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The Growing Need for Specialized Legal Services*

*Elliott E. Cheatham***

In this lecture Professor Cheatham discusses the specialization of lawyers, a topio of increasing interest and importance to members of the bar. He concludes that while there is a need for specialists in the practice of law, the general practitioner remains vital to the profession. The author lists problems inherent in specialization including training in a particular area, and coordination and cooperation between the specialist, the client, and the generalist, and emphasizes a need for the bar to take an active part in the solution of these problems.

In the olden days there were giants of learning, men who took all knowledge for their province. In late medieval times some of them roamed Western Europe challenging all comers and all questions. To one of them in Flanders Sir Thomas More put a point of the common law: "Whether beasts of the plough taken *in withernam* are incapable of being replevied"?[1] Before the simple question the giant quailed and fell. Perhaps some members of this learned gathering would be similarly confounded. On the sources of physical power you would be more conversant with the law as to the atom than the law as to beasts. You would be readier to consider the law of outer space than the law of ploughland.

Today no one would dare assert omniscience. Our times are unique in history in the swift development of the natural sciences and their derivative technologies and their impact on society. There is in sight,

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1. See 3 BLACKSTONE, COMMENTARIES 148; CAMPBELL, LIVES OF THE LORD CHANCELLORS ch. 31, at 24 (7th ed. 1878).

not the end of these developments, but the possibility through them of a transformation of society still greater than that already wrought. The historian, Trevelyan, made the point over a decade ago:

> My friend Sir Lawrence Bragg, the Head of the Cavendish Laboratories in Cambridge, recently gave a lecture in which he said that the advance of science and invention in our times was bringing about a change in the economic and other conditions of man's life which would, ere long, have produced as great a change as that produced by the practice of agriculture some thousands of years ago. Agriculture enabled wealth to accumulate and town life to begin, and thereby made the civilizations of which we know, ancient, medieval, and modern, up to the time of this further change now taking place.[2]

Paralleling even if not matching the natural sciences are the growth of the behavioural sciences and the intensification of humanistic studies.

This expansion of knowledge has led to consequent specialization in study and proficiency. The expansion and the specialization are illustrated in all institutions of study and research whether universities or foundations, or the institutes of government or business.

In the recent and far simpler past there were legal giants who took for their province all law and its neighboring disciplines. The work of one of the most notable of them was described by his biographer: "[Rufus] Choate was versed in every phase of the profession. . . . Choate, at various times, was psychologist, sociologist, neurologist, alienist, and father confessor, as well as attorney."[3] There are still alive men who assert membership in this species of legal giants.

Their claim brings to mind Mark Twain's warning which runs something like this: "It ain't what a man don't know that hurts. It's what he knows that ain't so." All of the immense and continuing developments in other fields of knowledge may be of importance and find reflection in law. They have made the law so diverse in subject and so developed in detail that no lawyer can have an adequate working or even beginning knowledge of the law on all the matters that may naturally come into the office of the general practitioner. Nor can any lawyer now acquire an adequate working knowledge of the law on all these matters in a length of time that will make practicable fees which are fair both to the client and to the lawyer.

Two personal incidents indicate the speed and extent of change. Public Utilities is a subject I taught in the 1920's. In the 1950's I attended a meeting of the Section on Public Utilities of the American Bar Assocation. The topic discussed was outside anything I had ever

2. Trevelyan, *English Literature and Its Readers, Presidential Address,* in THE ENGLISH ASSOCIATION 7 (1960).

3. FUESS, RUFUS CHOATE 140 (1928).

dealt with and beyond the reach even of those who were the most gifted when I worked in the field. It was the use of atomic energy and its effect on the regulation of public utilities.

The other experience was vicarious. In 1947 I made a talk to the Southeastern Conference of Law Teachers on the future of legal education. Feeling the need of practice in prophesying, I began by taking my stand in 1897 and predicting what would happen in the fifty years to come.[4] My prophecies were as astounding in the range of change as in the accuracy of detail, for I was bold enough to predict on politics and the physical sciences as well as on law and legal education. As for law I predicted that while in 1897 the volumes of the United States Supreme Court Reports and the Federal Reporter did not contain a single case on internal revenue, fifty years later one volume would require ten pages of the index for that subject alone. If today you would take your stand as prophets fifty years ago in 1913, and predict fifty years ahead, your predictions would be even more astounding in range than were mine as of 1897.

