THE RIGHT TO ZEALOUS COUNSEL

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Providing legal counsel for persons in trouble and in need is both a practice of ancient lineage[1] and a dynamic contemporary movement. This public purpose results from the adversary tradition and our democratic concern for the plight of weaker citizens. It is a consummate expression of our shared concern for individuals, a concern that no individual's rights go unheeded through the misconduct of important legal ceremonies.

For a very long time the movement to make legal services available to those in need has been preoccupied with the form of legal representation rather than its substance. We have striven to assure the presence of professional counsel, with little concern for the quality of the service ultimately provided. In the last decade or so, there has been increased awareness that making a lawyer available is not enough. The effectiveness of counsel has become an issue of growing importance.

This emphasis on the effectiveness of counsel is certainly appropriate; few doubt that poor representation can be worse than none at all. Most of the discussion to date, however, has been concerned with technical competence of counsel.[2] While technical competence may be a

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter cited as CODE; Disciplinary Rules and Ethical Considerations therein hereinafter cited only by DR and EC numbers];

R. HERMAN, E. SINGLE, & J. BOSTON, COUNSEL FOR THE POOR (1977) [hereinafter cited as COUNSEL FOR THE POOR];

E. JOHNSON, JUSTICE AND REFORM (1974) [hereinafter cited as E. JOHNSON].

1. The history of legal services to the poor has four phases. The first phase has been described as "political" and is represented by the patron-paeon exchange in the relationship around the Roman "clientela." The second phase has been described as "charitable"—the medieval mode, for instance. The nineteenth century recognized a "political right" to counsel, while the twentieth century has made access to counsel a "legal right." *See* Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1, 37-38 (1974).

2. A host of empirical reports is given in COUNSEL FOR THE POOR 9-10. Typical of such studies is the assessment of criminal attorneys in the cities of Denver and San Diego by Jean Taylor and associates. Taylor, Stanley, deFlorio, & Seekamp, *An Analysis of Defense Counsel in the Processing of Felony Defendants in Denver, Colorado*, 50 DEN. L.J. 9 (1973); Taylor, Stanley, deFlorio, & Seekamp, *An Analysis of Defense Counsel in the Processing of Felony Defendants in San Diego, California*, 49 DEN. L.J. 233 (1972).

Case law on effectiveness of counsel is abundant and has been surveyed in a number of

problem, it is not the subject of this Article; the concern here is with the spirit of advocacy.

Spirited advocacy is important at two levels. While we do not know to what extent advocacy does truly influence outcomes of disputes, it seems not unlikely that the degree of influence is in part a product of the degree of effort expended by the advocate. If our purpose in assuring counsel is to protect rights, it is important that counsel strive to achieve that result.

Moreover, legal proceedings are important in their ceremonial effects. It is an important purpose of a proceeding to reinforce feelings of trust, not only in those who must accept the decisions but also in the public that must accept the institutions. The role of advocate is, in important measure, to build trust in the fairness of the system. To inspire trust, the advocate must not only be vigorous, but he must also seem so. Thus, we are as concerned with the appearance of zeal as with its reality. We want and need counsel who strive for, and who seem to care about, their clients.[3]

I. THE SOURCES OF ZEAL

Zeal does not appear to be in short supply for lawyers being paid directly by their own clients. Although there have always been episodic complaints, particularly about criminal defense work performed in urban courts, clients who select and compensate their lawyers generally retain enough control to assure that matters are handled satisfactorily. At least this has been true for those clients who are part of the return trade, or who are likely to share their reactions with other prospective clients. As long as the lawyer is in business, he is usually in business to please the clientele, and that endeavor requires perpetual effort.

Our experience with contingent fees demonstrates the relation between zeal and the incentive system. The contingent fee was the chief nineteenth century contribution to the movement to make legal services available to weak litigants. It was a Jacksonian departure[4] from the more traditional rule that forbade lawyers from acquiring interests in litigation, a corollary of the ancient English constraint on barratry. The argument for the contingent fee was, and is, that it makes counsel

articles. *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Grano, *The Right to Counsel*, 54 MINN. L. REV. 1175 (1970); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964).

3. *See* CODE Canon 7.

4. Radin, *Contingent Fees in California*, 28 CAL. L. REV. 587, 588 (1940).

available to those who cannot afford to pay[5]—and so it does.

A secondary attraction of the contingent fee has been its apparent provision of an incentive for zeal. As the author of the leading work on contingent fees reports: "[T]here is much in the current use and discussion of contingent fees which indicates that the basic premises from which its proponents argue are rooted in the economic beliefs of a profit-motivated, commercially oriented society . . . ."[6] Even the wealthiest litigants have been permitted to use contingent fees for claims in which such practice is allowed, such as personal injury or eminent domain.[7] Experience suggests that most clients prefer to exercise the contingent fee option when given the choice, in part to assure zeal.

