

Bar Structure Workgroup

Comments

Thomas Mengert, J.D.

I appreciate the opportunity to add my input to the Bar Structure Workgroup as it explores the issues raised by current litigation and the impact on mandatory membership in a unified model of bar associations. I would like though to expand the perspectives of the work group to look beyond whatever demands of restructuring may ensue from pending litigation because as I will suggest what is really at stake is the survival of an organization that is being made daily less relevant to both the needs of attorneys and of the general public as well.

I have reviewed *The WSBA Functional Organization Chart* and *The Spectrum of WSBA Programs* and have found both to be informative and suggestive for possible reforms. Both documents show the variety of tasks that the current WSBA has chosen to embrace and the traditional grid-model of management that it has adopted for its internal functions. I hope that these comments in their candor will be seen as informative and helpful. I believe in the good intentions of the many people who enable the WSBA to function as it has but I also believe that certain design flaws are present and I will address those flaws here.

Let me begin by stating the there is an inherent contradiction between the duties owed to the membership of the bar and the often amorphous duties owed to general members of the public who seek legal services. Laws affect virtually every area of human life and potential conflict. Lawyers have traditionally been seen as the best avenue of advice and guidance as citizens wend their way through the system to address their specific needs. This means that in the last analysis lawyers are consultants. Even in their public role as Officers of the Court they are subject to all of the problems and inherent ambiguities that are entailed in adjudication under our system of laws which are a common possession of all citizens.

Many structural components are lost in a sea of rhetoric where law is concerned. Terms such as truth-finding, justice, equity, and most other terms of high-minded aspiration must be reduced to operational terms if prosaic due process is ever to be achieved. A quick review of the insights provided by the Critical Legal Studies movement and the Law and Economics perspective on Jurisprudence will reveal how empty most of what passes as legal rhetoric is when it encounters real-world situations.

As an organization we are often enamored with unworkable ideals and as a result we expend inordinate amounts of money and effort keeping the idol of our legal aspirations well-burnished rather than adopting the empirical studies that Dean Langdell once assumed that case law would provide to create a seamless web of law. The real empiricism that is needed however is that provided from outside the legal arena. Our globalized world is growing increasingly impatient with the impediments to change imposed by the Anglo-American Legal System. Even at the local and domestic level the true needs of the public are ill-served in spite of all of our existing efforts to guarantee competency and obtain affordable access. To make further impositions though upon often strained practitioners to give the public everything that it wishes or imagines to be possible in the endless pursuit of truth, justice, and the American way is a vain pursuit.

Lawyers are not super men and wonder women. For the most part they are well-intentioned laborers in the legal vineyard doing the best that they can with an intractable system to serve their client's needs. In spite of this lawyers are publicly maligned, occupationally mistrusted, and the bar associations often provides a focal point for undeserved malice towards individual attorneys and ungrounded complaints from a public that barely grasps elementary civics let alone an appreciation of our labyrinthine legal system. Lawyers are the unfortunate liaisons between the petulance of unjustified public expectations and a cumbersome residue of statute and precedent that is increasingly falling behind the needs of the 21st century world.

The ideals of professionalism are in the last analysis a clever way to shift public responsibilities to private actors. This is not a unique phenomenon; it is true of many doctors as well and of virtually all teachers in the public school system. Lawyers do not have a union since they are for the most part private practitioners. The best representative of their collective interests as they carry out their labors and attempt to earn a living is the bar association. Unfortunately it has become the practice of bar associations to increase their revenues to keep pace with various new regulatory schemes designed to supplement skills, to instill a unique ethical code based upon no religious roots or stoic school of conduct, and then to regulate, to enforce, and to sanction lawyer behavior while charging lawyers for the upkeep of the entire structure in all of its permutations and experimentations. Protest is seen as unseemly to the dignity of the profession and as manifesting an attitude of ungratefulness after having been granted the gratuitous privilege of a license to practice law. Lurking somewhere though in the background of all of these impositions and inroads of new competition from various quarters is the insidious supposition that when it comes to these assessments lawyers are obscenely rich and can afford them. This in turn creates an attitude of alienation among many members of the bar as they are forced to absorb whatever new ideas are floating about in the celestial ether of downtown Seattle.

Similar impositions on traditional definitions of legal practice and other changes are a nationwide phenomenon. The current inroads on the provision of legal services that are arising under various pressures have been explored recently in a publication of the American Bar Association entitled, *The Relevant Lawyer*. Upon completing my own reading of the book I felt that it might have been better entitled "The Irrelevant Lawyer" at least as applied to generalists and to embattled solo practitioners. It is clear that new management models are being instituted in law firms nationwide and that cumbrous litigation will increasingly be referred to private contract and standards set within industries. Legal business is migrating into in-house counsel. The pool of business for private firms is diminishing even as the supply of trained but under-utilized young attorneys is increasing.

Even our trust in public law is being undermined daily by events. Our most sacred ideas regarding the way that government works are being daily challenged by the neo-feudal concept of the Presidency entertained by Donald Trump as he hovers on the brink of impeachment hearings. Against such a dramatic background of daily national events the current bar has appeared in the local news in its own narrow spot-light of unfortunate notoriety. This does not foster member confidence. This is the context in which the Bar Structure Work Group must perform its difficult task as it tries to anticipate whatever new mandates may emerge from pending appeals of cases like *Janus*.

