Vanderbilt Law Review

Volume 24
Issue 6 *Issue 6 - Symposium on Legal Paraprofessionals*

Article 1

11-1971

The Education of Legal Paraprofessionals: Myths, Realities, and Opportunities

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VANDERBILT LAW REVIEW

VOLUME 24 NOVEMBER 1971 NUMBER 6

SYMPOSIUM ON LEGAL PARAPROFESSIONALS

The Legal Paraprofessional: An Introduction

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In this country, persons who have not been admitted to the bar are widely used in law offices. In fact, *A Lawyer's Handbook,* edited by the American Bar Association's Committee on the Economics of Law Practice, devotes an entire chapter to the nonlawyer employee. Investigators and accountants are common and legal secretaries are universal. There are pressing questions on what more should be done to utilize laymen in making legal services available. This issue of the *Vanderbilt Law Review* considers the paraprofessional in law.

The Symposium opens with an article by Mr. William P. Statsky. In his discussion, *The Education of Legal Paraprofessionals: Myths, Realities, and Opportunities*, p. 1083, he lays less stress on the paraprofessional who aids the lawyer and gives more attention to the one who works independently of and supplants the lawyer—the social worker or the welfare advocate, for example. Mr. Statsky also describes the methods employed by some universities and the organized bar in training legal paraprofessionals. A notable example was a three week pilot project conducted in San Francisco in 1970. The project, focusing on California probate law, was directed in turn to legal assistants, to their lawyer principals, and to the lawyer and the legal assistant working together as a team. The theme, borrowed from the American Management Association was "getting things done through people."[1]

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1. *See* the excellent article written by the ABA Special Committee on Lay Assistants for Lawyers, Training for Legal Assistants, in San Francisco Pilot Project Report (Preliminary Draft 1971).

The Attorney's Liability for Negligence was the subject of an earlier article by Dean John W. Wade.[2] In this symposium he considers the tort liability that may be incident to the work of the paraprofessional in law. His article, *Tort Liability of Paralegals and Lawyers Who Utilize Their Services*, p. 1133, recognizes that the liability might fall on the paraprofessional or on his principal. The discussion is linked to recent developments in the field of torts. The conclusions reached may well be reflected in the *Restatement (Second) of Torts*, of which Dean Wade is the Reporter.

Discouragement of the use of the paraprofessional may come, not only from the possibility of tort liability, but also from the characterization of the paraprofessional's activities as the unauthorized practice of law. Mr. Theodore Voorhees, in his article, *Paralegals: Should the Bar Employ Them?*, p. 1151, inquires fundamentally into the why and the where of the controversy over unauthorized practice. He would use as a guide "the public interest," as did the Supreme Court in cases that gave constitutional protection to group practice of law. He ends his thoughtful inquiry with a plea to the profession to welcome newer approaches in many parts of the field, including legal education.

The symposium continues with an article by Mr. Justice Tom C. Clark. In *Parajudges and the Administration of Justice*, p. 1167, he analyzes first, the old but still prevalent practice in England of having laymen as judges, and concludes that this system is unacceptable in the United States. He supports strongly, however, the federal magistrate system instituted in 1968, in which the lawyer-magistrate assumes responsibility for many of the preliminary details in the handling of cases. "I believe that the magistrate system, as enacted and as implemented, is a promising program for the federal courts and an excellent model for the states."

The next article is concerned with the working relationship of the lawyer with the paraprofessional. Mr. Louis M. Brown in his article, *Preventive Law and the Legal Assistant*, p. 1181, opens the discussion with the right question—what are the public needs for legal services and how may paraprofessionals wisely be employed in meeting these needs? Mr. Brown focuses on the field in which he is a leader, "preventive law." He makes concrete a variety of situations in which the legal assistant could be of aid to the client and the lawyer. Deploring the "single license" system, he condemns the use of the overtrained, omnicompetent lawyer to perform time-consuming, routine tasks.

The medical profession offers a parallel in the use of the paraprofes-

2. 12 VAND. L. REV. 755 (1959).

sional. The Sadlers' article, *Recent Developments in the Law Relating to the Physician's Assistant*, p. 1193, has as its authors a physician of the Yale University School of Medicine and a lawyer. They describe the varied activities of the physician's assistant and some of the more than 100 training programs already under way. Special attention is given to the problems created by the legal restriction of medical work to the physician. As a short-term measure, the authors suggest that other health professionals be content to serve as "delegates" of the physician. They recognize, however, that the physician's assistant and other health professionals are doing work that comes within the traditional definition of the activities of the physician—diagnose, operate, treat, and prescribe. As a long-term solution, they urge new legal definitions that will recognize this fact, yet will reserve to the physician the kind of activity and decision making that should be his. The authors ask that the other health professionals be given a title—aide, assistant, associate—that is indicative of the responsibility, importance, and dignity of their work. Certainly, the term "paraprofessional" is as uncouth in medicine as it is in law.

Professor Lester Brickman restates the case for the ready availability of legal services in the introduction to his article, *Legal Paraprofessionalism and Its Implications: A Bibliography*, p. 1213. The lawyer is essential to the equal protection of the laws and to their development by court or legislature. The bibliography, through selection and organization, suggests relevant questions and provides a guide to the wider use of legal paraprofessionals.

In the consideration of the place of the paraprofessional, it is helpful to keep in mind that the methods of making legal services available to the general public have recently seen great developments. They go far beyond the old professional ideal of the individual lawyer serving directly the individual client. From the client's point of view, the poor have been the greatest beneficiaries of this change. Starting as a meagerly supported charity, legal services for the poor have turned into government-supported offices. Their lawyers represent individual clients in their problems, attack institutions that harm the poor, and challenge government administration itself. At the other end of the economic scale corporate clients are served by house counsel, and by large law firms made up of generalists and also of specialists in almost every field of law touching the clients' interests. In the middle range, lay intermediaries now are able to furnish legal services under the protection of the Supreme Court of the United States.

