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Are Lawyers Failing to Meet the Existing Demand for Legal Services?

by *R.W. Ianni**

I. INTRODUCTION

THIS PAPER WILL focus on detailed data on such topics as the number of lawyers currently practicing law, their location, the types of legal services they are now providing, the general public's access to these services, the extent to which the public now uses lawyers' services and the identification of those other legal services which are needed or desired but which are not now available. I am particularly distressed about the lack of data on these topics for, it seems to me that without such objective data any attempt to answer the question at hand will be open to serious challenge.

Although this range of information is not available in any comprehensive form in Canada, there are several recent Canadian surveys worthy of note.

A few brief and general observations regarding the public's interest in an active and responsive legal profession, and the role and responsibility of law schools regarding the legal profession and the delivery of legal services must first be looked to.

II. NON-CANADIAN STUDIES OF NEEDS FOR LEGAL SERVICES

Several recent studies conducted in other jurisdictions of the needs for legal services deserve mention. The American Bar Association and the American Bar Foundation (A.B.A./A.B.F.) survey of the legal needs of the public, initiated in 1971, is one of these. This survey aimed at determining the extent to which individuals consulted lawyers in dealing with personal legal matters and sought to identify those factors which led an individual to seek or not to seek the help or advice of a lawyer. In 1975 the Law Foundation of New South Wales carried out a community survey, the first of its kind in Australia, to assess the extent to which lawyers' services were used and the cost and quality of those services. In England in 1978, Professor Zander and his colleagues published a report based on a survey of the legal needs of people in three of London's boroughs. Also in 1978, the Science Centre in Berlin held, in cooperation with the Organization for Economic Cooperation and Development (O.E.C.D.), an international conference on "Innovations in Service Delivery" the major por-

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tion of which was dedicated to research into legal needs and legal services.

These examples of recent legal needs research in other jurisdictions cannot be mentioned without referring to the significant and broad ranging research of the 1960's which heightened public awareness to the fact that lower classes and minority groups had been effectively barred from access to the legal system. The involvement of the universities in this research and the ineffectiveness in establishing a range of new legal services delivery models are now a matter of record. Public and government response to these activities paved the way for establishing a number of legal aid and judicare schemes such as store-front and clinical law offices and public defender systems. These newly created services contributed to what one writer described as "access to justice, the newest wave in the world-wide movement to make rights effective". It remains to be seen whether or not we will witness some similar phenomenon resulting from the more recent legal needs research.

III. CANADIAN STUDIES OF NEEDS FOR LEGAL SERVICES

In Canada there has been only one demographic survey of the legal profession. It was carried out in 1979 for the Canadian Bar Association (C.B.A.), with a second survey to have been completed in 1980. This C.B.A. survey was the first step in an attempt to establish an ongoing self-managed data base for the profession. It was, however, too general in nature. To be of assistance and guidance to those contemplating entering the profession, such a survey would have to have been more detailed and comprehensive and would have to have enjoyed a much wider distribution. Specific economic information taken alone would have been of greater assistance than the information provided by the 1979-80 survey. An example of the kind of detailed and comprehensive survey needed was carried out by the Illinois State Bar Association in 1975. The Illinois survey covered not only the broad spectrum of economic data on the profession but it also canvassed the opinions of lawyers on important issues such as specialization and the availability of legal services.

A number of attempts have been made in the province of Ontario to have the Law Society of Upper Canada sponsor a demographic study of the profession in the province. As early as 1964, and on at least three occasions since that time, representatives of the law faculties and/or the Ontario law deans have approached the Benchers about sponsoring such a survey in conjunction with the law schools. Indeed, the law schools had funded on their own a preliminary survey based upon available data. The Law Society, however, was not prepared to undertake such a study. The Law Society has conducted a survey of its members on the number of practicing lawyers, promotional advertising, billing rates and overhead costs. These matters, along with questions about lawyer specialization were the subjects of two of the most recent Law Society meetings. The

results of the Society's survey to convey the concern of the profession about the increasing numbers of attorney's. 72 percent of the respondents believed that controlling the numbers entering the profession would be beneficial to the public, and 85 percent felt such controls would be beneficial to the profession. The implication was that growing numbers of practitioners give rise to a lowering of the high standard of professional service. However, 74 percent of the respondents also felt that the Law Society, rather than the law schools, should restrict entry into the profession.

