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Edward R. Becker Honorable
U.S. District Judge, Eastern District of Pennsylvania

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The Need For the Revitalization of the Private Practitioner in Law

Honorable Edward R. Becker*

My subject is the trend toward elimination of the general practitioner from the ranks of the legal profession and what I consider to be the untoward, and indeed the deleterious, effect of this trend upon the client, the legal profession and the public. This subject emanates from the changes I have observed in the legal profession during the 15 years I have been a member of it. I have observed a virtual metamorphosis of the bar by the attrition, multiplied within the last 5 years, of the business of the general practitioner. As the subject indicates, I believe that this metamorphosis has great significance for our profession and for society now and in the future. And I choose to speak about it because hopefully, I can influence in some degree the judgment of significant leaders of the bar who can perhaps affect the course the profession is to take.

The decline of the private practitioner can be demonstrated of course by the statistics. According to American Bar Foundation figures, between 1948 and 1966, the number of lawyers in private practice decreased from 89.2% to 73.5%. These figures are dated, of course, and more recent figures are doubtless in the course of compilation, but I would predict that the percentage is now down to a point near 50%. In Massachusetts, in the wake of no-fault, it must be less by this time. However, I do not rely upon statistics for these observations. I rely upon what I have seen—with an emphasis on general practice

* Judge Becker is a United States District Judge in the Eastern District of Pennsylvania. This commentary was adapted from an address given by Judge Becker to the Juristic Society of Philadelphia on June 29, 1972.

in contrast to the entire spectrum of private practice, although I suspect that it is the general practitioner who accounts for the bulk of the decline.

I think it fair to say that a very substantial portion of the work of the general practitioners has been in the fields of criminal law, negligence law, domestic relations law and the representation of small business firms. We have all seen the small businessman become virtually a thing of the past; we have seen the legal aid societies, and, more recently, the community legal service organizations enter the domestic relations field; we have seen the field of criminal law become almost the exclusive province of the public defender organizations and the consequences of no-fault to the general practitioner, if it comes, are well known. Speaking in terms of the criminal field, I can recall that when I came to the bar, the station house, where preliminary hearings were held, and the criminal courts in City Hall, where other cases were finally tried, were places where hundreds of general practitioners plied their trade. By the time I had gone on the bench (and from my occasional reading of the Common Pleas criminal trial lists), the situation I have described had become a thing of the distant past. I would estimate that 90% of the criminal practice is in the hands of the public defender. In my judgment, the effect upon the general practitioner of this trend—if it continues, as it well may (particularly in the domestic relations and negligence fields)—is incalculable. I except only the strong general practice firms which I think will survive and thrive because of the attrition of the marginal ones and the failure of new ones to develop.

In this same regard, I note that there are proposals strongly afoot in very high legal circles in this nation to provide counsel to any person in any criminal case regardless of indigency. This proposal which would doubtless be implemented through expanded defender organizations would eliminate the private criminal bar entirely.

Some of you may disagree with these observations. In an American Bar Association Journal article written by William J. Fuchs,¹ the author predicts that in the years to come personal injury litigation is most likely to be curtailed through no-fault insurance plans; uncontested divorces and other aspects of domestic relations problems, such as support, may be handled by direct application to a government

1. Fuchs, *Lawyers and Law Firms Look Ahead—1971 to 2000*, 57 A.B.A.J. 971 (1971).

official similar to an ombudsman, without intervention of a private attorney and without proof of fault; and that other traditional legal transactions, such as the settlement of small estates, routine real estate transactions, simple tax problems and estate planning may be handled by non-attorneys. In other words, Mr. Fuchs has predicted the total demise of the general practitioner. However, he has also predicted that other new forms of business will arise:

A vast set of new legal rights (or newly recognized old rights in some cases) will emerge: rights growing out of ecology, including the right not to be harmed by pollution; consumers' rights; students' rights; welfare and other poverty rights; space rights; communication rights; the right to medical care and the right to receive replacement human organs; the right to privacy, especially against 'bugging' through the use of electronic devices; and the whole maze of rights growing out of the struggle of the individual against big government, big business, big charities and big institutions of every kind.²