Changes are disturbing to all of us for they compel us to get out of the pleasant grooves of habit. Yet the great changes in the recent past and the greater ones impending, forcing us out of the old grooves, are sources of opportunity as well as of disturbance. To law and to lawyers they give a double opportunity.

One opportunity is to help deal with these changes in the large. Adjustments and developments in the law will do much to determine whether scientific change and the social pressures it generates will be benevolent or catastrophic for our society. The other opportunity is to help deal with these changes in the small for particular individuals. It is the latter aspect to which I ask your attention. For these remarks so far are directed to the needs of particular persons and to lawyers as instrumental to the satisfaction of these needs.

One obvious matter is that there is need for specialization and specialists among lawyers. The need is made manifest by the fact of specialization at the bar, one illustration of which is the specialization of the corporate bar described by Judge Learned Hand.[5]

The second conclusion is that there is need for something more than a man who knows more and more about less and less of the law. The client is not merely a point or problem of law. He is a human being who seeks advice and help in meeting a problem with personal as well as legal aspects. His problem, even if looked at as an im-

4. Cheatham, *Legal Education—Some Predictions*, 26 TEXAS L. REV. 174 (1947).

5. "[I]n my own city the best minds of the profession are scarcely lawyers at all. They may be something much better, or much worse; but they are not that. With courts they have no dealings whatever, and would hardly know what to do in one if they came there." Hand, *Have the Bench and Bar Anything To Contribute to the Teaching of Law?*, in PROCEEDINGS, ASS'N AM. LAW SCHOOLS 45, 56 (1925).

personal case at law, often cuts across several fields of law, and its parts are not fragments isolated from one another. So there is need for a lawyer who has the judgment and wisdom to see and to deal with the client's problem and its various specialized elements as an integrated whole. In a word, there is need, too, for a "generalist," a word that has recently made a place for itself in the dictionary. The dictionary definition is: "Generalist: one who devotes himself to, is conversant with, or can handle several different skills, fields or aptitudes—opposed to *specialist*."[6] I question the last phrase in the definition, at least for our purposes. A generalist in law is not "opposed," in the common sense of the word, to a specialist. Rather, he is one who complements the specialist and integrates different specialized skills into an overall conclusion for the case and the client. Even generalists vary in their elements of strength. One may be acute in analysis and in perception of the several facets of the legal and human problem; another may be wise in judgment and counsel; yet another effective in negotiation and settlement.

From its earliest days the American profession has been accustomed to the generalist. The advent of the specialist has brought difficulties. The principal points of impact of the problems on the profession are three: legal education, the practitioner, and the organized bar.[7]

For the law school the problem is, how much specialization should it permit or encourage or require? The question can be put as well from the side of the law student. The answer for the school and for the student depends on the purpose of specialization in law school. Is the purpose to enable the student to acquire a thorough knowledge of a particular field; or is it, rather, to help him to develop his intellectual powers and to widen his understanding by going deeply into some one field? If left to himself, many a student would grasp the first purpose. In the last years of the elective system in college, I had a contemporary who took eleven out of his sixteen college courses in the field of chemistry. A wiser choice is indicated by a comment Judge Bernard Shientag made. The most helpful work he had in the Columbia Law School, so he said, was in a subject in which he never had a case in practice. The subject was that old quagmire, the New York law of perpetuities and trusts and powers. By going into the subject deeply he developed abilities that could then be turned to use in other fields.

6. MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (3d ed. 1961).

7. At this point my colleague, Professor Robert Covington, who very kindly and helpfully read these lectures in manuscript, wrote down a comment: "Much as I hate to say it, I think this leaves out an equally siguificant point of impact: the decision-maker. Should we let our federal courts of general jurisdiction handle tax, labor, patent matters at all? . . . [A]nd if the courts must handle specialists' problems, should they be allowed rights to consult panels of specialists within or without the profession"?

