs involve membership in a group with a centralized management that is able to evaluate the legal services performed by chosen lawyers and to engage in price shopping (as general counsels for corporations may now do in retaining outside counsel) while maintaining quality. Indeed, as a result of the aggregation of similar

[1] Benham, "The Effect of Advertising on the Price of Eyeglasses," XV(2) Journal of Law and Economics, 337 (1972).

frequently recurring transactions into common practices of handling, these transactions are likely to enhance the use of lay assistants, a development discussed below.

II. To what extent can the costs of legal services be reduced by lessening the needs for those services?

By definition, the costs of legal services would be substantially reduced if the legal system were altered so that there was little or no need for those services. The previous section considered the possibility of lowering costs by permitting a more competitive market to operate in supplying the services. In this section are discussed the possibilities of eliminating the need for some legal services. "Legal services" here means those functions of counseling, advising, negotiating, and litigating that one person performs for another, either in a representative capacity or as a professional counselor.

There are two major avenues to be explored: Simplification of transactions and creation of alternative methods of dispute resolution.

(*A*) *Simplification of transactions.*—Inasmuch as the call for laws that are simple enough for the commonest of the citizenry to comprehend has rung through the centuries—to little avail if our present legal system represents the response—recommendations in this regard are perforce modest. They are limited to those transactions: (*a*) In which middle-income Americans frequently engage; and (*b*) which are the source of controversies that require resolution, but for which the services of a lawyer are frequently too expensive.

Current categories of these transactions are: family law; real estate, including landlord-tenant matters; consumer transactions; and probate and testamentary matters. Foreseeably on the increase are disputes about various Government benefit programs, as for example, social security; on the likely decrease is personal-injury litigation; a probable constant is criminal law. For many of these transactions a lawyer is retained, but in others is not, many times because of the expense.

(1) With respect to these categories, the principal prospect of simplifying transactions to eliminate or reduce the utilization of lawyers is through the development of uniform codes of transactions. The underlying hypotheses are that it is less expensive (in terms at least of lawyers' time and charges) to prevent a controversy than to resolve it, and that one significant method of preventing controversies is to develop uniform codes to define the terms of the transactions.

Of course, many disputes are factual—who did what to whom? No form contract can resolve those issues. But it should be possible to insist on uniformity and simplicity in such areas as credit and lending arrangements and durable-goods sales. In a different economic environment, the Securities and Exchange Commission has insisted on uniform provisions in the documents upon which it passes. This requirement has prevented a good deal of controversy; similarly, some States require uniformity in particular provisions of insurance contracts.

Uniform provisions for the most common consumer transactions (particularly warranty provisions) could be developed by the Federal Trade Commission or other Federal agencies. Car sales contracts are one obvious example; the Council of Better Business Bureaus has already done some work of this kind. Future service contracts for vocational schools, health spas, and the like may be another area of need; the FTC has begun work in the area. For several years, HUD has required low-rent public housing program leases to adhere to certain standards. The standards might well be promoted more widely.

The aim here is to convert types of legal problems from an individualized (retail) basis to a standardized (wholesale) basis. In short, individual variations in common legal arrangements should to the maximum extent be eliminated by requiring uniform, officially approved approaches.

To this end, the subcommittee should engage in four types of studies:

(*a*) Studies of possible Federal legislation requiring uniformity and simplicity in key provisions in the sales, rental, and service contracts of major companies doing interstate business.

(*b*) Studies of the jurisdiction of the Federal Trade Commission and other Federal agencies to require that standardized provisions be inserted in those contracts, and the feasibility of Federal Trade Commission and other agency implementation of that jurisdiction.

(*c*) Studies of the feasibility and wisdom of creation of private causes of action to restrain practices prohibited by the Federal Trade Commission and other agencies.

(*d*) Studies of a variation on a theme proposed by Chief Justice Burger: requiring a "legal impact statement" for each piece of major Federal legislation. That statement could include: (*i*) The extent to which the proposed legislation affects the transactions of individuals; (*ii*) the extent to which specific contractual language has been inserted in the measure; (*iii*) the extent to which the Federal Trade Commission or another Federal agency has the power to implement the standardization-of-transactions concept; and (*iv*) the points of controversy affecting individuals that are likely to arise if the measure is adopted and the methods of resolution that the measure subsumes or proposes. The point of this statement would not be to discourage desirable legislation; it would be to assure that cost-saving techniques are incorporated in the statute.

