

ABTL Commentary: Admission to the Federal Bar

(Ed. Note: Following are excerpts from a statement by ABTL past president John H. Brinsley delivered last May 24, on behalf of the Association, before the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in Federal Courts — the Devitt Committee.)

Suggested Focus of the Commission. Preliminarily, those for whom I speak believe that this Commission should focus only upon the *minimum* standards of advocacy required to practice in the federal courts. We do not believe that the Commission should seek to impose any stricter standards than those required for an acceptable minimum standard of competence, or that it should seek to insure that all attorneys who appear in federal court match the standards of a Clarence Darrow or the barrister portrayed by Charles Laughton in "Witness for the Prosecution."

We decidedly do *not* want to turn the federal bar into a small, highly elitist and very expensive group of English-type barristers, or to limit access to the federal courts by young, minority or sole practitioners who could not meet stringent experience requirements (i.e., a certain number of jury trials) which are unnecessary in light of the realities of current federal practice.



John H. Brinsley

These figures illustrate a fundamental principle of modern federal advocacy: it is *not* primarily trial advocacy; that is but a small part. To be a competent civil litigator today in the federal system (as in the California system), one requires a multiplicity of skills including the abilities to analyze, plead, effectively handle law and motion matters, engage in discovery of all kinds, both written and oral, and to negotiate. The fed-

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ABTL Commentary: Pro Bono Legal Services

(Ed. Note: In early December 1976, ABTL's Board of Governors constituted a special committee to investigate and report on the issue of the duty of attorneys to render service for the public good. Following several months of investigation and research, the committee submitted a twenty-three page report, the recommendations of which were unanimously adopted by the ABTL Board at its July 1977 meeting. The committee's full report will be published in the State Bar Journal in 1978. This article by Loren R. Rothschild, chairman of the pro bono committee, which also includes James N. Adler, Raymond C. Fisher and James Marble, summarizes the committee's findings and recommendations.)

The Association's *pro bono* committee recognized that the obligation to provide counsel to those in need is an important tradition of the legal profession. That obligation is set forth in the Code of Professional Responsibility of the American Bar Association, Ethical Consideration 2-25 and is codified in California Business and Professions Code §6068(h). The committee also accepted as correct the assumption which underlies the debate on *pro bono* legal services that large numbers of persons lack the means to purchase necessary legal services.



Loren R. Rothschild

disputes and the need for professional legal services. It rejected the suggestion of a mandatory *pro bono* legal program on the grounds that such a program is philosophically, practically and, possibly, constitutionally objectionable.

The committee's philosophical objections to mandatory *pro bono* programs rested on the perception that morality cannot be legislated, particularly when the norm sought to be compelled is that of service to oth-

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eral court has become a paper court on the civil side — even up to and through the trial — and the abilities to research the law, analyze the facts, and present legal and factual contentions in succinct and persuasive written form are usually the ones most required.

The Current Quality of Representation. One of the tasks of this Commission is to determine the current quality of representation. We think that this is an impossible task. Competency differs in the eyes of the beholder. Furthermore, each beholder's view is limited to the few instances in which he has seen the lawyer in action. His perspective is affected by the type of case and his view of that case.

....
In some jurisdictions, trial in the federal court may still be by ambush; here, it is mostly on paper, refined (if not nurtured) by Local Rule 9 which requires careful delineation of legal and factual issues, exchanges of exhibits, listing of witnesses and motions *in limine* for all but the most routine questions of evidence. One need not, therefore, have Professor Younger's celebrated gifts to try a case in the federal court in Los Angeles, if one is willing to work hard in advance.

....
We believe that the quality of representation on the civil side is more than adequate; that the problems of incompetency lack severity; and that such problems ought to be handled on an individual, not a broad-brush, basis.

Frankly, we think the Clare Report represents a large tempest in a small teapot; our views are thus in harmony with Judges Frankel and Weinstein. We do not say that there are no problems — obviously the quality of representation could stand improvement. We do say, however, that the problems are finite, and that their solutions are capable of achievement through measures far less draconian than those aired so far.