It has now become clear, however, that the customary contingent fee does not always work to provide the intended incentive.[8] As Professors Schwartz and Mitchell revealed a decade ago, this economic incentive rewards fast, cheap settlements.[9] A lawyer who can settle a case with no time invested in it can go on to the next case quickly and better enrich himself, while one who labors through a full proceeding may obtain much more for his client, but only a little more for himself. Indeed, he may well earn less than he would receive from the additional cases that he would otherwise be able to handle. Feeble advocacy in the negotiation of sizeable claims is, therefore, a familiar canker in the practice of law. Douglas Rosenthal has more recently chronicled this inadequacy, focusing on the tendency of personal injury lawyers to coerce settlements from their own clients.[10] It is uncertain whether appropriate measures can be taken to correct this feature of contemporary contingent fee practice. It is clear, however, that although personal injury practitioners are economically motivated men and women, zealous advocacy is not always rewarded, and when zeal is not rewarded, it is often absent.

There are, of course, notable examples of lawyers providing legal services of the highest quality without remuneration. Usually these examples have been efforts on behalf of what the Code of Professional

5. EC 2-20.

6. F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 15 (1964).

7. *Id.* 70. MacKinnon also enumerates other common areas of contingent fee practice. *Id.* 25-28.

8. Three areas of potential conflict of interest are described in H. ROSS, SETTLED OUT OF COURT 82-83 (1970).

9. Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970).

10. D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 98-99, 109-12 (1974).

Responsibility calls "unpopular clients and causes."[11] The representation of unpopular cases was first recognized as a professional obligation in the late eighteenth century. The duty had the distinct flavor of *noblesse oblige*. Such early exponents of the obligation as Lord Erskine and Josiah Quincy seemed to have given premier efforts on behalf of unpopular clients without pay.[12] So it has been for many lawyers in this century, such as those who defended alleged communists in the early fifties,[13] or who engaged in many other ventures led by the American Civil Liberties Union.[14] These representations, however, often provide compensation in the form of nonmonetary rewards such as favorable recognition, at least by a small audience if not by the public at large. It seems fair to assert that zeal has rarely been purely the product of an unalloyed sense of professional obligation.

Such a conclusion need not lead to cynicism or despair. To invert Anatole France's cynical question about whether lawyers were ever children, the answer is affirmative: lawyers are people, too. The behavior of most people—lawyers and others—is, over time, largely the product of external influences. Exhortations, such as those in the Canons of Ethics, are important, but the effect of exhortations is lost if they urge a course of conduct that is seldom if ever rewarded in some way. Everyone needs reinforcement. While there will be admirable exceptions of lawyers laboring to do what few will ever know or care about, a system that desires zealous advocacy on the whole will have to reward it.

Moreover, even if it were not true that lawyers are people in the respect just stated, the serious problem that they often appear to be people would remain. As long as the clientele attributes normal human motives to lawyers, it will be hard to convince a client that his lawyer is exerting effort when the lawyer is not visibly productive. Unfortunately, a fundamental characteristic of an advocate's services is that one can seldom visually associate his effort with favorable consequences. Few clients are prone to credit counsel for good results. Many clients are prone to be critical of lawyer performance even when well served, especially if there is a gulf of culture or class between lawyer and client. For these reasons, client trust comes hard.

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11. EC 2-27.

12. E. CHEATHAM, A LAWYER WHEN NEEDED 13-38 (1963).

13. *Id.* 17-18.

14. Private activist groups such as the American Civil Liberties Union and the Legal Defense Fund (formerly associated with the National Association for the Advancement of Colored People), who were responsible for the "first wave" of public interest law in the twentieth century, also show a high selectivity in their orientation toward "big-impact" cases. *See* Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 209-24 (1976).

II. THIRD-PARTY PAYMENT OF FEES

Maintaining zeal and the appearance of zeal has taken on a new dimension for lawyers whose fees or salaries are paid by persons other than their clients. Third-party payment is becoming a very common practice. It is not novel: there were paid attorneys serving the poor in the Roman Papal government and in the admired cortez of Toledo in the fifteenth century.[15] What is new about the American staff attorney system is the scale of the enterprise.

Private lawyers established the Legal Aid Society in the nineteenth century as an institutional response to the needs of indigents.[16] Like other private charities of that time, it relied on volunteer help and provided rewards in the form of recognition for moral worth. In the early twentieth century, a few paid professionals appeared in the ranks of the societies and by World War I there were a number of full-time professionals.[17] After the war, Reginald Heber Smith published his important work, *Justice and the Poor*,[18] and the movement to improve the availability of legal services received a powerful boost.