For the young practitioner there is the question whether he should specialize and which field he should choose. If he decides to specialize what should he do after his first degree in law: should he go on with graduate work in law school, or depend for development on his work in a government department or in practice; or may he combine two of these methods? The answers may turn on individual factors, as, temperament, abilities, opportunities.

For established practitioners there are two markedly different situations. One is that of the large firm with specialized resources within it. The client of such a firm can count on it that the member he sees will draw on the specialized abilities of his fellows within the firm. The method is excellently described by Mr. Harrison Tweed in his Cardozo Lecture:

> The reason for the existence of law partnerships is not the possession of a big client but the need to bring together a group of lawyers collectively qualified to do the things that those of the public sought as clients want done and want done well.
>
> The law firm makes available to its clients a number of lawyers each of whom possesses at least one of the special skills needed by the clients. . . . [In addition] there is a demand for one partner with the ability to advise business clients on broad and crucial questions of policy although he may be less expert in any one area of the law than his partners. . . . Thus, from the large firm there may be obtained by a client precisely the close and confidential counselling which is in the best tradition of the Bar.[8]

This method is, in fact, the group practice of law. It is employed not so much for reasons of economy and lower charges to clients—reasons at times urged for group practice of medicine and of law for poor and middle class clients—but for better professional services.

The other situation is that of the solo practitioner or small partnership which does not possess within the office the specialized resources needed by the client. The magnitude of the situation is revealed by statistics. Far more than half of the lawyers of the country practice either alone or in very small firms. Most of them are generalists. They cannot render to all of their clients the services the clients need over the whole range of practice. Far oftener than they admit, they and their clients need the aid of specialists.

The third point of impact of specialization on lawyers is the organized bar. One measure already undertaken is the improvement of continuing legal education on various levels of expertness, which was

8. TWEED, THE CHANGING PRACTICE OF LAW 13 (1955) (Cardozo Lecture). See also Tweed, *The Changing Practice of Law: The Question of Specialization*, 48 A.B.A.J. 423 (1962).

discussed and advanced at an Arden House Conference.[9]

Another and far more difficult problem involves the coordination of the three sides of the professional triangle, the client, the generalist, and the specialist.[10] Before considering the task in the American legal profession it may be useful to glance at coordination in another country and then in another profession.

In England one finds both specialization and coordination in the legal profession. A manifest form is the division of the profession into two branches, solicitors and barristers. There is specialization in fact within the ranks of the barristers, as, in chancery work—a specialization aided by the fact that the solicitors who choose the barristers know well the field of effectiveness of their fellow lawyers, the barristers. There is specialization by firms of solicitors. And there is cooperation of the generalist and specialist through the practice of a solicitor taking the opinion of a barrister on fields of law within which the barrister is expert.

Medicine with its highly developed system of certification is a striking analogy. In 1959 it had examining and certifying boards in nineteen specialties, which over the preceding eighteen years had granted 77,447 certificates of proficiency.[11] There was no hasty growth of certification. The first board was created in 1915, the second nine years later in 1924, and most of them originated in the 1930's. So the system, growing slowly at first, developed only after its usefulness was proven. There are criticisms of the operation of the system and warnings lest the specialist become a mere narrow technician. There is no thought, however, of abolishing specialties and of returning to a system under which all physicians would be general practitioners. While medicine is a striking analogy, it may not be a close one.[12] Medicine and law differ greatly in the development and precision of the underlying sciences, in the facilities for post-graduate work under supervision, and in the methods of practice. It would be impossible to transfer the system of medical certification to law, and law must work out its own system.

After these detours to England and to medicine, I return to our problem of law in the United States. There are two general courses

9. See JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND THE AMERICAN BAR ASSOCIATION, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY (1959).

10. Dean Russell Niles has argued forcefully that "the most difficult problems are ethical," not those of proficiency and certification. See Niles, *Ethical Prerequisites to Certification of Special Proficiency*, 49 A.B.A.J. 83 (1963).