(2) Another approach to reducing the costs of legal services is to focus on substantive areas that affect citizens generally and that involve large total costs of lawyering. These are areas where "delawyering" could have the largest economic impact.

Surveys show that four fields involving the transactions of individuals produce major shares of total lawyer revenue: Personal injury litigation, family law, real estate transactions, and probate. Reforms have already occurred in the first two of these fields. Personal injury litigation accounts for some 20 percent of the revenue of the private bar. The advent of no-fault insurance, particularly on a nationwide basis, will inevitably lead to a substantial reduction in the costs of legal services. Enthusiasm for no-fault is clearly related to dissatisfaction with the costs of the prior system. The adoption of workmen's compensation systems and the elimination of defenses in Federal Employer's Liability Act litigation are illustrations of the same general development in an earlier era.

The de jure recognition of no-fault divorce and the ease and speed of divorce proceedings in many jurisdictions should also produce significant reductions in lawyering costs. Much more needs to be done

in this field to reduce the costs of legal services, but important steps have already been taken in some States.

The subcommittee should sponsor studies on ways to reduce the costs of legal services in other areas. Residential real-estate transactions and probate matters are first-order research targets; subsequently, this type of examination can be expanded to other fields.

(3) A third area for study would be ways in which legal costs might be reduced through procedural changes in litigation arrangements. Shifting burdens of proof and eliminating defenses are prime examples. The no-fault concept has been adopted in some foreign countries on a much broader basis than automobile accidents. Judicial procedures should not, of course, be determined solely on the basis of costs. But many Americans are denied effective access to the legal system—are denied, literally, their day in court—because of high legal costs. The subcommittee should review common types of legal transactions that affect the average person to determine how economies might be effected and rights more fully vindicated by changes of this kind.

(*B*) *Creation of alternative forms of dispute resolution.*—A different technique to effect reduction of costs is to change the forum, rather than the transaction. This approach assumes that a transaction has been entered into, a controversy has arisen, and some form of dispute resolution is in order. It was suggested at the outset of this report that there is a value in structuring dispute resolution so that not every dispute is processed expeditiously. To the extent that present dispute resolution requires lawyers and traditional judicial tribunals or administrative agencies, that result is assured. There simply is too much business in these traditional institutions now.

The subcommittee should sponsor a number of pilot projects involving forms of dispute resolution that differ from the traditional judicial trial.

This approach contemplates a range of possible dispute-settlement mechanisms—ombudsmen, arbitrators, and the like. Procedural fairness does not require the adversary/judicial process in every situation. Indeed, for those disputes in which the amount involved is relatively small, procedural fairness may require much simpler mechanisms than lawyers in the courtroom. Otherwise, dispute settlement consumes the amount in dispute. Other countries such as England (lay magistrates), Germany (many more courts than the United States), and Sweden (ombudsmen), provide examples of other types of arrangements. In all likelihood, we must invent our own new approaches to procedural fairness, using native materials though inspired by foreign ideas.

Studies of various arrangements and their utility are needed. One example is the use of public counsel in some Federal agencies, such as the Interstate Commerce Commission, to provide broad consumer representation in agency proceedings. Further, major national institutions, public and private, have differing mechanisms for dealing with disputes between individuals and the institutions. Preliminary review, moreover, indicates that a wide spectrum of settlement mechanisms for dealing with citizen complaints is employed within the Federal Government, including arbitration, mediation, and conciliation arrangements as well as adjudication. The diversity of

techniques in the private sector is even greater. Obviously, those agencies and companies that have continuing relations with customers and clients have an interest in working out individual problems, an interest that is lacking for those organizations dealing in nonrepetitive transactions such as appliance sales.

The subcommittee should study the ways by which selected public and private agencies and businesses handle disputes between customers or members of the public and themselves or those subject to their regulation. Stemming from that review could be a range of results including modest ones such as a subcommittee report detailing the techniques available for the expeditious handling of complaints (from ombudsman to Administrative Procedure Act hearing), or substantial ones such as Federal legislation requiring the creation of particular mechanisms for selected types of transactions and disputes.