In 1932, the right to counsel achieved constitutional status.[19] The scope of the right has been steadily expanded[20] so that it now applies wherever substantial penalties are to be imposed on citizens.[21] The number of cases to which the right applies has long since exceeded our limited capacity for voluntarism. The size of the criminal bar is now enormous, and most of its income is derived from representing persons who are not able to pay for the services they receive. What we have is a "bureaucratization of the defense of the indigent,"[22] a "highly organized and systematized activity involving thousands of lawyers and millions of clients."[23] Whether working independently by court appointment or as staff attorneys in the offices of public or private defenders, the attorneys enjoy neither high status nor high earnings. Their

15. A brief historical and comparative treatment is fonnd in M. GOLDMAN, THE PUBLIC DEFENDER 9-14 (1919).

16. E. BROWNELL, LEGAL AID IN THE UNITED STATES 7-8 (1951).

17. M. GOLDMAN, *supra* note 15, at 82-83, 87-98, acknowledges this growth. Salaried public defenders were appointed in a number of cities and counties, and many state legislatures have considered proposals for similar appointments.

18. R. SMITH, JUSTICE AND THE POOR (1919).

19. Powell v. Alabama, 287 U.S. 45, 68 (1932).

20. A thorough survey of the early development is presented in W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955).

21. The right is pronounced "fundamental" in Gideon v. Wainwright, 372 U.S. 335, 342 (1963), and is broadened to include misdemeanants in Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

22. COUNSEL FOR THE POOR 3.

23. *Id.*

work is performed in isolation from any pressure to deliver satisfaction to their clients. Like other providers of important public services, such as social workers and educators, criminal defense counsel generally hold a position of power over their clients.

A similar development has occurred on the civil side. While there has been little recognition of a constitutional right to counsel in civil matters, there has been a movement toward providing legal representation in civil cases. Congress has enacted legislation designed to provide minimal legal services to indigents engaged in civil or administrative disputes.[24] This was an important feature of the War on Poverty, a centerpiece in the effort to achieve distributive justice in the 1960s.[25] During the Nixon years, the movement was re-directed and substantially enlarged under the auspices of the Legal Services Corporation.[26] The Corporation now supports programs throughout the United States. In conjunction with state, local, and private agencies, it provides services to a very high percentage of the poor population of this country. It employs thousands of attorneys, whose incomes are somewhat lower than those of their criminal defense brethren and whose status is the lowest of any group of the bar.[27] Except for a few who are subject to direct selection through an available Judicare plan,[28] these attorneys are seldom accountable to their clients for the quality of the service they deliver, and most of them function with enormous caseloads.

Another group of attorneys who receive their compensation from third parties is presently emerging. Prepaid legal insurance has been a vision of the organized bar for several decades, ever since it became

24. *See* Economic Opportunity Amendments of 1966, Pub. L. No. 89-794, § 215, 80 Stat. 1451 (current version at 42 U.S.C.A. § 2996 (West Supp. 1979)).

25. E. JOHNSON 39-43, 137-140.

26. The Johnson era of great "wars" evoked a conservative backlash during the Nixon administration that included opposition to the reform strategies of the Office of Economic Opportunity. Many details of this resistance appear in the congressional debates preceding the establishment of the Legal Services Corporation as a replacement for the older Office of Economic Opportunity. Vice President Agnew summarized the conservative point of view. *See* Agnew, *What's Wrong With the Legal Services Program*, 58 A.B.A.J. 930 (1972). The goals of the more radical reformers are sympathetically depicted in Sullivan, *Law Reform and the Legal Services Crisis*, 59 CAL. L. REV. 1 (1971).

The Nixon move is styled the "war against justice" in J. AUERBACH, UNEQUAL JUSTICE 299 (1976). The nature and quality of the service provided by the federal program are critically evaluated in Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977).

27. This was the finding with regard to members of the Chicago bar. Laumann & Heinz, *Specialization and Prestige in the Legal Profession*, 1977 AM. B. FOUNDATION RESEARCH J. 155, 167.

28. The best single overview of the Judicare model is provided in S. BRAKEL, JUDICARE (1974). Brakel also points to research showing a strong client preference for Judicare over "welfare-type" legal services.

apparent that Blue Cross-Blue Shield brought extraordinary prosperity to the medical profession. The concept received a powerful boost in 1976 with the enactment of section 120 of the Internal Revenue Code.[29] That section grants experimental tax-exempt status for a period of five years for payments made on behalf of employees for prepaid legal services. While this change has not brought the enormous increase in the use of legal services that some had hoped,[30] a substantial development might still occur. Most of the prepaid plans employ the services of attorneys in private practice who are selected by their prepaid clients. Some, however, including the largest,[31] provide legal services through staff attorneys employed by the insuring group. These staff attorneys are employed under circumstances similar to public defenders and legal services attorneys.

III. THE EFFECTS OF THIRD-PARTY PAYMENT ON THE APPARENT LOYALTY OF COUNSEL

Competing influences upon advocates make it difficult to maintain the appearance and the reality of zeal. All attorneys have competing obligations to court, self, and client. The sometimes conflicting nature of these obligations can seldom be understood, much less appreciated, by the clientele.

