

A Better Mouse Trap

By JOHN S. BRADWAY

"If we lawyers, instead of defensively holding a Maginot line in a cold war, are willing to go out affirmatively and meet the competition on its home grounds and to match the quality of our product against the best he can offer, we may expect the reasonable client to choose us."

THE LAY MOVEMENT toward unauthorized practice of the law is one of the major unanswered problems confronting the legal profession. In seeking a solution we have drawn a line, told the world that our side of the line constitutes an area in which the lawyer has exclusive privileges, and prosecuted and otherwise endeavored to discourage trespassers. We have buttressed our position with acts of the legislature, court decisions, action by bar association committees. Yet the difficulty is still largely a matter of concern. No one knows when or in what form it may emerge to require further attention. Those who would like to see a permanent and satisfactory solution are inclined to look elsewhere.

The most obvious characteristic of the present program against the unlawful practice of the law is its negative quality. To argue that we should merely hold the line assumes a great amount of patience and persistence on the part of the members of the bar. Perhaps that effort could be used more constructively along other lines. It is one thing to resist and quite another to go out and deal directly with the troublesome cause. In the field of medicine we are accustomed to distinguish between treating a symptom and dealing with the cause of the disease. Perhaps there may be value in exploring the possibilities of an affirmative bar association approach.

JOHN S. BRADWAY is professor of law and director of the Legal Aid Clinic at Duke University. He is a graduate of the University of Pennsylvania, a member of the bar of Pennsylvania, California and North Carolina, and before taking up his present work he practiced in Pennsylvania and taught at the University of Southern California. He is a frequent contributor to legal periodicals, and has contributed numerous articles to this JOURNAL on legal aid and legal education topics.

Two arguments in support of a possible affirmative approach may be urged—both in the public relations field of the bar. First, the problem is not merely one in which we are dealing with a competitor—a two party controversy. The client is a necessary third party in interest. Just because a rule of law declares that we, and not our lay rival, have the "right" to serve him does not necessarily mean that he will be satisfied. Once he may have thought the lawyer was the only person to whom he might apply for aid. Now he has a choice. We may assume that in making that choice he will be influenced by his conception of quality of product. If the competitor's commodity pleases him more than does that of the lawyer the rule of law may not be a deterrent factor. Second, the lawyer has acquired rights in the position he occupies not so much by divine fiat as in fairly direct response to an economic need of the client. Just what would happen if the client concludes one of these days that he no longer needs the lawyer's services is anybody's guess. Some idea may be gained: by a perusal of the literature of criticism of the bar; by a survey of the areas of business activity which used to be exclusively the province of the bar and are now in the hands of laymen; by reading in the history of the legal profession how its position in public esteem has varied from high to low depending upon what the layman thought he needed. In the light of the information thus gleaned one may query the effect of the legal sanctions used to enforce compliance with the unauthorized practice laws in the client's mind. Will our specific sanction encourage the public to conclude that the lawyer can do the better piece of work?

Since the final solution to the problem of unauthorized practice of the law seems related more or less closely to the point of view of the client, we are justified in exploring the possi-

bilities of an affirmative program, in using as our point of departure a reasonable client.

We may argue that if we build a "better mouse trap" the reasonable client will brave the "wilderness" of professional reserve and "beat a path to our door." In other words *if we lawyers, instead of defensively holding a maginot line in a cold war, are willing to go out affirmatively and meet the competition on its home grounds and to match the quality of our product against the best he can offer, we may expect the reasonable client to choose us.* One risk we take in such a procedure is that the client may not be in a position to make an evaluation. There may be no suitable lay measuring rod of professional effectiveness. If this proves to be the case we have a problem of educating the public to appreciate first class professional service. The physician has made headway in this direction and we may anticipate no insuperable obstacle although the topic is not in line with the scope of the present paper. Another risk we take is that in such a contest the layman may demonstrate that in various respects he can actually do a better job than we can. It is with this possibility that I propose to deal. The remedy, if such a condition exists, naturally is for us to plan how we may improve the quality of our "product," justice according to law, and how we may raise ourselves by our own bootstraps to a pre-eminent position.

The problem of financing a remedial program directed to this end is large enough to call for a separate article on the subject. It may be sufficient here to recall that where there's a will there's a way. Whether such a program can be developed without involving the bar in the toils of a plan for socialized law may appear as we proceed with the present discussion.

A BAR ASSOCIATION PROGRAM

If any program for increasing the quality of the legal "product" is to succeed, responsibility for its promotion must rest somewhere. Probably the bar association because of its past interest in repressing unauthorized practice of the law is, at the moment, best prepared to assume that responsibility. At all events the present proposal is based tentatively on that assumption. Cooperation with other groups is essential and in due course all branches of the

profession will find a significant place in the program.