Nature of the Problems. As we perceive the problems which exist among relatively few civil litigators, they relate primarily to lack of preparation, lack of willingness to do the work required to check the Local Rules and ascertain local practices, and an unwillingness to spend the necessary time to make a first-rate presentation. These problems do not seem to stem from lack of knowledge of substantive or procedural law, or from an inability to answer examination questions. Rather, the problems are more practical. Many times they could be overcome by redrafting or reviewing a specific governing rule.

Thus, to the extent that there are deficiencies in advocacy, we believe that they are not due to lack of legal knowledge, or an inability to pass examinations administered by a law school or a committee of Bar Examiners. They do not seem due to innate ineptitude. Rather, they seem to flow from an unwillingness or inability to take the time (which is sometimes necessarily extensive) to prepare. These problems often stem from economic, rather than academic, causes.

We feel also that these problems are *not* confined to new admittees by any means. They are shared in equal measure by experienced practitioners.

Comments on Tentative Proposals. In essence, we believe that the problems in civil representation are parochial,

not national, and that they vary from district to district in nature and magnitude. We also believe that the problems are individual and are not widespread. We therefore believe that the solutions should not be national or grandiose, but local and individual.

Our reactions, therefore, to most of the proposed solutions are necessarily negative.

We do *not* believe that prescribed courses in law school (apart from the serious issues of academic freedom), or federal bar examinations, provide any real solutions....

We believe that the standards for admission to the federal courts should be no different than those applicable to the state courts. If an attorney passes the California bar examination, he or she should continue to qualify automatically to practice in the federal courts in California, subject to moral and ethical standards. So long as cases can be removed from the state to the federal courts, plaintiffs should not lose their attorneys automatically because of different federal requirements.

We are absolutely opposed to federal certification, particularly Professor Kelso's proposal that one could not appear unless certified for proficiency in trial advocacy, or associated with another lawyer so certified. We do not need a highly inbred class of barristers, with at least two expensive lawyers required, and consequent exclusion of those who represent legitimate claimants, such as the Legal Aid lawyers or neighborhood law clinics. Litigation has become far too expensive, as it is, without creating a samurai class whose fees would be astronomical. Given the relatively few civil cases actually tried in the federal courts, only a relative hand-

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REPORT

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ful of lawyers would presently qualify, and it might take years to attain the necessary trial experience.

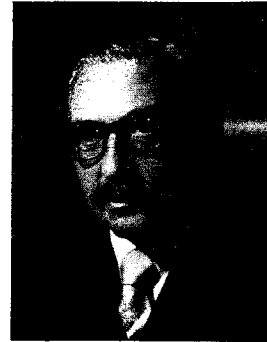
Finally, on our list of negatives, we oppose any disciplinary proceedings controlled by the judges or local United States Attorneys. We believe that such control could become coercive and might have chilling effects upon robust advocacy, particularly in criminal cases. **Some Positive Thoughts Re Possible Solutions.** We believe, in essence, that the Commission should eschew new broad-gauge, universal rules, and instead recommend that the bench and bar in each district strive on a local basis to improve the quality of representation, with programs tailored to the needs of that district. We believe that improvements could be achieved by the following: (a) If an attorney falls below the minimum standard acceptable to a judge, refer the matter to the State Bar for review. In California, Rule 6-101 of the Rules of Professional Conduct permits the State Bar to discipline an attorney who performs services in the absence of the learning and skill ordinarily possessed by lawyers who perform (but do not specialize in) similar services in the same locality under similar circumstances. The Rule also requires discipline where an attorney fails "to use reasonable diligence and his best judgment" in an effort to accomplish "with reasonable speed" the purpose for which he was employed. (b) In jurisdictions which lack the power or machinery enjoyed by the California State Bar, encourage the creation of state or local bar committees to review alleged problems of incompetency and handle them within the bar. We agree with the recent statement of Mr. Paul Connolly, Chairman of the ABA Section of Litigation, in the Section's 1977 Winter Publication, that the profession must police its own members through appropriate disciplinary or competency boards. (c) Support new innovative programs in teaching advocacy. Perhaps one of the best such programs is presented by the National Institute of Advocacy. We believe that the NITA approach should be encouraged. Through cooperation between bench and bar, similar to the Inns of Court in San Diego, programs to improve practical advocacy could be made shorter, less expensive and more available. We do not believe that such programs should be *mandated* however — just encouraged. (d) The bench and bar should encourage student participation in internship programs — either as law clerks or advocates — under careful supervision.