The exhortation to zeal that is expressed in the Code of Professional Responsibility is balanced by an exhortation to maintain "independent judgment."[32] The desire to preserve this independent judgment lies behind the proscriptions of conflicts of interest and serves as the unifying purpose behind the constraints forbidding lawyers to be witnesses,[33] to be representatives of multiple interests,[34] or to acquire

29. The new section was enacted as § 2134(a) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1926. Attempts to repeal section 120 have been rebuffed. *See* 3 NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, NEW DIRECTIONS ACTION LINE 29 (1978).

30. Using a mail survey, G. Alpander and J. Kobritz recently conducted sketchy empirical research into the popularity of prepaid legal services as an employee benefit. Their poll of 350 national corporations and 100 national unions, of which 150 corporations and 86 unions responded, is summarized in 31 INDUS. & LAB. REL. REV. 172, 173-74 (1978). Only four percent of the unions surveyed had put prepaid legal services on the collective bargaining table; of these, 70% had been successful in securing prepaid legal services as a fringe benefit. *Id.* Legal services were shown to be a less popular item than dental insurance. *Id.* The actual number of group prepaid legal plans reported to the Department of Labor for 1979 was 3,500. Fretz, *Decent Legal Care for Moderate Income Americans: Hope for the Eighties*, 36 NLADA BRIEFCASE 2, 2 (1979).

31. The UAW plan, inaugurated in 1978, is the largest with 140,000 members. *ABA's Seventh National Conference on Prepaid Legal Services*, 47 U.S.L.W. 2293, 2296 (Nov. 7, 1978).

32. CODE Canons 5, 7.

33. DR 5-101(B).

34. DR 5-105.

self-interests in litigation.[35] Detachment and zeal are uncomfortable companions, however, and few lawyers have perfected the self-discipline to maintain both at all times. The obligations of zeal and independence thus may compete with one another; in excess, they may join in mutual defeat. Lawyers frequently associate the idea of independence with personal autonomy and even the right or obligation to dominate clients.[36] Some observers have noted a tendency toward authoritarianism on the part of lawyers;[37] Rosenthal has gathered substantial data to show that lawyers impose their tastes and preferences on their clients.[38]

To some extent, many lawyers view such domination as a mark of professionalism. Few lawyers emphasize the importance of helping clients make their own decisions on the basis of full information. Indeed, one official bar publication states that reasoning "not only prolongs the interview, but generally confuses the client. The client will feel better and more secure if told in simple straightforward language what to do and how to do it . . . ."[39] While some have decried this attitude, it is probably the norm for attorney-client relations in many areas of practice.

Against this background, it is scarcely surprising to find members of the criminal defense bar, or the legal services bar, demeaning the importance of their clients' judgment. It must certainly be the case that lawyers who overbear their clients will be even more likely to do so if the client has no control and no choice. Third-party provision of legal services is therefore likely to provide masters as well as servers.

Not only does third-party payment tend to liberate the attorney from the client's control, but it also helps to create a relationship of rivalry. He who pays the piper may, or may seem to, call the tune. If he does not call the whole tune, he may nevertheless be regarded as the primary audience to be pleased by the piper. Thus, there is a special danger that public defenders will not be trusted because they are perceived to be yet another arm of the state, in league with prosecutors.[40]

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35. DR 5-103.

36. Becker, *The Nature of a Profession*, in EDUCATION FOR THE PROFESSIONS 38-39 (N. Henry ed. 1962).

37. H. FREEMAN, LEGAL INTERVIEWING AND COUNSELING 236 (1964); W. WEYRAUCH, THE PERSONALITY OF LAWYERS (1964).

38. D. ROSENTHAL, *supra* note 10, at 29-61, 66-67, 112-16.

39. *Id.* 19.

40. Social and political scientists who have conducted personal interviews with criminal defendants often record their "distrust and hatred" of the public defender's office and the absence of "handholding." The defenders' "inattention to psychological needs" is said to have "alienated" the clientele. Indigents may be frustrated at being forced to use public services: they view the

In legal services programs, the perceived third-party interest is often political. In the early years of the federal program, political agencies often interfered directly in particular lawyer-client relationships to pursue or frustrate particular claims or defenses deemed to have political importance.[41] One of the purposes for organizing the Legal Services Corporation in 1974 was to insulate the lawyer-client relationship from external interference. This was done in return for modest constraints on litigation to pursue political ends.[42] Nevertheless, one of the goals of legal services programs continues to be the achievement of general law reforms favoring the interests of disadvantaged citizens. While the interest of the individual, disadvantaged client may often coincide with the interests of the larger clientele, this is not always the case, and the tension between the two is a legitimate source of mistrust for the individual client.

