

LAWYERS AND THE CONSUMER INTEREST. Edited by Robert G. Evans and Michael J. Trebilcock. Toronto: Butterworth & Co., 1982. Pp. xv, 459.

Under the direction of one of the editors of this book, Michael Trebilcock, the University of Toronto Law School has developed a vigorous teaching and research program in the area of the economic analysis of law. The Law School has established a publication arrangement with Butterworths, which has agreed, to date, to publish six monographs in a series entitled "Studies in Law and Economics". The volume considered in this review is the first in that series.

The purpose of this volume, according to the editors — an economist and a lawyer, respectively — was to review the operation of the legal profession in the same manner as one might normally analyse any other "industry". Consideration was to be given to "supply and demand" of legal services, the "market" for lawyers, and the "efficient allocation of scarce resources". To achieve this goal, the editors have brought together fifteen papers: thirteen written by lawyers, one by economists, and one by an economist and a health administrator.

Before commenting on these papers separately, let me note that I found the book as a whole very useful, but also highly variable in quality. The greatest asset of the book is that it brings together a vast amount of research on the legal profession which previously could not have been obtained in one place. There are, for example, articles on: licensing, advertising, contingent fees, multidisciplinary firms, regulation, legal aid, and self-help. To a certain extent, the mere juxtaposition of views on such a variety of topics contributes to our knowledge, as it is made clear to the reader that the resolution of many of the problems discussed are closely interconnected. Indeed, the solutions suggested to some of the problems raised are such that discussion of other problems considered in the book becomes almost superfluous.

One of the two general criticisms which I have of this volume is that insufficient attention was paid to the maintenance of consistency. This must remain a minor complaint, as it is extremely difficult to obtain such consistency among fifteen sets of authors, all of whom appear to have written their papers specifically for this book. The second general criticism which I have, also a minor one, is that the volume relies too heavily on description and personal opinion. With too few exceptions, there is inadequate reliance on formal analysis to obtain the policy prescriptions which the authors offer.

The first paper, "Cui Bono — Who Benefits From Improved Access to Legal Services?", effectively summarizes the major contributions of the remaining papers and should, I suggest, become required reading for all of those who are interested in the restructuring of the legal services sector. The purpose of this paper is to identify the myriad of factors which must be of concern when any proposal is made to alter the method of delivering legal services. The article is replete with important insights: it is not only those who currently have no access to the legal system who must be of concern; thought must also be given to those who currently are receiving an unsuitable "mix of services". It is legitimate to consider the

effects on *suppliers* of legal services — both current and future, lawyer and non-lawyer — when investigating the costs and benefits of revisions. Advertising may actually reduce the need for some types of legal services, by encouraging individuals to write clearer wills and contracts; advertising may be necessary if the cost advantages of paraprofessional use are to be obtained (and passed on to consumers). One effect of legal insurance schemes may be to make it more difficult for new law firms to establish themselves.

The second paper, “Public Attitudes Towards Lawyers”, summarizes the results of a number of polls concerning consumer perceptions of the legal system. None of these results were very surprising: lawyers are considered to be less honest than doctors and police but no less honest than university professors or engineers; the older a respondent the more likely he or she was to have ever used a lawyer; most people find a lawyer through recommendations of friends and relatives; and slowness and overcharging are the most common complaints made concerning lawyers. The paper, however, makes little contribution to the book, as no suggestions are made regarding the issues raised.

Chapter 3, “Licensure in Law”, considers in detail the various arguments for and against the licensing of legal practitioners and reviews the various alternative schemes for enforcing such licensure. The authors suggest that the primary advantage conferred by licensing provisions is that they provide protection for uninformed consumers. After a detailed analysis of the conveyancing “market” in Canada and the U.S., however, they conclude that the costs of licensure produced by the monopoly power it creates may well outweigh the benefits, particularly if advertising is allowed.

The fourth paper, “Public Accountability of Professional Groups”, reviews the various attempts made in Canada to ensure that Law Societies become accountable to the public. A minor criticism which I had of the paper is that it made no real attempt to identify the costs and benefits of greater accountability and, therefore, it was unable to offer any criteria for evaluating the different proposals which were available. More importantly, the paper struck me as superfluous in light of the preceding paper’s argument that licensing requirements, and therefore a major source of the Law Society’s power, should be reduced.