Woven through all of these thoughts is a common theme: cooperation between the local federal bench and bar. We believe that there should be joint efforts to improve advocacy. Some of our federal judges here in Los Angeles have indicated a willingness to help establish practical training programs. If, as the Chief Justice suggested in his 1973 Sonnett address, a key problem is the failure of lawyers to observe rules of courtesy and etiquette, these can be easily taught. Where to stand; not to address counsel directly; whether to ask permission to approach a witness; whether to argue objections in front of the jury or by the bench — all of these can be learned. And, in this jurisdiction at any rate, the district judges educate the attorneys on the spot. **Conclusion . . .** We strongly urge this Commission therefore to tread lightly and to encourage local, rather than national, approaches to whatever problems exist in civil representation.

—John H. Brinsley

Letter from the President

The summer doldrums have had little apparent effect on the activities of the Bar or the Judiciary. The Los Angeles Superior Court Committee on Court Improvements, vigorously examining court procedures, has recently published its report containing twenty-six recommendations for streamlining court procedures and saving tax dollars. Among the recommendations made with regard to civil litigation are the reduction of juries from 12 to 8; preemptory challenges to be reduced to six for each party and eight for each side; the increase of the legal rate of interest on judgments from 7% to 10% per annum; the court appointment of appraisers in eminent domain actions; the abolition of findings of fact and the substitution of a brief statement on the record by the judge of the reasons for his decision; and the adoption of new rules governing discovery, including preparation of standard interrogatories and the limitation on number of interrogatories and limitation on sets of interrogatories.



Murray M. Fields

The U.S. Supreme Court's landmark ruling on attorney advertisement (*Bates and O'Steen vs Arizona State Bar*) has inspired the American Bar Association to adopt regulatory and discretionary proposals to be distributed to all the states for consideration in establishing their own rules. The State Bar Board of Governors has submitted a plan for limited attorney advertising to the State Supreme Court which no doubt will be thoroughly examined in the light of the *Bates* case. Parenthetically, with all the furor following the decision it is noteworthy that the first time the *L.A. Times* ran lawyer ads under the euphemistic heading "Attorney at Law, Legal Directory" there were seventy-eight ads. In sharp contrast, in a recent publication of the *Sunday Times* only two law firms advertised. *Res ipsa loquitur* or should it be *Requiescat in Pace*.

Considerable interest and attention has been focused on proposals for gratuitous *pro bono publico* services to be rendered on a voluntary or mandatory basis by members of the Bar. On page 1 of this issue you will find a summary of an ABTL Pro Bono Committee Report made by Messrs. Loren R. Rothschild, James N. Adler, Raymond C. Fisher and James Marble. We are pleased and proud to announce that the Report, entitled "Pro Bono Legal Services: The Objections and Alternatives to Mandatory Programs," has been accepted for publication in a future issue of the *California State Bar Journal*.

Another area of interest is the work of the Devitt Committee to Consider Standards for Admission to

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President's letter

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Practice in the Federal Courts. ABTL's position concerning this study has been ably and thoughtfully expressed in the statement made by our former president, John H. Brinsley, before the Committee, excerpts of which also begin on page 1 of this issue.