The dimensions of this problem are enlarged by the difficulty in maintaining a clear institutional purpose for legal services programs. Inevitably, judgments must be left to individual staff attorneys who may wish to enlarge their own importance by overblowing a case. Examples of this situation arise frequently. Perhaps the most sweeping accusations have been made by Harry Brill, who has charged his former colleagues in the San Francisco Neighborhood Legal Assistance Foundation with massive manipulation of clients—even to the extent of lying—to encourage elegant class suits in lieu of individual actions that likely would have been more effective for the individuals involved.[43] While Jerome Carlin has disputed some of Brill's allegations,[44] he does not really deny that the Foundation lawyers had an agenda of their own making, one which took precedence over the desires and interests of individual clients. As Brill put it:

> The specific needs of clients and the question of whether or not they could gain from class action were incidental to the lawyers. They were concerned only with filing as many dramatic class action cases as possible. Among other things, this meant that they were constantly seeking out interesting issues and organizations that might help generate them. So they had little time or patience for community organizations that sought other, less dramatic kinds of legal service.[45]

Another variety of conflict of interest that arises in the legal serv-

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public attorney as simply part of the system oppressing them. *See* P. WICE, CRIMINAL LAWYERS 202 (1978). *See also* J. CASPER, CRIMINAL COURTS: THE DEFENDANTS' PERSPECTIVE (1978).

41. *See* E. JOHNSON.

42. *Id.* 39-43.

43. Brill, *The Uses and Abuses of Legal Assistance*, 31 PUB. INTEREST 38 (1973).

44. Carlin, *The Poverty Lawyers*, 33 PUB. INTEREST 128 (1973).

45. *See* Brill, *supra* note 43, at 54.

ices context is the practice of targeting particular defendants that legal services programs identify as malefactors. Jeanne Kettleson describes this activity as "focusing" to increase the impact of a program on particularly exploitative practices.[46] While this practice may be highly desirable from the viewpoint of the larger clientele, it can be contrary to the interests of individual clients whose claims are not aimed at the right target.

The problem of third-party interest extends as well to prepaid insurance plans for middle income clients. Since the programs are so new, there is not yet much evidence that employers or unions will marshal the energies of their staff attorneys toward particular objectives. The potential for abuse may be present in some plans, however, and the staff attorneys are in some circumstances vulnerable to suspicion that they may have substantial agendas of their own. Stuart Israel has described the practice of targeting by one plan office in Columbus, Ohio, which clearly illustrates the potential for serious abuse in some prepaid plans.[47] Thus, generally, clients are right to have less trust in attorneys paid by third parties. Such attorneys seem more likely to compromise their client's interests for the sake of their own goals.

IV. THE EVIDENCE OF MISTRUST

The preceding statement is intuitive, but the perception is validated by the available empirical evidence, which tends to show that the level of client mistrust is associated with the degree to which an incentive system gives the client some balance of power in the attorney-client relationship. The most significant body of data on this subject has been gathered by Herman, Single, and Boston in their recent work, *Counsel for the Poor*.[48] Based upon data from prosecutions in Los Angeles, New York, and Washington, D.C., their work was limited to criminal defense representation. Defense representation consisted of privately retained counsel, appointed counsel compensated by the state, and public defenders. The authors were unable to detect any significant correlation in the resolution of cases that could be attributed to the differences in delivery systems, although there was a barely discernible difference in outcome that favored institutional staff attorneys over individual lawyers who were privately retained or appointed.[49]

There was, however, a substantial difference in client perceptions.

46. Kettleson, *Client Getting*, 35 NLADA BRIEFCASE 12, 12 (1977).

47. Israel, *Changing the Balance of Litigating Power*, 2 NEW DIRECTIONS LEGAL SERVICES 102 (1977).

48. COUNSEL FOR THE POOR.

49. *Id.* 153, 160-61.

The authors found a "pervasive antipathy of unexpected magnitude toward publicly paid defense lawyers, primarily those who work for the first-line defender systems . . . ."[50] "[I]t rapidly became evident that these antipathies were based on defendants' suspicions about both the loyalties and the abilities of these lawyers."[51] Many of the defendants were, of course, experienced in the ways of criminal courts and had data of their own on which to base their mistrust. On the other hand, their powers of observation were offset by their inabilities to control variables as could the data analysts. Evidently, the belief that public defenders are ineffective was based on "general social assumptions . . . [that] you get what you pay for."[52] Illustratively, one defendant, when asked if his Legal Aid lawyers did good work, replied, "No. Why should they?"[53] Clients also believed that those on the public payroll would retain a primary loyalty to the state court, not to the client.