With only two meetings left and another two that remain optional at this point it will be surprising if a definitive position can be reached. It will be enough if some of the concerns that I raise here will be addressed. To expedite this process I will list them:

- ❖ Whether the WSBA should eliminate its quasi-governmental role by disbanding as a self-governing body? Instead the strictly regulatory functions of legal practice could be referred to the legislature to create an administrative agency paid for from tax revenues to supervise all provision of “legal services” however that term is to be understood.
- ❖ Whether attorneys might then establish a voluntary organization or group of associations to help them in a specific and individualized capacity to improve in their particular practice areas so that they may function as able consultants to the individuals who wish to use legal means to effectuate their agreements or to seek redress for injuries.
- ❖ Whether various branches, boards, advisory groups, etc. are of sufficient general public appeal to be set up as non-profit corporations with access to the public as members and as clients to advance their public policy initiatives.
- ❖ Whether law schools should be advised in a timely fashion that the great gold-rush of dumping unprepared three-year law graduates after graduation on a saturated market (for attorneys) is over and that mentorship, internships, and actual practice and business skills will henceforth be required if their graduates ever intend to join the multiplying hybrids in providing legal services in a cost-conscious and competitive environment.
- ❖ Whether legal services will take a sectional model as its beginning and recognize formal legal specialties along the lines suggested by Board-Certified areas of medical practice.
- ❖ Whether lawyers who have already indebted themselves to repay loans for a model of legal education and subsequent firm practice that is becoming swiftly antiquated should be helped to transition to the new realities of legal process outsourcing, virtual law firms, and the progressive dismantling of professionalism and the ongoing lawyer/client relationship by a commercial model that will finally give the public the cheap access to the courts that it desires.
- ❖ Whether the bar association may discharge its conscience on significant legal issues without seeming to be “too political” and without causing a revolt in its ranks or charges of impositions on free speech. Must the bar be vapid or irrelevant or refrain from all public discourse for fear of offending somebody?
- ❖ If the bar adopts a fractionated body of separate “subscriptions” to various services could an overarching core-institution contain them all thus preserving some of the advantages of the former unified bar model without the dual mandate of regulation/investigation/compliance/enforcement and on the other hand lawyer health and professional services that currently prevails.

However these and similar questions are to be resolved they cannot be resolved adequately by a mere workgroup, particularly one with such a short mandate of existence, without driving a final nail into the coffin of mistrust. The few comments thus far received are more of a testimony to the lethargy of the membership born of long habits of acquiescence than a manifestation of assent to the present structure of the unified bar. I would now like to be even more specific. The membership has neither the time nor the ability to even adequately represent their interests and concerns before the Board of Governors let alone to plumb the depths of the actual workings of the extensive programs that the bar association has

undertaken over time. It is time for a pruning even if the unified model is to be retained. I would request that prior to concluding its inquiries and operations that the work-group recommend some manner of ongoing review of the following specifics:

- ❖ **First, in the regulatory arena of operations: whether bar exams except for those who may choose to practice in other states are not simply one more arbitrary and unnecessary student hurdle that could be internalized into an expanded law-school curriculum under WA Supreme Court imposed standards**
- ❖ **Second, again in the regulatory arena of operations and in light of my proposal for recognized specialty designations for advanced and specific training in law specialties, general MCLE's would no longer be required (just as they have not been for attorneys practicing in Washington, D.C. and in several states)**
- ❖ **Third, again in the regulatory arena, that as the forms of legal practice change including what might be called temporary or flow-through law-firm-like associations many ethics rules that were devised with another model of the provision of legal services in mind may need to be revised**
- ❖ **In the area of Mandatory programs I would suggest the following for Supreme Court Review. As the WSBA downsizes its extensive operations certain functions should no longer be imposed upon it. LLLT's and LPO's should have their own organizations or be state regulated at tax-payer expense. The Access to justice Board should be a non-profit external organization funded by the general public through memberships. This new organization could also maintain self-insurance so that the Client Protection Fund currently financed by honest practitioners would no longer be imposed upon them as a sort of B & O tax as it presently seems to be.**
- ❖ **In the permissive area of WSBA functions many fertile grounds exist for a subscription only set of services. It is possible that a separate umbrella organization could sponsor any and all of them. What would be lacking is enforced funding of the cafeteria of services and interests for those who are for whatever reason on a conceptual diet.**

In conclusion I would like to explain the provenance of many of the ideas presented here. In the process of my writing a book entitled, *Dean Langdell is Dead: Breakdown in the American Legal Profession* I undertook a substantial amount of research on the way that the provision of legal services is currently practiced in America particularly since the Great Recession of 2008. I did this assessment in light of extensive reading in systems analysis, organizational cybernetics, and organization design. One of the key points in these new fields is the importance of emergent phenomena under pressure of changing conditions. Linear and hierarchical organizations often use their power to become self-perpetuating through the use of force and involuntary compliance. Truly efficient organizations are free. They can respond to change without consulting internal cliques and power structures. That is the kind of bar association called for in a 21st century world and one that will never need to rely on mandated membership to fill its ranks. Thank you for the opportunity to share these frank thoughts with you today.

Thomas Mengert