In 1980 the Committee of Ontario Law Deans and the Law Society of Upper Canada cooperated in publishing a survey which has some relevance to the topic of whether there are too many lawyers. The survey, entitled "Employment Opportunities for Articles Students and Graduates of the Bar Admission Course in Ontario", resulted in an impressive report which presents a number of interesting indicators concerning law students' perceptions of their law school, their articling and bar admission experience, as well as their ultimate employment in the profession. While the survey does not cover the most recent graduates, it did establish that at the time of the survey only 4 percent of the 1975, 1976 and 1977 law graduates were still not employed in the legal field. The 1979 C.B.A. survey revealed that less than 2 percent of the respondents were either unemployed or retired. The C.B.A. consultants concluded that this statistic supported the premise that "lawyers continue working well past the conventional retirement age and that lawyers can usually find at least some work in law, even in difficult economic times". Accordingly, while one might conclude, at least for the period covered by these surveys, that because new lawyers found permanent positions, there was a demand for their services. The surveys do not, however, provide any insight into the types of services being offered by lawyers and whether there was a demand, perceived or otherwise, for legal services other than those traditionally provided by lawyers. The C.B.A. study did conclude, however, that "specialization among lawyers has not kept pace with the rapid diversification of activities within the country." More specifically the study concluded that "negligible proportions of lawyers specialize in areas of law pertaining to important issues of the country." For example, less than 1 percent of the respondents report specializing in any one of the following areas of the law: air, bankruptcy, civil liberties, constitutional, consumer, energy, environmental, immigration, maritime, media, native and patent law.

While some satisfaction can be derived from the fact initiatives are being taken in this country to gather empirical data on the numbers of lawyers and employment opportunities for lawyers, these surveys do not, of course, directly address the question of the legal needs of the public.

Perhaps the most significant effort in this regard is the working paper prepared by a group of scholars for the Professional Organizations Committee (P.O.C.) entitled "The Market for Legal Services". The

P.O.C. was established in 1976 by the Attorney General of Ontario to review the statutes governing the professions of public accounting, architecture, engineering and law "with a view to making recommendations to the government for comprehensive legislation setting the legal framework within which these professions are to operate". Approximately one-half of the working paper dealt with an economic analysis of the market for lawyers' services. This research attempted to assess "the conduct and performance of the market and the effectiveness of the present regulatory environment as a means of protecting the public interest." The structure of the market was examined with reference to the characteristics of "demanders" and "suppliers" including their geographic distribution, size of areas of practice and suppliers' specialization.

Of particular interest to us here is the examination of the nature and extent of information available to clients at each of the following points in time when the decision to consult a lawyer was made; when the search for and selection of a lawyer was embarked upon; and at what point the services received were evaluated. For these purposes the users of legal services were divided into two groups — household clients and businesses. The household clients' survey indicated a general mistrust and misconception about lawyers. For example,

- 64.7 percent of the sample felt that a person should not call a lawyer until he has exhausted every other possible way of solving his problem . . .
- 66.6 percent agreed with the statement that most people cannot afford the money to see a lawyer . . .
- 72.4 percent agreed that many people do not go to lawyers because they do not recognize the legal nature of the problem.

The household clients' survey also revealed that "individuals are not frequent purchasers of legal services . . . only 26 percent used lawyers more than twice a year". These individuals relied largely on the legal referral services. Once they had found and used the services of a lawyer, they generally reported satisfaction with the quality of service received.

From the very limited survey of business clients it was apparent that business clients did not have the same reticence in calling on the services of a lawyer as did clients in the first group. Of those surveyed, 4 percent had their own legal departments and 4 percent kept lawyers on retainer. The remaining 92 percent hired a lawyer more than twice a year. In fact, 68 percent of the respondents regularly dealt with more than one law firm. These results are based on 30 responses, and while the business clients were randomly chosen from a sample of firms stratified by gross revenue there is no breakdown on the use of lawyers' services by firms in various gross revenue brackets. Nonetheless, in spite of the "apparent" ease of access large percentages of the business clients wanted more information about lawyers (65 percent), their fees (74 percent), qualification (53 percent) and area of specialization (68 percent). A number of general

conclusions flow from the Ontario research:

1. "The lack of information about lawyers' services is likely to be inhibiting consumers from consulting lawyers about matters with a legal orientation;"
2. "Not only do consumers hesitate to consult lawyers because they do not recognize their value as resources but also because they do not appreciate the legal nature of many of their problems;"
3. Consumers have a difficult time choosing a lawyer and "most frequently rely on the recommendations of friends, relatives or colleagues;"
4. Individuals are not frequent users of legal services 46 percent of those surveyed had only consulted a lawyer once or twice in five years, 19 percent consulted a lawyer once or twice a year and 26 percent consulted a lawyer more than twice a year.
5. "Fees play an important role in the decision as to whether or not to consult a lawyer, (and) non-users are inhibited from consulting lawyers owing in part to over estimation of lawyers' fees."