An example may help to give this suggestion some focus. It has become a commonplace that courts in our country are called on to do too much—to provide speedy and informal dispute resolution through pretrial proceedings and at the same time to act as tribunals if those proceedings fail to resolve issues. There should be studies on ways to encourage dispute settlement outside courtrooms, through pressures for arbitration as a first step. A pilot project might be designed, for example, in which particular causes of action could be brought in court only in the event of: (*a*) Failure to participate in arbitration; or (*b*) gross abuse by arbitrators; with the provision that the losing party pay all costs, including attorneys' fees in the judicial proceedings. Dispute settlement in these matters would then be substantially removed from the courtroom, leaving courts to a limited role—a move that seems to be occurring in the labor field. Research is needed on whether this development could be encouraged in other fields as well, and if so, whether Federal intervention would be as appropriate as in the labor field.

III. To what extent can the costs of legal services be reduced by a major expansion of the use of legal assistants and machines to perform services traditionally performed by lawyers?

The previous sections have discussed the possibilities of lowering the costs of legal services by removing competitive restraints, by altering substantive law and procedures, and by creating alternative dispute-settlement mechanisms. This section considers the possibility of reducing those costs by replacing lawyers with specially trained, lower-salaried personnel and machines.

The provision of legal services is a labor-intensive industry. The capital investment is limited to library and office equipment. Any substantial reduction in the costs of providing legal services must, therefore, come from the replacement of lawyers by either machines or lower paid personnel.

To put the issue somewhat more concretely: a reasonable estimate is that an average fee of $20 per hour must be charged for a lawyer to net $16,000 per year before taxes, an income that is at the lower part of the range of lawyers' incomes. The type of middle-class legal services that have been discussed—those involving, for example, landlord-tenant problems and consumer transactions—do not usually involve great sums of money. Most persons are unwilling to purchase many hours of lawyers' time (even at the minimum $20 per hour) to deal with such matters, particularly since the outcome is rarely free

from doubt and there are other costs (their own time, other legal expenses, etc.). The great legal financial risks, like personal liability, to which average persons are exposed, are covered by standard automobile and homeowner's insurance policies.

The possibility of reducing current nonlawyer salary costs (overhead) seems quite limited; the share of nonlawyer costs in law firms runs a fairly constant 35–40 percent regardless of size of law firm. If the cost of legal services are to be reduced, reduction of that part of the revenue which goes to lawyers—as opposed to overhead, etc.—must be effected.

Consequently, a delivery system is needed by which lawyers spend less time per problem than in traditional arrangements, and the tasks that the lawyers no longer perform are taken over by less costly techniques—either machines or lower paid personnel.

There have been interesting developments recently in the greater utilization of machines in the practice of law. But such developments must be viewed with caution. Indeed, although the principal changes in the conduct of the practice of law have come through the inventions of the telephone, typewriter, and Xerox machine, whether these inventions have resulted in lower prices to clients is not at all clear.

Today, the major technological development seems to be the use of data-retrieval machines for the production of form documents and for legal research. These developments have not yet proceeded to the point that it is possible to tell whether they will significantly lower costs of legal services for most middle-class people. A number of law firms and legal clinics are now using such techniques. The subcommittee should study their effectiveness, with a view toward Federal sponsorship of pilot projects to test arrangements not yet in use because of high capital costs.

The most hopeful prospect, however, is a future development of a recent trend: the training of paraprofessionals or legal assistants to perform some of the routine tasks that lawyers now perform. The subcommittee has already held hearings on this subject and has gathered extensive materials concerning legal assistants.

The legal profession in the United States has been remarkably late in encouraging and utilizing formally trained adjunct personnel. Whatever the reasons, until the last 5 years, lawyers' assistants have been largely trained by themselves or by the particular lawyers for whom they worked; with the exception of secretarial personnel, they have been used in very limited numbers.

This situation is changing at a rapid rate. Special training programs for legal assistants have grown up all over the United States. Prototypical programs are in probate, corporate law, and trial assistance. The training programs vary widely, and the American Bar Association Special Committee on Legal Assistants has recently published guidelines for approval of such training programs.

Because of the embryonic stage of this development, it is difficult to be confident about what the future will or should hold. However, if it is assumed that the objective of such training is to lower the costs of legal services, and also that the present high cost of such services is largely because of lawyers' preemption of the field, then it is doubtful that much will be accomplished if (a) the regulation of the development of this new phenomenon is vested in lawyers; or (b) there is a

regulatory scheme that preempts the field, in terms of either educational programs or tasks. At the heart of the various controversies, of course, is the specter of unauthorized practice—the representation of people in important matters by those who allegedly do not have the requisite qualifications or competence. The traditional solutions are, as stated above, state regulations of the group, control of the group by accredited personnel, i.e., lawyers, or a combination of both.