Chapter 5, on “Competitive Advertising”, is one of the more balanced papers in the book. Some of the author’s conclusions include: that the main advantage of price advertising is not improved access to legal services, but the encouragement of innovation in production; that price advertising will not lead to unhealthy concentration of the market nor to a deterioration in service quality; and that non-price advertising will primarily benefit the urban, small client sector as adequate information is already available in other sectors.

Chapter 6, “An Economic Analysis of Legal Fees Contracts”, employs a formal model of risk and information cost to argue that pure contingent fees are superior to hourly-based fees. Contingent fee-billing provides access for plaintiffs who could not afford hourly fees. More importantly, however, the authors stress that the basis of the contingent fee

— the size of the award — cannot be manipulated *ex post* by the lawyer in order to increase his fee, whereas the basis of the hourly contract — hours worked — can easily be exaggerated in this way. Unfortunately, the impact of the paper was unnecessarily diluted by the use of superfluous mathematics.

The seventh chapter, “The Development of Prepaid Legal Services in Canada”, is interesting for its historical description and for its listing of the various costs and benefits of prepaid schemes. However, it can have little to offer in the way of public policy prescriptions as there is no impediment to the provision of prepaid services by the private market. That is, if the benefits of these services exceed the costs, they will be offered privately, with no need for public intervention.

The primary contribution of the eighth paper, “Manpower Policy and the Legal Profession”, is to point out the extreme difficulty which governments would have in trying to forecast the supply of and demand for lawyers, and the immense social costs in attempting to meet such a goal. Its main failing is that although the paper contains a lengthy criticism of the admission requirements set by the Ontario Bar, it offers no criteria for determining what an “appropriate” set of requirements might be.

Chapter 9, “The Non-Lawyer as a Means of Providing Legal Services”, describes the many different types of non-lawyers now operating in Canada as well as the types of functions which they perform. But although the author indicates a strong preference for the increased use of non-lawyers, he offers no concrete proposals for attaining this result.

Chapter 10, “Incorporation by Lawyers”, notes that many of the non-tax benefits of incorporation such as centralization of managerial functions or maintenance of continuity, can be achieved through the use of partnerships. Most of the remaining advantages are of minimal or dubious value — e.g. the ability to raise equity capital and limitations of liability. Thus, as most provinces no longer offer significant tax advantages, the incorporation of law firms offers a net benefit to society only if it allows for the participation of non-lawyers in those firms.

This conclusion leads into Chapter 11, “Multidisciplinary Legal Services and Preventive Regulation”. The inescapable conclusion to be reached from this paper, however, is that virtually all of the benefits which could be obtained through the cooperation of lawyers and non-lawyers can easily be obtained without the incorporation of those individuals within one firm. There is nothing in the current rules to prevent a law firm from renting part of its office space to an accountant or an actuary, for example, and forming a symbiotic relationship with that individual outside the confines of formal incorporation.

Chapter 12, “Regulating Continuing Competence”, reviews the current methods for identifying legal incompetence (civil liability, review by the consumers of the lawyer’s advice, and review by the lawyer’s insurance carrier) and considers additional methods for identifying incompetence such as reports by members of the profession, complaints from officials, and peer review. The author reviews responses to incompetence (mandatory supervision, required course work, and/or

relicensing) and identifies the possible incentives for the incompetent lawyer to accept sanctions, particularly financial penalties and the threat of disbarment. The author concludes that peer review of 5% to 10% of the total membership should be conducted annually and that those found incompetent should be required to take courses “. . . dealing with areas of practice where incompetence is either frequent or easily controllable . . .”.<sup>1</sup>

Chapter 13, “Compensation for Personal Injuries”, is a brief summary of the no-fault insurance literature. As such, its role in the book is to offer one method by which the function and, therefore, cost of lawyers in society could be reduced. Given this role, the paper should have concentrated more on the cost effects of substituting a bureaucratic, government-controlled insurance agency for the current system, as well as on the reduction in benefits which such a substitution would produce. The extensive discussion of compensation effects is unnecessary in this context; full, first-party insurance is already available, without forcing no-fault insurance on drivers.

Chapter 14, “Legal Services and the Poor”, begins with a very useful review of the development of legal aid services and a discussion of the issues which have arisen in this context. However, the second half of the paper degenerates into a political diatribe, with statement after statement being totally unsupported by any factual or theoretical argument.

Finally, Chapter 15, “The Role of Self-Help in the Provision of Legal Services”, provides a very brief survey of such self-help services as legal pamphlets, courses on legal issues, and informal arbitration of disputes.

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\* J. Swan, “Regulating Continuing Competence” in *Lawyers and the Consumer Interest* (1982) 372