By now ABTL members and friends have received the announcement of our Fourth Annual Seminar to be held on October 28-30, 1977 at the Santa Barbara Biltmore. Henry Zangwill, our program chairman, has assembled an eminent group of panelists who will deal with the preparation and examination of witnesses in business litigation. We urge everyone who can possibly attend to make reservations promptly and to help make the seminar the success it deserves.

—Murray M. Fields

Pro Bono Legal Services

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ers. The committee report stated that:

"... providing counsel to those in need stands as an ethical guidepost to every member of the legal profession. Every lawyer should strive to give of himself or herself in discharge of this obligation and, hence, to be a worthy member of a profession which has traditionally excelled in public service. The ethical significance of the obligation, however, lies precisely in the fact that the rendition of free legal services, except in limited circumstances, is not compelled."

The report also observed that at least two significant adverse consequences would flow from any program of mandatory uncompensated services. First, grave concerns arise regarding the quality of the service provided under such a program. When a lawyer voluntarily undertakes to represent a client, whether with or without fee, he accepts the burden of representation freely. If that burden is thrust upon the lawyer by the force of the law and without either compensation or the satisfaction of freely discharging an ethical duty, the interests of the client may be placed in peril. Second, if the obligation to provide counsel is reduced to a "minimum requirement" of uncompensated service, the ethical principle which has guided the bar may be lost. By requiring a certain number of hours of *pro bono* work, the *pro bono* obligation is converted into one much like that of paying dues. When the dues are paid, the obligation is extinguished.

The committee also argued against the proposition that the financial burden of satisfying society's unfilled needs for legal services should be borne exclusively by lawyers because they have a "monopoly" on the needed service. This proposition is often supported by the inaccurate observation that while citizens can repair their own automobiles, give themselves haircuts, and replumb their homes, they cannot write wills or defend themselves in court. The committee disagreed with the view that the profession's "monopolistic" position justifies imposition on individual lawyers of the entire financial burden of remedying a social problem of the magnitude of the one to be addressed by *pro bono* services. That burden, like the costs of social security, welfare, and similar methods of meeting society's basic financial needs, should be borne equitably by all citizens. It also pointed out that the State of California has long rec-

ognized that the financial burden of representation should not be imposed solely upon the legal profession. Thus, in 1921, the predecessor of Government Code Section 27700 was enacted authorizing the establishment of public defender programs and in 1941, Penal Code Section 927a (now Penal Code Section 927.2) authorized the payment of reasonable fees to attorneys appointed when the public defender is unavailable.

The committee noted that constitutional objections to compulsory service of attorneys could be raised if the state attempts to shift the burden of establishing a comprehensive legal service program to the legal profession as a class. In *State v. Rush*, 21 ALR 3d 804, the New Jersey Supreme Court stated:

"Conceivably the burden upon the bar could reach such proportions as to give the due process argument a force it does not now have. We have not reached that extraordinary stage. Nonetheless, and far short of that point, there is the policy question whether in fairness the bar alone should be required to discharge a duty which constitutionally is the burden of the State." *Id.* at 812.

The committee report deals at length with the several practical considerations which also militate against a mandatory approach to the problem of assuring equal access to justice. The first of these is the definitional problem: what is to be regarded as *pro bono publico*?

If the need for *pro bono* services is stated in terms of the goal of equal access to justice for the poor, it would seem appropriate under a mandatory program to limit qualified services to those rendered to individuals, or classes of persons, who cannot afford counsel. This would be consistent with the obligation owing to "those unable to pay reasonable fees" under A.B.A. ethical consideration 2-25. Indeed, some advocates of a mandatory program have suggested a definition of *pro bono* services which would exclude activities related to the administration of justice and charitable organization representation. On the other hand, in its 1975 resolution concerning the obligation to provide "public interest legal services," the A.B.A. defined such services to include services to the poor, civil rights representation, public rights representation, charitable organiza-

ABTL Calendar

4th Annual Seminar

(Henry S. Zangwill, Program Chairman)

Subject & Participants

"Witness Preparation and Examination"