On the basis of this prediction, Mr. Fuchs has concluded that there will be more, not less, practice for the private attorney. I respectfully dissent. While Mr. Fuchs wrote the article in the wake of his service as Chairman of the Section of General Practice of the ABA, I respectfully point out that Mr. Fuchs is not a general practitioner—he is a corporate lawyer with a large firm. I submit, as a former general practitioner who ought to know, that this new set of legal rights is not the stuff of which the livelihood of a general practitioner is made—it is the stuff from which legal service corporations have operated and will continue to operate unless and until—and I will discuss this later—some form of judicare or prepaid legal services makes it possible for the general practitioners to handle such matters. Now, lest you jump to the wrong conclusion as to the ultimate thrust of my remarks, I hasten to underscore what I am not proposing. I am not proposing a retrenchment from what is now a national commitment to provide competent legal counsel to the underprivileged and to the accused. That commitment has been enhanced very recently by the historic and unanimous opinion of the United States Supreme Court in the case of *Argersinger v. Hamlin*,³ in which it was held that the right of an indigent defendant in a criminal trial to the assistance of counsel is not governed by the classification of the offense, or whether or not a jury trial is required, and that no accused may be imprisoned for any length of time as the result of a criminal prosecution, includ-

2. *Id.* at 972.

3. 40 U.S.L.W. 4679 (June 12, 1972).

ing for a so-called "petty offense," in which he was denied the assistance of counsel. What I am questioning is the method by which our society, with the support of the organized bar, has chosen to meet this national commitment.

It is my view that the means by which we have honored the national commitment which I have described must be re-examined, and that the economic resources devoted to fulfilling it be redirected to enable the private practitioner to play a significant role. I submit the following propositions:

ONE: For the most part, a client is better served by a private practitioner than by an employee of a corporation such as the public defender or community legal service.

TWO: The average assistant voluntary defender or legal services corporation lawyer does not wish to be an employee for the balance of his professional life—he wants to engage in the private practice of law—but under the present and prospective scheme of things, he has no place else to go.

THREE: The elimination of the private practitioner poses a detriment to society as a whole, increasing the trend towards a structured impersonalized society as opposed to a society more open, more human and more flexible. Let me expound briefly.

As to my first point, both as lawyer and as judge, I have never been convinced that, except in a limited range of cases, a public service corporation lawyer represents his client more adequately than a private practitioner. In my judgment, the average private practitioner will, as a rule, exert more zeal and resourcefulness on behalf of the client than the average legal service corporation lawyer to whom a given case may be routine or humdrum. For instance, I do not demean the acknowledged expertise of the public defender in criminal matters, but there are many, many private practitioners with equivalent skill. I note too that there are many fine lawyers who, as private practitioners, specialize in various phases of the law, personal injury law, for example, who will be drastically affected by the events in progress. I point this out to indicate that the trends I describe are not affecting the general practitioner alone. I also believe, by the way, that, as in medicine, general practitioners will continue to be necessary. It is my judgment that the average client has more confidence in, and prefers to be represented by a private practitioner rather than by a public service corporation lawyer. Finally, and this is a point which I believe has escaped

attention heretofore, the private practitioner will, as a rule, accept an appointment in a criminal or other case at a less than lucrative fee because of another advantage that the representation gives him—contact with and exposure to new people: the litigant, his family, witnesses and friends, all of whom the lawyer views as potential clients. The referral of one client by another is the most productive means of development of a private law practice.

As to the second point, I have talked to countless young men and women who are employed by the public defender and community legal services. Many of them have no opportunities in the large firms or prefer not to practice with the large firms, and do not wish to work in government. Many of them are members of minority groups. I note that the large firms have been doing well of late in hiring members of minorities, but they can do only so much.) I can tell you that most of them do not wish to work for public service legal corporations for the rest of their professional lives—they wish to be private practitioners, and yet they fear that there will be no business to support them as such in the years to come.