The process by which one pulls himself up by his own bootstraps may be included in the term "education." If we are to improve the services of the legal profession, our concern is with legal education and what may be done to modify it to meet a definite challenge or series of challenges. There are two main areas for improvement, quantity and objective. The quantity of legal education today is generally circumscribed by what the individual student is able to absorb: in three (or perhaps four) law school years; in occasional bar association institutes; in personal research in one's own office. The high quality of industry of the bar is attested by the research done in the private law office; but such work on a cost accounting basis is wasteful of time and effort and requires that the lawyer combine in himself a great variety of qualities which in the medical field are divided among the practicing physician on one hand and a large group of laboratory technicians on the other. The bar association institute offers admirable instruction but it is held only occasionally and does not purport to cover the entire field of law. The law school is hampered by being expected to turn out men prepared for a variety of functions, each of which naturally requires a lifetime of preparation. They do a remarkable piece of work in the gravely restricted period of three (or four) years. The theory of the proposed remedy is: (1) to adopt the concept that legal education, if we are to serve our clients properly and meet lay competition, is a lifelong task and one which calls realistically for organized instruction all the way; (2) to divide the life span into convenient segments and assign to each segment a reasonably attainable and mutually coordinated goal.

To implement these general ideas, and by way of illustration as to how the program might conceivably be carried out, let us be more specific.

1. A pre-legal stage should be designed to equip a man to enter law school.
2. An initial law school stage should prepare the student to function effectively as a general practitioner and no more.
3. A second stage of organized instruction should:

keep a practitioner abreast of new law;
 provide special instruction for incumbents of special legal positions;
 develop a profusion of specialties in substantive law.

The profession would, then, be divided horizontally into two groups: the general practitioner and the experts. The success of the medical profession along these lines raises the hope that some similar plan in the field of law might be developed to a point where the service to clients would be considerably more effective than it is now. This brief outline requires elaboration.

THE PREPARATION STAGE

Many pre-legal students would be glad for additional guidance. They fear they may be wasting their time during four years in college. Law school faculties have not always been too helpful. They frequently assert that they have no preferences among pre-legal courses. The desideratum is described in terms of a broad cultural background. However much this position may be justified from the law school standpoint it fails to meet the presently imagined needs of the student. The student viewpoint may provide us with direction in developing a remedy.

We may do better than at present by telling the pre-legal student we will do three things to prepare him to be a law student:

(a) By a course in comparative professions, their growth and problems, and what they reasonably require of their members, we can help the student to answer two basic questions: (1) Do I want to spend my adult life as a professional man? (2) Do I want to assume the responsibilities and inevitable drudgery which are the lot of the lawyer? If the course is properly given it may serve to attract to law young men who may have something of distinct value to contribute to the profession but who are initially attracted by certain dramatic aspects of the opportunities offered by other fields of endeavor; and to weed out others who are not serious in their intentions.

(b) There is no reason to minimize the need for the traditional broad cultural background. One may however question whether this is best secured by turning the student loose among a large number of electives. It is not necessary to require specific courses by name, but perhaps

we may be helpful in giving individual advice without introducing a process of overall regimentation. This period in college need not cover the full four years because space should be made available for the following item.

(c) We may require certain pre-legal courses not in the sense that they teach accounting, or business law or English constitutional history, but because they fit pieces into a picture of what the full-fledged lawyer should have and be if he is to meet lay competition on its merits.

If we conceive of a lawyer as an isolated omniscient personality we shall have to teach him everything and give him experience in how to do anything. The order is a large one and fortunately a more modest alternative is available. The lawyer may be the legal member of a team. Who the other members of that team are will depend upon the needs of the particular client, in a particular case. To solve one problem the lawyer may call in an economist; in another a physician; in others chemists, engineers, psychologists, sociologists. In such a system the lawyer needs to know and have time to concentrate upon the law. If, in addition, he is able to decide accurately when and who to call in to help, if he knows how to work with the other person or persons on a high level of interprofessional cooperation, he will be able to supply his client with a pretty fair brand of solution no matter how complex the difficulty.

There seems no better time in the educational process to lay the groundwork for interprofessional cooperation, for integration of the field of law with the fields of the other social and physical sciences, than during a year or year and a half in the pre-legal period. Courses may be developed which might be referred to as "sightseeing" courses. In them the student would be introduced one after another to a large number of fields of knowledge which infringe in some way or another upon that of the law. He would learn something of the specialized vocabulary in each field; something of the extent of the field and the way it functions, what its sanctions are; something of how to secure its aid in the solutions of lay problems. He would not become in any sense an expert, but merely a trained observer. Then he would pass on to the consideration of the next field.

Of a somewhat different type would be the following aids to the pre-legal student:

(a) Publication, round table conference, symposium or other comparable device operated jointly by the faculties of the undergraduate and law schools to produce literature dealing with the problem.