IV. THE AMERICAN APPROACH

While the particular focus and form of the Ontario research and the size of its sample make comparisons with research carried out in other jurisdictions tentative and in some sense even unfair, it is important for purposes of general information, to summarize some of the major conclusions of the A.B.A./A.B.F. survey:

1. Of those 45 years of age or older at the time of the survey, approximately 25 percent had never consulted a lawyer, 33 percent had consulted a lawyer twice or three times and only 10 percent had consulted a lawyer more than three times.
2. Of those 18-44 years of age at the time of the survey, 44 percent had never consulted a lawyer, 26 percent used a lawyer only once, 21 percent used a lawyer two or three times and 9 percent had used a lawyer more than five times.

The type of problems for which individuals contacted a lawyer included: 85 percent for will preparation; 50 percent divorce and estate planning; 37 percent for real property matters; 16 percent injuries and property damage; 15 percent for governmental agencies and services; 12 percent consumer transactions; 1 percent for job discrimination. In general, the survey uncovered that lawyers were consulted for less than $\frac{1}{3}$ of all problems that could reasonably be classified as legal problems.

The principal researcher in examining these results indicated that she "began with the premise that there is [a] generally shared predilection by the public not to seek advice or help from lawyers in problem solving". She further speculated, and I believe rightly so, that the decision to see a lawyer is affected by "the intensity of concern" about the outcome of the problem and "the probable effectiveness of the lawyer in achieving the desired outcome at a reasonable cost related to the poten-

tial benefit." Of course, when dealing with legal needs research, one must be careful to address the policy question of whether or not an unfulfilled need is a sufficient reason for the reorganization of the delivery system. This is an important issue which will obviously have to be addressed at an appropriate time.

The A.B.A./A.B.F. survey has been followed up by a *Report of The Task Force on the Role of Lawyers in the 1980's*, a project of Young Lawyers Division of the American Bar Association. In its summary conclusions the Task Force identified a number of critical actions that should be taken in order to assist the profession to respond to the challenges of the eighties:

- develop more economical services to middle-income groups;
- provide better public education for the public in substantive law and legal procedures — rights, responsibilities, remedies and resources;
- educate the public on what it can expect the law and lawyers to accomplish;
- reduce costs and complexities of litigation.

An examination of the available data from the U.S. and other jurisdictions has led one respected observer to conclude that:

"There is no longer any room for doubt that a substantial unmet need for legal services does exist. Studies in the United States, England, Australia and the Netherlands have shown that many members of the public fail to seek the help of lawyers in a wide variety of legal problems."

Indeed, researchers in the above-mentioned jurisdictions, having established the existence of an unmet need for legal services, are not focusing their efforts on developing a thorough theoretical basis for explaining why that unmet need exists and are assessing alternative strategies for increasing access to legal services.

While we can certainly draw some strong inferences from the empirical data currently available in Canada and also speculate as to the applicability of the other research referred to, I would be the first to admit to deficiencies in the Canadian data and to signal the obvious problems associated with data from other jurisdictions. The size of the Ontario sample, the absence of detailed information on lawyer utilizations, and the lack of revenue data represented only a few examples of such deficiencies. I leave a more detailed assessment and critical analysis of this data, as well as proposals for the design of an appropriate Canadian survey, to those qualified to do so.

In brief, my view is that I do not believe that lawyers are meeting the existing demand for legal services. I harbor no illusions as to the general reception of my response in various quarters given the available data, the special interests involved and the important consequences in attempting to act upon such a view to this problem. The initiation of a comprehensive and broadly based public needs is strongly needed in Canada, to be

undertaken with all possible haste. Given the importance of the issue and Canada's rather unimpressive track record for predicting manpower needs, public interest alone should dictate such a course of action. The information that would be generated by such a survey would be of enormous interest to the public, to the law societies and to law students, especially those who intend to go into the private and traditional.