Date & Place

October 28-30, 1977, Santa Barbara Biltmore Hotel

Dinner Program

Subject

"Effective Law and Motion Practice"

Date & Place

December, 1977 (site to be selected)

Dinner Program

Subject

"Handling the Small Commercial Dispute"

Date & Place

February, 1978 (site to be selected)

Dinner Program

Subject

"Civil Discovery Practice"

Date & Place

April, 1978 (site to be selected)

tion representation and work designed to improve the administration of justice. The resolution comports with the traditional conception of the *pro bono* obligation as one which extends beyond the obligation to represent the "defenseless and oppressed," and one which may be discharged differently by different lawyers.

Related to the problem of definition of *pro bono* work is the question of whether lawyers should be permitted to meet their responsibilities with financial contributions rather than services. The committee noted that prominent members of the bar have argued that lawyers should not be permitted to "buy" themselves out of this obligation with money or other professional activities. The committee disagreed with this conclusion. Financial contributions can play an important role in a balanced program in coordinating the efforts of uncompensated lawyers and providing compensation to full-time public service lawyers. The only legitimate purpose of a *pro bono* program, whether mandatory or voluntary, is to provide counsel to those in need, and this purpose in fact may be better served by a financial contribution than by a grudging rendition of services. Furthermore, the efficacy of compulsory "beneficence," as was noted above, is questionable, and, thus, it is doubtful that ruling out financial contributions would have the effect of making lawyers more ethical.

The committee found that serious administrative difficulties inhere in the administration of a *pro bono* program. For example, a mandatory *pro bono* program will require an extensive apparatus for coordinating resources with problems, lawyers with clients. The process of providing counsel would become encumbered with the burden of assuring that counsel are provided with an opportunity to meet licensing requirements. Substantial resources would be diverted to enforcement mechanisms and away from programs to bring volunteers and needy clients together.

A further difficult administrative problem arises by virtue of the impossibility of neatly packaging legal services into finite units of forty hours (the number proposed in the Knox Bill's mandatory program). An

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4th Annual ABTL Seminar Set for Santa Barbara Biltmore

The Fourth Annual ABTL Seminar will be held October 28-30, 1977, at the Santa Barbara Biltmore Hotel. The topic: "The Man in the Box: Preparing and Examining Witnesses." Experienced litigators will explore all aspects of witness preparation and examination in business and commercial lawsuits.

The first Seminar panel, on Friday afternoon, will feature a discussion of witness preparation. On Saturday morning, a panel will discuss the techniques and methods of direct examination. The Seminar will conclude with a Sunday morning panel exploring the art of effective cross-examination.

Panelists include:

Allan Browne—ERVIN, COHEN & JESSUP

Richard M. Coleman

Marshall B. Grossman—SCHWARTZ, ALSCHULER & GROSSMAN

Marsha K. McLean-Utley—GIBSON, DUNN & CRUTCHER

Howard P. Miller—BUCHALTER, NEMER, FIELDS & CHRISTIE

John A. Sturgeon—SHEPPARD, MULLIN, RICHTER & HAMPTON

Charles S. Vogel—NOSSAMAN, KRUEGER & MARSH
Frederick J. Zepp—LATHAM & WATKINS



Henry S. Zangwill

Registrants will also receive an extensive syllabus available only at the Seminar and containing outlines, articles, checklists and a bibliography.

On Friday evening ABTL will host a wine and cheese tasting party at poolside — weather permitting — for all Seminar participants. On Saturday evening a no-host cocktail reception will precede the traditional Seminar banquet. Also, registrants will have ample time to enjoy the wide array of leisure activities offered by the Santa Barbara Biltmore, including tennis, golf, horseback riding, sailing, fishing, and an Olympic size swimming pool.

Seminar enrollment is limited to only 100 registrants, with registration forms processed on a first come, first serve basis. The registration fee, which includes all program materials and social functions, is \$75.00 for a single registrant and \$100.00 for a registrant and spouse. ABTL also has arranged special rates for Seminar participants at the Santa Barbara Biltmore Hotel of \$50.00 single and \$58.00 double occupancy.