(b) A practice in undergraduate courses of having the instructor emphasize, for the benefit of the pre-legal students in the class, legal aspects of the topic under discussion. He may show, for example, how the engineering work of surveying is of interest to a lawyer.

(c) A joint committee of law and undergraduate faculty members to offer personal counseling service to students.

(d) A pre-legal student organization to help to develop a student viewpoint and aid in securing contributions toward improving the situation.

A pre-legal student emerging from this type of discipline would not know or expect to know the law; but he would have some ideas of his own: that he wanted to be a lawyer; that he had acquired the broad cultural background; that he was familiar with a lot of areas of human activity which, as a lawyer, he might well expect to have to call upon for help. It is submitted that he would compare favorably with the average of the present crop of entrants.

THE INITIAL LAW SCHOOL STAGE

The specific objective of the initial law school stage would be to turn out a competent general practitioner. To this end there would be only two courses offered—one in law; the other in method. The student would be required to demonstrate passing ability in both before he would be allowed to attempt a bar examination.

The course in law would be limited to the dimension "breadth". It would seek to be comprehensive so that the student would have contact with the various "fields" of law. It would emphasize the law not in terms of academic "fields" but realistically as a seamless web.

At present law school curricula tantalize the student by offering him a choice: Course A or Course B. Sometimes it is Course A or Course B or Course C or Course D. He cannot take them all and yet he needs them all. Sooner or later some client is going to come into his office with a case resting largely or entirely in

a field of law in which the student has never had a course in law school. It is the unusual lawyer who, when faced with such a challenge, will tell his client that he is unprepared to handle the case. He will usually spend a great amount of time acquiring a familiarity with the subject. Sometimes he may try to bluff his way through. How justifiable may be time thus spent is problematical if we consider the matter, as sooner or later we must, from the standpoint of cost accounting. In the law office the proposed plan would eliminate complete surprise as a factor in substantive law. The main question in setting up the system would be—how much depth can you afford to give a student in three years where the main purpose is to provide breadth? In other words—how much should a general practitioner of law know?

The answer to this question is not something to be glibly assumed in some more or less superficial formula. It is, however, something which could be worked out by the trial and error method. To that end we might ask the American Law Institute or some similar agency of comparable scope, dignity, and prestige, composed of all branches of the profession to undertake the task of finding an answer.

Such an agency might well start with the present restatement of the law and produce a series of volumes, comprehensive in the sense that *Corpus Juris II* and *American Jurisprudence* are inclusive but with a different content; simple in the sense that a *Hornbook* is simpler than *Wigmore on Evidence* and yet not a duplication of a *Hornbook*. With a view to using the series as a teaching device the volumes might contain cases, text, problems, or other instructional media.

A person who took a course in such a series would know the law which the profession has decided a general practitioner ought to know. He would also know it in such fashion that he could follow a particular principle of law across the boundary lines of the present academic courses or fields. This ability would help him in dealing with those clients who do not wear in the lapel of their coats a badge on which is written the name of the field of law in which their problem and its solution lie.

A second function of this agency would be to offer periodically a national bar examination to those law students who had finished the

comprehensive course discussed in the preceding paragraphs.

A third function of the agency would be to oversee the operation of the whole plan and make appropriate corrections and improvements.

The course in method required in this initial law school period would be based on the instruction given in legal aid clinics. It would supply the student with skills and experience and would point toward the state bar examination.

A student who, for perhaps three years, had taken these two courses and had passed a national and a state bar examination would emerge qualified as a general practitioner. In that capacity and in comparison with many a present-day young law graduate he should be able to give a good account of himself.

Nothing has been said about cultural courses in law, legal ethics, and other similar matters. Some place might be found for them—perhaps in a summer school session between the second and third years.

A further advantage to be expected from this initial law school period would be in the acquisition of a common denominator of mutual experience among members of the profession. In a period when the trend toward premature specialization must be taken into account in estimating the strength of the legal profession, it is no light matter to feel sure that everybody who calls himself a lawyer can look back to a period of identical experience.

THE SECOND LAW SCHOOL STAGE

Perhaps a second law school stage could be worked out during the month of June each year. Courts might close. Lawyers might lock up their offices and flock back to the school of their choice to become specialists.

If the lay competitors of the lawyer were merely general practitioners, each in his chosen field, our problem would be solved by raising the incoming members of the bar to the rank of general practitioner. However, since they frequently are specialists in their own right, and have their own systems of adult education, we must go further and turn out a group of legal specialists.