11. *Requirements for Certification, American Specialty Boards*, 171 J. AM. MED ASS'N 806 (1959).

12. A helpful criticism of the analogy of medicine and law is given in Siddall, *Specialization in the Law: A Retort to Professor Joiner's Call for Control*, 42 A.B.A.J. 625 (1956).

the organized profession may take toward specialization. One is laissez faire. Laissez faire means only that the bar associations will remain unmoved. It cannot mean that conditions will remain unmoved and the forces of change suddenly halt. Though the associations decide on a policy of abstention, specialization in practice will continue to grow and develop but without aid, direction, or control by the associations. The wise generalist will continue to seek a competent specialist, and specialists—real or assumed—will continue to offer their services to the generalist or to the public.

The other method is for the organized bar to interest itself in these developments and to aid in working out a system of coordination of the work of the specialist and the generalist which will protect all the interests involved. Both methods have been discussed by the American Bar Association. After long abstention the Association in the early 1950's undertook a consideration of the matter, but dropped it within two years. In 1961 the Association made a fresh start through a special committee, which has submitted proposals for the Association's consideration.[13] In an article which characterizes the proposals as a beginning in another long continuing educational effort, a member of the special committee states his convictions on the need to promote specialization:

> For years I have been convinced that the survival of the legal profession (at least, its retention of its present monopoly of practice in some areas) and the public interest—and, as a poor third, the increase of lawyers' incomes —all demand a substantial raising of the level of competence in practice. And I see no way to do it except by promotion of specialization in the proper sense.[14]

With the decisions still in the making by those in authority comments may be in order.

The interests of the different sides of the professional triangle interlock and are difficult to disentangle. Yet it is useful to look at the problem common to all of them from the viewpoint of each in turn.

The Client. The particular client is entitled to competence from the lawyer he employs. An expert in will drafting made the point in ethical terms:

> [O]f all the moral obligations of the lawyer who undertakes to prepare a will the obligation of competence is paramount. . . . If the lawyer doubts

13. The recommendations of the Special Committee on Recognition and Regulation of Specialization in Law Practice were reported to the Association by the chairman, Mr. David F. Maxwell. See 48 A.B.A.J. 983 (1962).

14. Cantrall, *A Country Lawyer Looks at "Specialization,"* 48 A.B.A.J. 1117, 1119 (1962). See also Randall, *The President's Page,* 46 A.B.A.J. 575 (1960).

> his ability to produce the best possible will for the client, he should decline to prepare one.[15]

Mr. Drinker has drawn this conclusion as to the association of a specialist with a generalist: "A lawyer should not presume to undertake professional employment for which he is not reasonably competent but should recommend or at least associate a specialist."[16] In medicine, where specialization is better known to the public, the recommendation or association of a specialist has begun to take form as a legal requirement based on the standards of the profession.[17] When in our "claims-conscious" generation lawyers are as ready to sue one another for incompetence and negligence as they are to sue physicians for malpractice, this unfraternal atttitude will quickly make the bar see the uses of the specialist.[18]

Clients as a whole, that is the public, can be informed by the organized bar that there may be need for the specialist as well as the generalist in law. Ingrained assumptions of the omnicompetence of the lawyer may at first make this difficult for clients to grasp. In medicine the patient who is told by the general practitioner that he needs the services of a specialist, too, will accept this as a mark of the care of his physician. In law the client given this advice may take it as proof of the incompetence of his lawyer. The same assumptions of omnicompetence, by lawyers themselves, may for a time make generalists resent a plan that seems to reflect on their ability to handle their clients' cases.

The client must be protected from double fees or excessive charges. For the reputation of the bar he must believe there are no such excessive charges. The specialist and the generalist together can, in fact, give him better services at as low a charge as the generalist alone, and the client should be made to see this is so and why it is so.