Not surprisingly, the clients' disdain of lawyers was reciprocated. Few defense lawyers thought their clients' opinions about the quality of legal representation mattered. Their view was that criminal defendants are "too self-interested, too anti-social, and too uneducated to have opinions worth soliciting."[54] This reciprocation is, of course, a part of the problem of creating a relationship of trust. The authors are surely correct in expressing a view contrary to that of most defense lawyers:

> Defendants' views of how effective their lawyers are and how well their lawyers treat them are an important index of the extent to which the criminal process in practice honors some of its most fundamental guarantees. And for the defendants themselves, a belief that they are inadequately represented can become a self-fulfilling prophecy. If they are not candid with their attorneys, or refuse to accept legal advice, or are so uncooperative that they impair the attorneys' motivation to work effectively for them, the end result may be the same as if the state had failed from the start to provide adequate representation.
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> The appearance of justice may also be crucially important to what is presumably the central goal of the criminal process, which is securing future compliance with the law both by the courts' immediate "clientele" and by other citizens. If the law's processes are perceived as unjust or arbitrary, they are unlikely to command the respect of present or potential violators; if they are seen as capricious, irrational, and unpredictable, their deterrent effect may also be un-

50. *Id.* 153.
51. *Id.*
52. *Id.* 156.
53. *Id.* 169.
54. *Id.* 167. Legal Aid lawyer distrust of defendant perceptions is evidenced in Erdmann, *An Answer by a Lawyer*, in PRISONERS' RIGHTS SOURCEBOOK 57-62 (M. Hermann & M. Haft eds. 1973).

dermined.[55]

The available analysis of client perception of staff attorneys on the civil side is less comprehensive. In part, this is because our experience with alternative delivery systems in civil matters has been much more limited than in criminal matters: the bureaucracy of the War on Poverty strenuously resisted the development of Judicare—the use of private attorneys compensated at public expense to serve the poor.[56] Despite this resistance, however, some legal service plans do exist, and there have been several efforts to compare client reactions to services by private counsel with their reactions to comparable services by staff attorneys.

The first, and still the most illuminating, study is that of Samuel Brakel. His work on the Wisconsin Judicare experiment revealed a "pronounced" client preference for private attorneys selected by the client.[57] A second study made by Greenberger and Cole in Meriden, Connecticut, produced results that were inconclusive about client perceptions, but clearly showed that social workers preferred to send their welfare clients to staff attorneys and that the social workers found the staff attorneys generally more congenial than private lawyers.[58]

Earl Johnson, the leading spokesman for the staff attorney system, has attacked the Brakel study, contending that Brakel's book is methodologically flawed.[59] Brakel's rebuttal seems quite convincing[60] and is enhanced by Johnson's own final argument against Judicare, which is that client choice is meaningless because of the pervasive client ignorance of the qualifications of lawyers.[61] As Brakel points out, "[t]his entire picture of poor people as a totally isolated and alienated class of virtual subhumans is only one of several myths that are used to support indiscriminate preference for social engineering, law reforming, and other paternalistic activities."[62] It is, in any case, a posture that bears a close resemblance to the views of defense counsel that client appraisals of their work do not matter.

While one can hardly view this body of empirical data as dispositive, it does seem to confirm the intuitive thesis that assigning advo-

55. COUNSEL FOR THE POOR 167.

56. *See* E. JOHNSON 117-21.

57. S. BRAKEL, *supra* note 28, at 127.

58. H. GREENBERGER & G. COLE, FINAL REPORT: CONNECTICUT STATE WELFARE DEPARTMENT LEGAL SERVICES DEMONSTRATION (1972).

59. M. CAPPELLETTI, J. GORDLEY, & E. JOHNSON, JR., TOWARDS EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 167-70 (1975).

60. *See* Brakel, *Styles of Delivery of Legal Services to the Poor: A Review Article*, 1977 AM. B. FOUNDATION RESEARCH J. 219, 243-46.

61. *See* M. CAPPELLETTI, J. GORDLEY, & E. JOHNSON, JR., *supra* note 59, at 171.

62. Brakel, *supra* note 60, at 248.

cates' roles to lawyers who are seen as having no stake in their clients' welfare tends to reduce the level of trust associated with their lawyer-client relationships. It also tends to confirm that present levels of trust are none too high.

Judicial observations provide further confirmation of this thesis. Increasingly, courts are acknowledging that the assistance of counsel provided in satisfaction of constitutional guarantees cannot be presumed to be effective. Although it remains unusual for a conviction to be set aside on grounds of ineffectiveness of counsel, it is not unusual for courts to acknowledge a substantial responsibility for oversight of appointed counsel. Perhaps the strongest example of this requirement is the opinion of the Supreme Court in *Anders v. California*,[63] which held that an appellate court cannot accept at face value the assertion of assigned counsel that there is no ground for appeal. The Court further held that it is the prescribed duty of the appellate court to search the record for error and to prod counsel to be an advocate. This decision was an expression of substantial mistrust of staff attorneys. If the Supreme Court does not trust the lawyers, it is not surprising that the clients do not either.