The period in which the specialist is developed would be characterized by numerous courses in fields of substantive law and corre-

sponding advanced instruction in method. The work could begin at any time after a man was admitted to the bar and it could and should continue until the end of his professional career. The instructional work would differ from that in the traditional law school because all the students would have behind them the earlier phase and would be operating on a higher level. Having once seen the law as a seamless web, the task of following one aspect of it to the bottom should be accomplished with greater speed and less effort.

While the term "breadth" applies to all fields of law, "depth" is used to emphasize the need for a specialist to know everything in his field. Instead of referring to a single case in a casebook on a point, the specialist-lawyer-student would expect to master every case which had ever been decided on the point, all statutes having a bearing, all administrative rulings, all law and related materials in the field. But the full objective would be accomplished only after he was also thoroughly at home in the method side. He should demonstrate facility in the use of practices, methods, routines, devices actually used by professional and lay individuals and groups functioning in the field. Sources of information would include the law library, but largely as a point of departure. In addition, he should be shown, supervised, and the supervision relaxed when he had demonstrated his ability to perform as an expert. He should seek to acquire as much skill in the field as anyone, lay or professional. Field work might be arranged in banks, in realtor offices, in manufacturing plants, in labor unions, in mines, in laboratories, in specialist classes conducted for laymen. The legal specialist thus would learn the lay side of the problem of method just the way his clients learned it. A course in depth contemplates going beyond the printed page to the bottom of the barrel.

Members of a law faculty competent to teach in this area would not be of the ivory tower variety. They would do well themselves to alternate—perhaps a year of teaching and writing, and then the next year of actually working and studying method in some law office or industrial plant, or business office, or other front-line agency. The resulting freshness of their approach in the classroom would be carried over to and reflected in the improvement of the students.

There is no limit to the number of prospective experts who might desire to take courses in this specialization period. Probably most lawyer-students would be content to become preeminent in at most one or two fields, but there should be no restriction beyond that of physical endurance. Rather there should be encouragement, if such were needed, to continue such study perennially. The increased opportunity to render better service should be inducement enough for more lawyers. Academic degrees would be possible, but not essential, rewards. In addition, the right to place on one's letterhead or building directory or telephone listing a notation for each field in which expertness had been attained should be helpful. If this bit of "advertising" were allowed, the lay public could more easily select a lawyer qualified to handle a problem in a special field.

At the conclusion of each course in this stage of the proposed plan, the lawyer would feel reasonably sure that he was, in fact, more competent to serve the public in the legal aspects of a particular field than are the lay competitors, even those who also may have had special training. When such effectiveness is multiplied by the number of the various members of the bar, the total effect upon the prestige of the profession would be substantial.

THE FINAL STAGE

During the early stages in this proposed educational process—those devoted to breadth and method—students might meet in the conventional class. The topics, breadth and method, lend themselves to group treatment. During the second stage, instruction would be given at most to small groups on a seminar basis, or even better, to individuals. A study of depth and expert method requires that consideration be given to a particular situation for which the lawyer may desire to fit himself. The third stage calls for annual refresher courses in breadth, depth, and method given again to the conventional class. This opportunity should be offered at least once a year from the moment the student became a member of the bar until, after a full lifetime of service, he retires from active practice. One course for the general practitioner would emphasize breadth brought up to date. Another directed toward the specialist would present new developments in the particular field. If,

as would often be the case, the lawyer was a general practitioner with one or more specialties he would be expected to take both.

This part of the program should be the easiest to finance. The enthusiasm of the bar for institutes, law services, and similar aids, oral and visual, indicates that the ice has been broken. It is probably less expensive for a lawyer to take a few days off each year and attend classes for organized and supervised study and discussion than to do the research work on his own account, in his own law office.

If some compulsion were necessary to stimulate attendance, a rule of court might easily impose penalties for failure of an officer of the court to keep himself informed of the progress of the law.

CONCLUSION

A problem is presented—continuing pressure by laymen in unauthorized practice of the law. A solution is proposed—an educational program sponsored by a bar association and covering the entire professional life of the lawyer. The educational program may be operated on a state-wide basis or through several law schools simultaneously without affecting its essentials.

It might be difficult to operate year after year if the whole responsibility rested upon an existing law school or many a present-day bar association. A new organization might more easily be created. In starting it, instructors and advisers could be borrowed from law schools and bar associations. When it had proven its effectiveness, the student groups could be shifted gradually to the new organization. Several possible names occur as appropriate to the new enterprise. Professional Training School for Lawyers, Institute for Improving the Promotion of Justice, Bar Association School—are possibilities.

The plan is not perfect, but perfection is not a prerequisite. The objectives sought by the plan should not be too objectionable in their main features, though there may be much discussion over details. Several groups of persons are affected. All but one of them should see advantages herein which outweigh the disadvantages.

Under the proposal, the student, and later the lawyer, receives much more and probably more carefully oriented legal education than at present. We may assume he becomes in