Utilization of personnel whose training is less expensive than that of lawyers and is constructed for the performance of well-defined tasks of limited compass is the major avenue by which the costs of many of those services not denominated legal may be reduced. The subcommittee should continue its inquiry into the phenomenon as a whole, and more particularly: the number and variety of paraprofessional training programs; the placement of those who have satisfactorily completed such programs; the extent to which there has been a discernible reduction of the fees for the services provided; and the extent to which the ABA standards or other State regulatory schemes seem likely to advance or retard this development. The subcommittee could also undertake to consider the possible role of the HEW accreditation functions as a possible point of entry by the Federal Government. Other points of entry are through Federal subsidies to paraprofessional educational programs that conform to certain approved Federal criteria or their students, or through Federal funding of an independent study of accreditation.

Over the course of the next few years, a wide variety of employment opportunities will undoubtedly develop for legal assistants. What is to be avoided is the premature adoption of certification requirements, for these could readily stifle this promising development.

IV. To what extent can the training of members of the bar be altered to reduce the ultimate costs of legal services?

There are a few States in the United States in which a man or woman can become a member of the bar without having attended for 3 or 4 years a law school approved by an official accrediting agency, principally the American Bar Association. The standards for approval of law schools of that association are intended to assure a certain minimum type of education.

Although the standards are designed to permit and indeed encourage flexibility within the educational programs, compliance requires a particular level of investment and operating expenses. There is, as has been repeatedly noted, a remarkable similarity in educational programs in the law schools of the United States. Whether the actual cost of legal education is paid by the student or subsidized through endowment or Government subsidy, there are added expenses to the student during the 3 or 4 years of foregone income that, in combination with the cost of the education itself, must be ultimately recouped in earnings of the graduates.

The almost monolithic training received by American law students does not correspond to the great diversity of legal tasks and roles these students perform upon admission to the bar. This is not to say that there may not be some common minimum legal education that is needed by the vast majority of law graduates for their professional

roles. It is to say that were we to start over again in constructing legal education, we might deliberately create differentiated law schools.

Should an effort be made to modify legal education in the United States so that law students are more efficiently and economically trained for the tasks and roles they are most likely to perform? A complete undertaking of this kind would require a careful review of the bar of the United States to ascertain to what extent common patterns of practice exist such that legal education could be restructured to provide focused training.

An operational hypothesis on which an investigation of legal education might proceed until such a comprehensive study is completed is this: the most expensive legal education (time, investment) should be accorded to those who will deal with the legal problems with the greatest impact; the least expensive training should be for those who will deal with those of the least impact; and there is a range between most and least.

The grading of legal problems according to impact raises serious questions. Very few of us believe our own problems to have minor or insignificant impact; so far as we are concerned they have major impact. But for the purposes of examining the costs of legal education, it seems appropriate to attempt to relate those costs to the nature of the tasks for which the education is provided. Impact here is used to convey a concept that is the product of the elements of complexity, infrequency, and consequence. If a calculus or scale based upon these factors could be constructed, the most expensive legal education would be fashioned for those who as lawyers will be concerned with legal problems that are sufficiently complex to make routinization impracticable, are sufficiently infrequent to make directed training for the particular problem inefficient, and have a substantial consequence for the law, the economy, or numbers of people. Thus, it might well be that although a certain type of law practice deals with large sums of money, the training of the lawyers for that practice need not be at the most expensive end of the scale because of the uniformity of the ways in which the transactions are processed. Correspondingly, certain types of practice that involve individual clients only, as the criminal law, might be adjudged so complex, infrequent, or consequential to warrant the maximum investment in legal education. At the other end of the impact scale would be the member of the bar whose practice is largely composed of routine, simple transactions of minimal consequence for the law, the economy or numbers of people—a description that may also be applicable to the work of legal assistants we previously described.

If, on the basic operational hypothesis, it were possible to develop this scale and to relate legal education to points along it, the issue would then be where along this scale the legal problems of the middle class fall. If they can be routinized, are not particularly infrequent or complex, and do not have a significant consequence beyond the individual, the next hypothesis would be that the training of those who will engage in such practice can probably be made less expensive than it now is.