V. Remedies to Assure Zeal

As the previous discussion notes, our present systems do attempt to assure attorney zeal through various forms of supervision, even to the extent of involving judges in the supervisory enterprise. Supervision is currently the primary means used to assure the appropriate level of effort by attorneys who are not financially accountable to their clients. For reasons previously discussed, however, supervision is at best a weak assurance of spirited advocacy. The supervisor of staff attorneys faces the familiar problem that the quality of legal services cannot be judged by the attorneys' tangible results. Supervisors can check to see that formal steps have been taken, but this kind of inquiry only infrequently penetrates to the substance of the service rendered. Rarely, if ever, does it extend to the matter of client satisfaction and the appearance of effective advocacy.

Moreover, supervision in high-volume law offices is itself a problem. Such offices face a constant tension between the quality and the quantity of services to be rendered. When staff attorney time and energy are scarce resources, short-cuts in selected cases may be fully justified by the need to apply more time to the more important matters. Gary Bellow has forcefully argued for the maintenance of consistently

63. 386 U.S. 738 (1967).

high standards of performance in legal services offices,[64] but his argument seems insensitive to the competing interests of clients who must be turned away if the staff attorneys invest too much effort in too few matters. Thus a perpetual time problem arises in almost every matter that is handled, and it is virtually unavoidable to leave substantial discretion with the individual staff attorneys in deciding how best to apply their own time. Accordingly, too rigorous an application of checklist supervision may at times be counterproductive to the purposes of the legal services programs. While this aspect of the problem may be alleviated as the workload is reduced by fuller staffing, it is unlikely that a public defender office or a legal services office will ever have sufficient personnel to make careful decisions about individual time allocations. Furthermore, it will always be true that the attorney who is accountable to the client for his fee has a greater inducement to make effective use of his time than does the individual staff attorney.

Supervision also gives little assurance to skeptical clients who are suspicious of the motives of staff lawyers since the supervisor is just another staff lawyer whose motives must be viewed in the same suspect light. Supervisors will inherit no more trust than their supervisees enjoyed; they must earn it, perhaps by being accountable in some ways that the staff attorneys are not.

Finally, it should be observed that there is very little opportunity for supervising court-appointed criminal defense counsel. A few judges do make an effort to control the quality of criminal defense advocacy by maintaining a system of evaluation through which ineffective counsel may be removed from the list of those eligible for appointment. On the civil side, there is no reported effort to impose supervision of any kind on Judicare lawyers.

In addition to this nominal supervision, the present system does afford other disincentives for lawyer neglect of the affairs of nonpaying clients. For criminal defense lawyers, there is the unpleasant prospect of embarrassment associated with a determination that one's representation of a client was so ineffective as to be unconstitutional. This possibility is so remote, however, that it is unlikely to arise often in the minds of advocates or clients. Perhaps a more effective disincentive at the present time is the developing law of professional malpractice.[65] It is still the case, however, that few advocates are likely to be exposed to liability by perfunctory and uninterested performances. For liability to ensue, the neglect must be identifiable as a technical lapse, and a rather

64. Bellow, *supra* note 26, at 119-22.

65. A current description is R. MALLEN & V. LEVIF, LEGAL MALPRACTICE (1977).

substantial one at that. Mere oversight of an "esoteric" rule appears insufficient to expose counsel to suit.[66]

In the final analysis, the only practice presently in use that is capable of generating positive incentives to the lawyers of nonpaying clients is Judicare. Although Judicare lawyers are subject to little or no official supervision, they are subject to the incentives of the marketplace. If clients are to return or send their friends, the Judicare lawyer must give satisfaction. The Brakel data tend to suggest that this method works, at least to some degree.

One question that this Article seeks to raise is whether there are variations on the Judicare model that can and should be more generally employed to make lawyers more accountable to nonpaying clients.

Herman, Single, and Boston have offered a suggestion, although they limit their advocacy to the criminal setting in which they have worked. They propose that every accused person should have the right to fire the first lawyer assigned to his defense.[67] As they explain:

> [I]mportant in equalizing the power of choice is the power to fire the attorney, whether or not he or she was selected by the defendant in the first place. Defender organizations and assigned-counsel systems do not permit this; instead, they generally require that the court, on the motion of the defendant or the lawyer or both, be asked to determine the issue. (In New York, a defendant who asks to be relieved of a Legal Aid Society lawyer cannot get another Legal Aid lawyer.) When faced with a request for a change of counsel that emanates from the defendant and does not have his or her lawyer's endorsement, the court generally considers it the tactic of a chronic malcontent and routinely denies it. No doubt some defendants would be encouraged to try to dismiss counsel without reasonable cause, perhaps to delay the proceedings against them. Nonetheless, the possible abuse of a right argues for safeguards, not wholesale denial of the right. One safeguard might be for a defendant to be able to dismiss his or her lawyer peremptorily (without cause and without court approval, but perhaps not on the eve of trial) only once in a case. The defendant would retain the additional right to have any lawyer dismissed by the court for adequate justification.
>
> Granting the indigent client this degree of control—which in practical terms is still considerably less than that of the client of retained counsel—would do a great deal to encourage lawyer accountability, much as it does with retained counsel. It is not pleasant to be fired, and it is bad for one's career. The power to fire their assigned counsel might also stimulate a more demanding attitude and greater

66. Lucas v. Hamm, 56 Cal.2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (en banc); *cf.* Smith v. Lewis, 13 Cal.3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (en banc) (attorney who failed to assert client's community interest in retirement benefits in a divorce proceeding found guilty of malpractice).