Now, as to the third point, and perhaps the most important, I consider the institution of the private practitioner as an important one to our society. In my view, the polarization of the bar into large law firms (and it is obvious that the large firms are here to stay or get larger), government service and public service law corporations, is most unhealthy. There are a number of facets of this problem.

One is the impact which the trend which I foresee will have upon the political life of our country. I need not labor at length the role that lawyers have played in the development of this country. 25 of the 56 signers of the Declaration of Independence were lawyers, as were 36 of the 55 members of the Constitutional Convention, including Adams, Jefferson, Madison and others. From 1790 to 1936, 66% of the United States Senators were attorneys, as were 50% of the Members of the House. To the present time, most of our governors and our legislators are lawyers. I believe that this is a good thing. Lawyers in our century have been the pre-eminent social inventors, creating new institutions and adapting old ones to society's needs. And yet, precious few lawyers from the large law firms venture into politics at all. There are exceptions, of course. Yet, during the many years in which I engaged actively in politics I saw lawyers from the big firms sally into politics, but it was generally only for one campaign, because of the particular issue or candidate involved.

Lawyer employees of government and of the public service corporations are prohibited from engaging in political activity, and employees of corporations generally are as well. Hence, the bulk of lawyers in politics and government have come from the ranks of the private practitioners. If those ranks are substantially depleted, we will, I predict, have substantially fewer lawyers in government and politics. This phenomenon will not, in my view, be limited to the large urban centers; it will have perhaps greater effects in the areas of the small cities and in the rural sections of our nation.

Of equal importance, in my view, as its impact upon our polity is the impact which the attrition of the private practitioner will have upon our legal institutional milieu. There are doubtless still those who believe that the mature society is one in which essential public services should be exercised by governmental or quasi-governmental bureaus, but I am not among them. If the direction in which things are headed is not reversed, I foresee these hordes of young attorneys who are now overpopulating our law schools having no place to go but to large firms, government corporations, or else large legal service corporate bureaucracies. They will not even have the opportunity to become partners, as in the large firms. Their choice will be to become employee or manager in the mold of the technocratic state, and I predict that many will become disillusioned, as some are already, and rebel against that system. This is a far cry from the concept of our profession as many of us foresaw it, where our creative energies could be directed in a deeply interpersonal way towards the service of our clients, hence our fellow man. But, unless something is done to reverse the trend, predicting in a different way from Mr. Fuchs, I see the bar of the year 2000 as being comprised of large law firms, legal service corporations, and lawyers in government and private corporations with the private practitioner as we have known him comprising but a very small segment of the bar. As I have said, I believe that the strong general practice firms existing now will survive. The weaker ones will fade away and the new lawyers will never have a meaningful chance to establish general practices.

I note too that I see the existence of a private criminal bar as a bulwark of protection of individual liberties, and yet the movements in the land that I have referred to threaten its existence as well.

I have dealt in these remarks only with the problem as I see it. I believe solutions are available. I will not discuss the solutions to the problems except in a most general way.

First of all, I believe it urgent that the bar dedicate itself to the enactment of programs such as Judicare or some other form of prepaid legal services which will enable the average citizen to afford a lawyer of his choosing. There has been much awareness lately that the middle income American lacks sufficient access to legal services, and I agree. Having recognized our commitment to the citizenry to provide for legal services, should there not be a medicare for lawyers? I believe there should. Secondly, such programs must include the fields of criminal and civil law, and relate to all types of legal disputes, however small, so that we can reduce the size of our public defender organizations and community legal service organizations and have their services performed by the private bar.

I think that it is a fair statement that, over the last decade, when the changes that I described were taking place, it was the members of the large firms who led the organized bar and who played a major role, along with the officials of government, in effecting them. Let me underscore one more point. I think that the legal service corporations which have evolved were conceived with the highest of intentions and, too, they were perhaps the only manner in which society could expeditiously respond to the social movements and the decided court cases which summoned their existence. I speak in the hope that leaders of the bar will consider whether the expeditious response is the best response in the long run, and in the hope that they will reconsider and direct their leadership energies towards developing other solutions which will lead to the preservation of the private bar as we have known it for yea these many years.