When the problem is put that way, however, and the various institutions of legal education in the United States are reviewed in that light, there is reason to believe that such a differentiated system is now

in fact in existence. That is, on the one hand, there may well be a set of law schools—the allegedly national, prestigious institutions—that do provide expensive training and whose graduates do engage in legal transactions with the highest relative impact and, on the other hand, a set of law schools that are at the low end of the training costs and of the relative impact of the lawyering in which their graduates engage.

Without undertaking another review of American legal education, it may suffice to point out that commentators—including the authors—have suggested that it is one-third too long and could be reduced to 2 years for the first professional degree without much sacrifice in education for the average law student. Whether 3 years should be retained for those who will deal with the high-impact problems is unclear. It is likely that the law schools that are nationally recognized are in fact training their students for the high-impact transactions. There may be a greater lack of correspondence, however, between education and job requirements in the law schools at the other end of the cost spectrum—where training tends to be imperfect and truncated replications of the education at the other schools and not sufficiently related to the types of work in which the graduates will engage.

There are profound social reasons that militate against the deliberate de jure stratification of law schools, even though such stratification may exist de facto. All that is here suggested is that there may be room for improvement in the training of those whose legal careers are to handle the types of problems characterized as having the least impact. As an initial step, the subcommittee should sponsor a review of legal education in those law schools that have the lowest expenditure per student to ascertain whether Federal inducements for changes in the education—via accreditation or subsidy—might be used to effect a better correspondence between training and performance.

More generally, a two-phase inquiry on legal education should be undertaken by the subcommittee. The first phase would be devoted to research studies. There is little statistical information of even the most basic demographic kind concerning law students and law teachers. A recent study, sponsored by the American Bar Foundation, has outlined in some detail a range of needed research on legal education.[2] The subcommittee need not, of course, sponsor all of that research. But a number of key studies are essential to making informed judgments on future Federal roles in legal education.

Perhaps most important, little is now known concerning the actual costs of legal education in different types of institutions and the probable costs of various reforms. A number of proposals have been made, for example, to require certain courses in law school as a condition to bar membership. One such proposal, from a committee appointed by the Chief Judge of the U.S. Court of Appeals for the Second Circuit, would require clinical training in advocacy. A serious study of the costs of legal education in a wide variety of institutions would be a major benefit in evaluating this and other proposals. Some initial work has already been done in this area, but much more is needed.

In the second phase, the subcommittee should hold hearings on the extent to which training is now being provided for the full range of required legal services. Such hearings should be held at the end of this

[2] Boyer & Cramton, "American Legal Education: An Agenda for Research and Reform," 59 Cornell Law Review 221 (1974).

stage of the committee's deliberations rather than at the beginning. For, at that point, the subcommittee will have reached some considered judgments on national needs for law-trained persons. It will also have the results of the ABA survey on legal needs. The subcommittee can, therefore, explore in the hearings whether law schools and other law-training institutions are providing the education needed to meet those needs. Particular attention can be focused on training designed to promote new systems of delivering legal services. The hearings should include a wide spectrum of views on legal education from both within and outside law schools.

As a result of the research projects and hearings, the subcommittee should be in a position to decide whether to sponsor one or more new types of Federal involvement within the realm of legal education. Even though the specific areas of that involvement cannot now be predicted, two projects are examples of the type that might emerge.

First, professional law training—particularly in the formative first year of that training—is fashioned largely around the single judicial case. From the first day in law school, students are exposed to a series of individual controversies. Their lawyering skills are developed through comparing and differentiating among those controversies. There are few studies of what might be called mass justice—of systemic problems. Yet most of the subcommittee's work over the last year has been devoted to mass justice—how to provide adequate legal services to citizens generally. These quantitative dimensions of delivering legal assistance are too rarely considered in law-school courses. If the Federal Government is to support law-school work in any area, administration of the legal system for the general public is an obvious candidate. Some efforts have already been made, but far more is needed.

Second, unlike the situation in other areas of higher education, there are now no sustained programs for teacher training in the legal field. Federal sponsorship of teacher-training programs in law could have enormous impact on the future development of legal education in a variety of important ways. Particular attention might, for example, be devoted to clinical techniques involving legal services for the poor

Ongoing research is needed concerning the impact of the legal system, particularly as it affects masses of people. In both the civil and criminal fields little is known about how our laws actually work—how they affect people generally—and how to make them work better. Law schools are the primary institutions for carrying on that research; there are no other significant institutions available. But there is virtually no Federal—or private foundation—support for it.