The Specialist. The specialist needs, first, the identification of himself as one who meets standards of proficiency. It is this need to which the American Bar Association committee has primarily directed its efforts so far, with the proposal that standards of proficiency be formulated by agencies of the Association and certification of proficiency be effectuated within the Association. The difficulties in the way are manifest. The insight and understanding and judgment so essential in our professional work are difficult to test, yet the standards

15. Miller, *Function and Ethical Problems of the Lawyer in Drafting a Will,* 1950 U. ILL. L.F. 415, 423.

16. DRINKER, LEGAL ETHICS 139 (1953).

17. See McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549, 597 (1959); Annot., 132 A.L.R. 332 (1941).

18. See Wade, *The Attorney's Liability for Negligence,* 12 VAND. L. REV. 755 (1957).

of proficiency if they are to be meaningful must be something more than paper standards. The table-thumper and the client-getter could not meet even the paper standards, so he would naturally resent them. The established and competent specialist, too, would object to a test of proficiency which, unless there is to be a grandfather clause, might be more readily met by one of half his years and ability. The resentment would be all the greater when the young but inexperienced fellow who passes examinations with the greatest of ease flaunts on his walls and in conversation the certificate which his elder feigns to disdain.

The second need of the specialist is to have himself made known to the generalist. The American Bar Association committee has proposed that this be done in ways approved by the Committee on Professional Ethics. Committees on professional ethics have already given their approval to cards sent by specialists to generalists and to similar advertisements in newspapers that circulate principally among lawyers. Some state bar associations have had "an experienced lawyer service" through which a general practitioner may secure the names and background information of men who are experienced in various fields. Perhaps this use of background information within the profession together with certification would be an adequate way of enabling the generalist to choose his associate wisely, say, to choose between the certificate holder, and the experienced but uncertified practitioner. Time may help to solve the problem, once a system of certification is established. The able men will seek the certificate in their youth, and the uncertified but able specialist will slowly disappear from the bar.

The Generalist. Specialization may threaten the generalist in his self-esteem and in his clients. The threat to self-esteem will abate if the bar makes known, as it should, his continuing importance and the client's need for him. It is gratifying to observe that the newly established Section on General Practice of the American Bar Association already has a large membership.

The threat to his clients is both general and individual. As to the general threat, the less scrupulous of the specialists may disparage their brethren of unconcentrated ability. By excessive claims and quiet publicity they may well make prospective clients believe that the generalist is not needed and that one fee to one lawyer is better than two fees to two lawyers. For the individual threat, the client who goes to the specialist on recommendation of the generalist may thereafter abandon his old lawyer, the generalist. The danger is the greater because the present bar association plans do not contemplate that a certified specialist shall be confined to his specialty. He may engage in the general practice of law, too. Under the English practice

of the solicitor taking the opinion of an expert barrister there is no such danger of client-stealing, for the lay client goes to a solicitor first and may not go directly to the barrister.

The Method of Cooperation. The method of association of the generalist and the specialist for a particular client or case has been called an "ad hoc partnership."[19] The Canons of Professional Ethics deal with professional cooperation in Canon 7, which assumes that it is the client who makes the move for additional counsel, and in Canon 34, which condemns division of fees except when there is a sharing of service or responsibility. The former Canon gives an emphasis outmoded in these days of specialization, since it may now be the professional responsibility of the lawyer consulted to recommend the cooperation of another lawyer. The latter Canon does not stand in the way of cooperation and division of fees when, as is assumed in this discussion, the generalist does not merely refer the client to the specialist to handle the case but continues as guide and coordinator.

Specialists in Other Disciplines. So far the discussion has been directed to specialization within the law—to the fact of specialization, the need for the specialist in many cases, and the bar associations' part in the coordination of the work of the generalist and the specialist. There is another area of specialization and of specialists outside law that may be important for the lawyer and his clients and which calls for mention. The area referred to is not the natural sciences, with their transforming effects on society that must be reckoned with by law and lawyers. Nor is it the humanistic studies, though the ethical factors are among the most powerful of what Chief Justice Stone in his last report as dean called "the energizing forces" that are constantly remaking the law. The area is that of the behavioural sciences, as, economics, political science, sociology, and psychiatry.