Further information and registration forms can be obtained from ABTL program chairman Henry S. Zangwill, c/o Schwartz, Alschuler & Grossman, 1880 Century Park East, Suite 1212, Los Angeles, Calif. 90067. Telephone: (213) 277-1226.

attorney who undertakes to represent a charitable organization or an indigent person may find that the matter raises difficult legal or factual issues requiring literally hundreds of hours of work in the course of a single year. Thus, unless carry forward provisions are included in any mandatory program, the program will be inherently unfair. On the other hand, inclusion of such provisions will move mandatory programs towards an undesirable complexity.

Finally, the entire bureaucratic mechanism would have to be overseen by a licensing committee of the bar charged with processing applications for license renewal. Unlike certification of specialists, such a licensing procedure would require monitoring of services rendered by every member of the bar and to a vast class of clients.

The committee further recommended, however, that the bar take immediate and substantial steps to increase significantly the delivery of legal services to those who cannot now afford such services, both through development of voluntary *pro bono* programs and reforms in the legal process itself. The impetus for a mandatory *pro bono* program reflects a growing and insistent concern with the deficiencies in our present system; we, as lawyers, must recognize these concerns and take constructive action to deal with them.

The committee urged the organized bar itself to establish an administrative mechanism to match client needs with attorneys' services and suggested that the primary responsibility for such a program rests with the State Bar, working in conjunction with local bar associations. It made specific suggestions for the content of a voluntary program including appointment of a full-time administrator and staff, coordinating with law firms, adoption of a non-binding imperative of a certain number of hours (or monetary contribution in lieu of hours), and consideration of methods to avoid adverse economic impact on attorneys whose practice is dependent on representation of persons who might otherwise qualify for *pro bono* representation.

Finally, the committee observed that:

"In the past, the discussion of *pro bono* legal services has focused on the controversial issue of mandatory plans and has had as its premise the need of the nation's poor for legal service. While we do not deny the desirability of satisfying this need, we also believe that parallel steps must be taken to diminish the need itself. This nation already labors under an unprecedented dependence on laws and lawyers. Legal pollution is a social malady of important dimensions. It stultifies and diminishes our lives. We accomplish no great benefit by simply extending an unjustified dependence to additional segments of society.

"Thus, in addition to developing programs to encourage voluntary *pro bono* activities, the bar should actively involve itself in the search for alternative methods of dispute resolution. Too many disputes in our present society may be effectively resolved only in court and with the aid of attorneys. The need for *pro bono* service would be greatly reduced if alternatives which permitted the res-

olution of more disputes with less lawyering could be devised."

The committee's report concluded with the following specific recommendations:

First, the Association should manifest its opposition to a mandatory *pro bono* program and its support of increased efforts to deliver legal services to those in need on a voluntary basis and of programs designed to reduce the need for lawyers and courts. Specifically, the Association should inform the Governor, the Legislature and the State Bar Board of Governors of its position.

Second, the Association should establish a permanent *pro bono* committee whose function will include coordination with the Board of Bar Governors, the Los Angeles County Bar Association and other organizations directly involved in *pro bono* programs. The committee should assist the administrators of such programs in matching clients with trial attorneys and in tapping the substantial resources of the member firms. The Association's membership is comprised of highly experienced and expert litigation attorneys. The committee should develop means to channel this experience and expertise into the *pro bono* programs. Obviously, as the committee gains experience, it will develop additional means by which the Association can participate actively in the enhancement of the practice of law for the public good.

Third, the Association should establish a permanent legal process committee whose functions will include coordination with the Board of Bar Governors, the Los Angeles County Bar Association, and other organizations. Like the *pro bono* committee, this committee should draw upon the extensive experience and expertise of the Association's membership to assist in developing means for "de-lawyering" the processes of dispute resolution and improving the methods of delivery of legal services.

—Loren R. Rothschild

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