Establishment of an institution like the proposed National Institute of Justice would be a major step toward meeting the needs for legal research in this country. (In the alternate, a research division could be created within the Department of Justice.) The institute could sponsor research projects at various law schools just as the National Institutes of Health and the National Institute of Mental Health does at medical schools. It could be an important step toward correcting the imbalance between time spent in considering whether to adopt legislation and time spent in considering whether legislation already adopted really works.

V. What effect will reduction in costs have on the quality of legal services?

This report has focused on ways to lower the costs of legal services. Even within that ambit—and certainly when the subcommittee inquires more generally into the legal profession—the quality of legal services should also be considered. Quality and costs are inseparable.

Shabby lawyering inevitably raises the ultimate cost of a legal service to the client. At the same time, some legal services now performed by lawyers could be performed by specially and less expensively trained legal assistants more cheaply and, at times, more competently. These examples of the relations between cost and quality could be multiplied.

There are three kinds of quality controls in existence. The first is the market, i.e., letting the consumers decide by their purchasing power who are good lawyers and who are not, so that the less competent will ultimately be weeded out. Because of the factors previously discussed, this does not appear to be an effective means of assuring quality.

The second category is the sequence of the steps required for admission to practice: admission to law school, satisfactory completion of law school requirements, passage of a bar examination, and admission to the bar; in the very recent past certification of specialists has been added, and a requirement of maintenance of professional competence is being seriously discussed. At each point, there is an attempt to assure quality of ultimate performance by limiting those who may render the service through the various examinations and formal requirements.

The third category includes control over performance. Here the assumption is that whether the practitioner is qualified will be tested by the evaluation of a particular professional service. The two principal current means of testing and thus assuring that quality are professional discipline and malpractice litigation.

No one really knows who competent lawyers are, or, to put it another way, how effective are these systems of quality control. The subcommittee should conduct a broadly based hearing or hearings on quality control in the provision of legal services. How is competency evaluated and monitored? How should it be? In the main, these hearings should focus on the self-regulation of the legal profession—admission to practice and discipline. Currently, every State requires satisfactory performance on a written examination as a condition to bar admission. That examination tests both substantive knowledge and analytic abilities, but not a wide range of other skills that most would agree are required for satisfactory law practice. It is by no means clear that those other skills are testable—and the implementation of a testing requirement would inevitably increase the educational and testing costs—but the hearings could produce material on which to base studies on these issues.

Further, as the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement—headed by Justice Tom C. Clark—made clear, few State bar organizations have established effective systems of discipline to insure compliance with their codes of legal ethics. We did not need Watergate to remind us that the problem of professional responsibility is a national one. The American Bar

Association issued its completely revised code of professional responsibility only a few years ago, and, while it is much too soon to evaluate its day-to-day impact, whether the code deals adequately with many of the difficult problems of legal ethics, as for example, the area of conflicts of interest, is very debatable.

As a result of these subcommittee studies and hearings on quality control in the legal profession, specific proposals of various types for Federal action could emerge. One type might include direct regulation of the qualifications to practice in the Federal sector.

The subcommittee might also propose grants to States for the conduct of pilot projects on monitoring and improving the competence of lawyers. Whether directly through Federal grants or indirectly through the States, the adequacy of regulations of the profession regarding admission, maintenance of professional competence and discipline should be a primary focus for the subcommittee in the coming months. Those regulations obviously have a bearing on the adequacy, as well as the costs of legal services.

CONCLUSION

In a country so concerned with its legal system, it is continually surprising how little that system has been seriously studied. This report has proposed a range of research projects. As a first step, the subcommittee should engage for at least a year a full-time research director to coordinate and administer these studies. The actual research should, in the main, be done by outside experts. But a director with a sound background in research methodology on the one hand and the legal profession on the other is needed to organize and coordinate the enterprise.

The report also recommends that the subcommittee conduct two major clusters of hearings during the coming year. One cluster would focus on regulation of the legal profession—licensing and discipline particularly. The other cluster of hearings would be on legal education, but should be held after completion of the other work, for that work should give some better sense of the needs for legal services. The legal-education hearings would then focus on the degree to which adequate training is available for persons to provide those services.

Finally, several concrete legislative proposals have been suggested, as for example, creation of private rights of action to enforce Federal Trade Commission rulings. Over the course of the year, other proposals will certainly emerge.

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