All these methods of delivering legal services have begun to recog-

nize what might well be called a true iron law of wages: an increase in the wages paid by the producer will be borne ultimately by the purchaser of the product. The law applies to steel, to homes, and to transportation; it applies no less to legal services, whether paid for by the client, a charitable institution, or the Government. It is especially clear to the lawyer in private practice, "a self-employed business man,"[3] that it is incumbent on him to organize and run his office to keep down costs that he would have to pass on to his clients.

One aid in keeping down the lawyer's costs is the delegation to lay assistants of the parts of his practice they can perform well under his supervision. The delegation saves the lawyer's time for more demanding matters. It may even improve the quality of the work delegated, because the specialized employee can attain a higher efficiency. It aids the client, for the lawyer can pass on to the client the lower hourly charge for the legal assistant's time. Altogether this can mean increased output of the office, improved quality, and lower charges to the client.

An outstanding illustration of the use of lay personnel in law offices are the solicitors' clerks in England. "Clerk" has different meanings. A long formal apprenticeship in a solicitor's office is a requirement for admission to practice, and the formally entered apprentice is called an "Articled Clerk." Other unadmitted office personnel range from the office boy and the typist to the Managing Clerk. The last is an employee who through informal apprenticeship has learned the skills of a solicitor, but he has not met the profession's requirements for membership, and he may work only under the supervision of a solicitor.[4]

The privilege of reading the symposium suggests some observations that I wish to submit.

Although there is a need for the paraprofessional in the American law office, the system in England of the Managing Clerk in a solicitor's office is, fortunately, not feasible here. With our system of part-time legal education and less restrictive admission requirements, a person in

3. Mr. Justice Harlan, in Cohen v. Hurley, 366 U.S. 117, 124 (1961), stated: "It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed business men as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes."

4. The English system, with its heavy reliance on the solicitor's managing clerk, is described excellently in Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK ch. 12 (1967). It is illustrated vividly by the experience of an American lawyer who negotiated a UK-US corporate merger with an English firm of solicitors: "[A]t least 75% of the draftsmanship [was] . . . done by a single man, a solicitor's managing clerk. . . ." Sproul, *Use of Lay Personnel in the Practice of the Law: Mid-1969*, 25 BUS. LAW. 11 (1970). The barrister's clerk is very different from the solicitor's clerk and has no American counterpart. He is not a performer, but a unique combination of office manager and of intermediary between the barrister and solicitor. *See* Q. JOHNSTONE & D. HOPSON, *supra*.

this country with the potential of a Managing Clerk would become a member of the bar, and as office manager he would be a partner, not a clerk.

The fields of work for legal assistants that come at once to mind are noncontentious office matters, but the duties of the legal assistant need not be confined so narrowly. In several cases the Supreme Court of the United States has given constitutional protection to the activities of lay intermediaries in adversary matters.[5] In one of the cases Mr. Justice Harlan, in dissent, described the way in which workmen's compensation claims were handled by the lay employees of the labor union's salaried lawyer, without the lawyer ever seeing the clients unless they rejected the settlements proposed.[6] On the opposite side of the negotiations in these cases is a Kansas law firm of three lawyers and over twenty lay personnel that represents numerous employers in workmen's compensation matters.[7]

A troubling question concerns the authoritative source of the privilege to represent or to advise in legal matters: is it state law or federal law? When the matter is before a federal agency or concerns a matter within the agency, it is federal law.[8] But what of the numerous situations in which a state agency administers social security with federal funds as a principal source? It seems clear that a state may not through its procedural rules hamper the achievement of the federal purpose in providing the funds.[9] Perhaps, the same conclusion applies to unduly restrictive state rules regarding the privilege of a lay claims advocate or social worker. There are millions of persons with claims to press against state administrative agencies. The claimants are usually the very persons most in need of legal aid, yet the claims are too small to justify financially the expenditure of a lawyer's time. Because the lay advocate could effectively represent the interests of these claimants, the need for the lay advisor is clear.

An important element in the efficient use of legal paraprofessionals

5. *See* Voorhees, *Group Legal Services*, 55 A.B.A. J. 532 (1969). The latest decision is United Transp. Union v. State Bar, 401 U.S. 576 (1971).

6. *See* UMW Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 230-31 (1967) (Harlan, J., dissenting).

7. For a description of the Great Bend, Kansas law firm that specializes in negligence, workmen's compensation, and probate work see Sproul, *supra* note 4. "[Their] experience, incidentally, illustrates that it is not only the large metropolitan law firms which stand to benefit from increased lay assistance." *Id.* at 20 n. 21.

8. For a discussion of the authoritative sources under our political systems of federalism and separation of powers see L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 28-38 (1971).

9. California Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971).

is the creation of a sense of professionalism in their work. Respect toward the paraprofessional will enhance his respect for the work and will give him an accompanying sense of responsibility. The lawyer must make the legal assistant realize that he shares responsibility and is appreciated as an associate professional in law. In addition, the official or tribunal before which a lay advocate appears should make him know that he is held to the same standards of conduct and is accorded the same measure of respect as the lawyer. There is notable illustration and support for the importance of such a sense of professional pride. Justice Brandeis, before he went on the bench, wrote that business managers should recognize themselves as a profession with a correspondingly heightened feeling of responsibility.[10]

10. *See* L. BRANDEIS, BUSINESS, A PROFESSION 1 (1914). *See also* Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 199 (1935).