On legal education, notably in Columbia University, these studies have already had a profound effect, as a perceptive and candid critic observed:

> The most significant development in American legal education since 1870 is the movement toward reorganization of courses along functional lines and toward the broadening of law school studies to include nonlegal materials, chiefly from the social sciences, which are relevant to legal problems. The movement may be regarded as having had its origin in the extensive studies of legal education undertaken by the faculty of the Law School of Columbia University in 1926-27 and 1927-28.[20]

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19. Joiner, *Specialization in the Law: Control It or It Will Destroy the Profession,* 41 A.B.A.J. 1105 (1955).

20. Currie, *The Materials of Law Study, Part Three,* 8 J. LEGAL ED. 1 (1955). See also Currie, *The Materials of Law Study, Part One,* 3 J. LEGAL ED. 331, 332-34 (1951).

This is not the time to discuss these efforts or their precursors,[21] or the excessive hopes, the disappointments, the renewal of efforts, and the measure of achievement in many law schools. Nor is it the time to do more than to mention some of the uses in law of these sciences, as, by the practitioner in his argument, or the judge in his decision and opinion, or the legal scholar in his criticism and proposals on the law, or the social scientist in his observations and findings of our profession and its working.

What is relevant to our discussion is the development of practitioners in this area. Until the latter part of the nineteenth century the lawyer was almost the only expert in the field of human relations. Following close behind the extension of knowledge by the social scientists came the development of new groups who seek to apply this knowledge to human affairs. They like to call themselves professionals, since it is of the essence of a profession that its members apply accumulated knowledge to the individual case. The economist, the political scientist, the sociologist, and the psychologist have stepped out of the universities into business and into the government bureaus formerly dominated by lawyers. The desire to understand human action and the need to deal with hampered or twisted personalities have produced the psychologist, the criminologist, and the social worker. Increased efforts toward the clarification of business conditions have created the statistician and the accountant.

The members of the bar have at times the opportunity and, it may be, the duty to employ the new knowledge for their clients. A reply to a questionnaire sent out for The Survey of the Legal Profession put the matter succinctly:

> The lawyer cannot properly advise and counsel his clients without the assistance of experts as well as of lawyers who specialize in particular fields. It is suggested that a Canon should be framed stressing the duty of a lawyer in giving counsel and advice to utilize the services of such experts.[22]

A well known treatise affirms that "estate planning, in its modern sense, is a team job."[23] The book continues that the team "ought properly to be captained by the lawyer." To me also this captaincy seems proper. But I remember my experience in a Columbia University Seminar on the Professions, made up of faculty members from the social sciences and the professions, in which each one seemed to believe his field was the central one in the consideration of the case and the others were concerned with mere techniques.

21. See *id.* at 378-83.

22. McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399, 421 (1951).

23. SHATTUCK & FARR, AN ESTATE PLANNER'S HANDBOOK § 1 (2d ed. 1953).

When there is this cooperation with lay specialists the terms of cooperation will take into account the Canons of Professional Ethics which prohibit division of fees for legal services with laymen and the furtherance of the unauthorized practice of law. But the situation is not one of unauthorized practice of law by ignorant and unskilled men. It is the utilization of men of greater knowledge and skill in their fields which are of importance for our clients. These men should be recognized for what they are, collaborators in the common task of advising and guiding the public.

The behavioural sciences have not yet attained the precision of the natural sciences. So law cannot rely on them as medicine does on the natural sciences. Yet the behavioural sciences are refining their methods and becoming more precise and dependable in their conclusions, whether as to groups or as to individuals. There will be an increasing realization of the need for them in law. Some future worker in law may be able to match as to his own work the statement of one of the great men of medicine about his work as being "a lifelong attempt to correlate with art a science which makes medicine, I was going to say the only—but it is more civil to say the most—progressive of the learned professions."[24]

24. OSLER, THE OLD HUMANITIES AND THE NEW SCIENCE (1919), reprinted in OSLER, A WAY OF LIFE 9 (1951).