67. COUNSEL FOR THE POOR 173.

> frankness from clients who would otherwise be afraid of alienating the assigned lawyer. In turn, this development could lead to favorable consequences for the client, both in case outcome and in satisfaction.
>
> Allowing defendants to hire and fire their own appointed lawyers would unavoidably make any system of assignment of counsel less cost-efficient. How much additional money it would take is impossible to estimate without some very crude guessing about how many people would exercise their powers of choice. We doubt, however, that the cost would be very large, and it might be made up for in benefits besides client satisfaction. Some cases, for example, might be disposed of more quickly if the clients trusted their lawyers' advice; some posttrial proceedings challenging convictions by attacking the competence of assigned counsel might never be brought.[68]

Against the advantages must be weighed some substantial drawbacks. As the authors acknowledge, it is not unlikely that the power to fire counsel could be used for dilatory purposes. Further, its effect on the plea bargaining process is, at best, difficult to appraise in the absence of recorded experience. Nevertheless, it might be worth a try, as a means to assure greater zeal. This idea may indeed be meritorious enough to be considered for use in legal services programs as well as in the administration of closed panel systems for prepaid services.

It would be worthwhile to consider other provisions to accompany such a system of peremptory dismissals. A bonus system could reward staff attorneys who give such satisfaction that they are seldom dismissed by their disgruntled clients. To carry this notion a step further, a bonus system might also undertake to reward staff attorneys or appointed counsel for the favorable results they achieve. A significant bonus for the public defender who secures an acquittal or a reversal might serve as a substantial inspiration to zeal in many cases in which it is presently lacking. It would at least afford some assurance to the accused that he and his attorney share some community of interest.

At least two considerations arise in connection with this last suggestion. One is that the bonus system must not be so handsome that the staff attorneys concentrate all efforts on cases in which they are most likely to win. This problem of proportions is somewhat similar to the problem of properly proportioning the usual contingent fee. Clermont and Currivan's very excellent article[69] demonstrates that rigorous thinking about the contingent fee can develop rules that fit the interests of the client and advocate much more closely than does the present customary practice. They propose a contingent fee that is in part mea-

68. *Id.* 173-74.

69. Note, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978).

sured by the attorney time invested in the case. If the winning advocate is fully compensated for his time, with a smaller, flat percentage fee added, then he will have an incentive to keep working on a case for as long as necessary to achieve the best results for the client, but no longer than *is* necessary.[70] It would seem that the logic of the Clermont-Currivan analysis might be applied to the problem of the staff attorney bonus to produce a system that is at least intuitively sound. On the other hand, it must be acknowledged that the effects on plea bargaining in criminal cases might prove to be highly undesireable if a proper balance could not be achieved.

The second consideration is the legitimacy of any contingent fee interest in a criminal case. The Code of Professional Responsibility twice proscribes contingent fees for criminal defense counsel,[71] but nowhere in the literature is the rationale for this emphatic rule clearly stated. Perhaps the concern is that the bar's public relations would suffer too greatly if the great hired defense guns were seen to profit directly from frustrating law enforcement in publicized cases. In fact, it is hard to see why the successful arguments for contingent fees in personal injury cases are not even more persuasive for criminal defense cases. Whatever the unwritten concerns, it must surely be true that they are directed primarily at the retained private criminal bar. There is really very little occasion for concern, for all the reasons stated here, that appointed counsel or public defenders could be rendered excessively zealous by the prospect of bonuses for acquittals and reversals. That evil, should it even arise, can be dealt with at the time. DR 2-106(C), which proscribes criminal defense contingent fees, should be deemed inapplicable to bonuses paid to lawyers on public payrolls whose incentives are so much in doubt.

VI. CONCLUSION

Granted, there may be no fully satisfactory solutions to the problem posed. Certainly it seems unlikely that the problem would be solved simply by greater use of Judicare or the variations just suggested, limited and dubious as they are.

The absence of good visible solutions, however, does not detract from the seriousness of an under-appreciated problem. If lawyers for nonpaying clients cannot be induced through a system of incentives to represent their clients zealously, the right to counsel may become a useless cosmetic that insults more than it serves the interests of the clien-

70. *Id.* 578-80.

71. *See* EC 2-20; DR 2-106(C).

tele. The reputation of the bar is a matter of interest to the community as a whole, for it is unlikely that the public's regard for the law itself can long survive disdain for the craftsmanship of those who administer it. Further attention to these issues is therefore in order.