V. THE PUBLIC INTEREST IN LEGAL SERVICE DELIVERY

Professional organizations in Canada have been given the privilege of self regulation based on the rationale that it is the best method for protecting the public interest. Put in another way:

"They (the professionals) oblige themselves to abide by a code of conduct whose hallmark is the foreswearing of the temptation to take advantage of those entrusted to their care. The professional becomes a fiduciary. Service — in theory at least — takes precedence over self interest."

Given this philosophical underpinning one can understand the temptation for lawyers, as fiduciaries, to profess that they believe to be in the best interest of the public. However, many lawyers are questioning some of the more recent pronouncements of the profession about what is best for the public when no attempt has been made to directly assess its sentiments. For example, in recent discussions at Ontario's Law Society of Upper Canada, members (Presidents of County and District Law Associations) have expressed an overwhelming conviction that: a) there are too many lawyers in the province; b) because of the overcrowding in the profession, the quality of legal services has deteriorated; c) advertising by lawyers should not be allowed, although some institutional advertising might be constructive; and d) there should be no specialization of lawyers at this time. An objective observer, even one without any depth of background in economics, might blanch at the apparent inconsistencies involved in a perceived oversupply of lawyers and the prohibition on advertising and specialization. One might also question the causal relationship of oversupply to lowering of quality. At the same time there was in an obviously missing dimension in this debate — the public interest, — as well as a total lack of empirical data. Accordingly, I would submit that the profession's willingness to speculate as to what is in the best interest of the public may not necessarily correspond to that interest.

Finally, to quote an influential participant in this debate:

"I may say if the credibility of the stance of the lawyer is shrouded in some suspicion of self interest, this taint cannot be avoided by the Ontario law schools, whose provincial grants are made on a per capita basis."

In spite of the funding mechanism referred to which we have on many occasions attempted to change it is a matter of record that enrollments in at least two Canadian law faculties have been decreased in the

past few years and that the two newest faculties have very small enrollments. While the vast majority of law graduates proceed to a call to the bar it would be a grave mistake to view modern legal education as narrowly vocational. The law schools must be concerned with the development of a program capable of preparing students not only for the traditional practice of law but for the general purposes of a rapidly changing society which requires and expects of them much more than mere technical skills. The range in variety of optional programs is but one indication of the efforts of educators to have students expand their legal horizons and develop interests in areas of law not currently covered by those in traditional practice. Discreet areas of substantive law are no longer studied in isolation. They are placed in their social context and the rules studied in reference to the related area of human activity. In this vein, interdisciplinary courses and programs have been developed. These initiatives were not always kindly received by the profession or the various law societies. In fact, as recently as three years ago when the pressure of numbers was not a primary concern, the legal education committee of one of the larger law societies asked the law schools in its jurisdiction to expand the core curriculum and encourage students to take courses deemed useful and necessary to general practitioners. In the light of today's discussions the strong resistance on the part of the law schools to those pressures would appear particularly felicitous. Nonetheless, the practicing lawyer — the role model for most students — has enormous influence on the direction students take in law school.

Ultimately, the Law Society's decision as to what subjects will be included in any given bar admission course will determine student's choices in the universities. In this regard we can only hope that practicing attorneys will objectively evaluate the initiatives and programs of the law schools for the new dimensions and perspectives they provide and their potential for responding to the legal needs of the future.

The university law faculties in this country have played another important role in examining the provision of legal services and indeed have been responsible for developing successful delivery models. When the first two university-based law clinics in Ontario were established to provide legal services to those unable to afford them and for matters not covered by the legal aid plan, there was significant opposition to these clinics by members of the practicing bar and the professional organization. These clinics have now served as the models for more than 30 legal clinics which have been established throughout the province since the early 70's. Universities have also established a number of projects such as public legal education programs and such research and resource programs as the Pre-paid Legal Services Program. These experiences have constituted the universities' attempts to respond to the need for greater access to legal services and a community of professionals who are responsible to the needs of varying constituencies.

The role of any law faculty extends beyond the careful and in depth

study of substantive law and procedure to the study of the legal profession itself, access to the legal system and law reform. Given the nature of these activities it may mean that there will be a tension from time to time between the law faculties and the practicing bar. However, these tensions have in the past provided a positive impetus for improvements in legal education, the profession and the provision of legal services. I have every confidence that the current debate will lead to similar results.