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# ETHICS AND ECONOMICS IN LAWYERS' FEES

BY LAURIZ VOLD\*

## I. THE CODE OF ETHICS

*The American Bar Association Code of Legal Ethics*, in Canon No. 12, deals with the problem of lawyers' fees as follows:

"Fixing the Amount of the Fee: In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

## II. ELUSIVENESS OF THE CODE STANDARDS OF VALUE

*The American Bar Association Code of Legal Ethics* thus enumerates some general considerations in the light of which the reasonableness of the amount of the lawyers' fees in individual cases may be judged. It is stated in general terms that the value of legal services should be neither overestimated nor undervalued and that in reaching a conclusion it is "proper to consider, first, the time and labor required, the novelty and difficulty of the

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question involved and the skill requisite properly to conduct the cause, second," etc.

Manifestly, under this language the consideration presented as number one consists of many separate and incommensurable elements. The time required is the only single element that is susceptible of definite measurement in regard to which careful computation can be made. The labor required cannot be known in advance nor frequently can it be known whether the amount of labor actually given was enough properly to conduct the case. The novelty of the question involved and the difficulty of the question involved are relative terms having no definite criteria by which they can be judged and bear little or no relation that is identifiable with the ordinary conceptions for determining value. The requisite skill is equally intangible. The individual lawyer's personal skill is not thus variable from case to case but follows him as the general expression of his professional efficiency while the skill that may be requisite in any particular case may depend on innumerable turns of fortune in the course of preparation for trial and in the incidents of the trial itself for which no criterion of value is available. Whether a cause is properly conducted is equally a relative term. It appears, therefore, that the time element is the only element here referred to which can be definitely calculated with reasonable approach to accuracy and in the estimation of which the resort to guesswork can therefore be practically eliminated.

It is needless to go through the other considerations separately enumerated in Canon No. 12 in order to make similar comment on the palpably vague and shadowy character of most of their content. The only other consideration which approaches definiteness is the consideration indicated as number three, the customary charges of the bar for similar services. Slight reflection will indicate that even this consideration is to a considerable extent unmeasurable since lawyers' services for their various clients are to a large extent services unique in their character in that they are adapted from client to client according to the personal needs, judgments, and problems that seem to present themselves in each separate case as an isolated independent matter. The customary charges of the bar for similar services, therefore, before the term can be applied with anything like definiteness must be restricted in its scope to the customary charges of the bar for legal services of a standardized routine character which frequently recur in

dealing with cases in the ordinary day's work of legal practice. Thus for instance, may be mentioned customary fees for such routine work as the drawing of simple contracts not requiring individual research as to the scope of their terms, the drawing of simple wills, the making out of simple corporation papers, the simple routine for securing default judgments or decrees in uncontested cases, mortgage foreclosures by advertisements, etc. Where the legal services take the form of standardized routine operations performed by different lawyers in substantially similar ways one can get a generalization as to what the ordinarily current charges for such standardized routine services in any community ordinarily is.

It is thus apparent that while the *American Bar Association Code* enumerates in generalities a number of different considerations in the light of which the value of legal services is to be valued, it furnishes no concrete assistance for specific application of these considerations to the individual lawyer's problem of determining what he shall charge for legal services in order to do justice to himself and not at the same time do injustice to his client.

In the light of this uncertainty as to detailed application of the Code considerations above referred to the present writer has, on numerous occasions, sought to gain some light on the problem by inquiring from various attorneys in active practice what their basis for estimating fees could, as a general proposition, be said to be. The answers to such inquiries for information have been vague and unsatisfactory, despite the most manifest candor in the attempt to discuss the subject. It is a fair generalization of the answers of the lawyers who have been kind enough to attempt to discuss the matter of fees in its general application as distinguished from fees chargeable in any particular litigation that might be adduced as illustrative that the charges have been based on personal experience of what the traffic will bear, helped out as to routine matters in the beginning by the example of what others are reputed to be charging for similar services. In this connection charging what the traffic will bear is not used in an invidious sense but is simply used to indicate that the fixing of charges, as a matter of common every day practice, seems to be largely a problem of personal adjustment which is carried on experimentally without any expressed generalization or rationalizing of the actual determining factors which are present throughout the

process. In other words, lawyers' fees are in actual practice fixed very largely on the same general experimental basis as the values of other services or commodities are fixed in the hagggle of the market. The haggling is not quite so manifest on the surface as it is in a commercial auction room but it is present just the same.

### III. ECONOMIC CRITERIA FOR VALUING LAWYERS' SERVICES

It has therefore occurred to the present writer that some generalization of the fundamentals underlying the fixing of lawyers' fees may be undertaken in the light of the familiar economic problem of value by avowedly applying to the process the commonly accepted economic criteria by which it is agreed as a matter of general observation that values in commercial exchange are, in fact, adjusted. It is familiar economic doctrine for which numberless authorities might be cited that the value of goods is fixed in the short run by the law of supply and demand and that this value which prevails at any particular time tends to conform for longer periods as a whole to the cost of production. In other words, in any one time or place the value is fixed in the hagggle of the market by supply and demand, but in the long run, goods will not continue to be produced below cost, and therefore, if the demand at any certain price falls off thereby lowering the value, the lower value being unremunerative tends to cut off some of the current production, thereby reducing the supply and again tending to increase the value. Without attempting here to elaborate discussion of the many qualifications necessary for scientifically accurate presentation it can be generally recognized that value is determined in the short run by supply and demand, and in the long run by cost of production. It is apparent therefore that these same general elements of supply and demand and of cost of production are in some sort present in the fixing of the values of the lawyers' services as they are present in the fixing of all other values.

#### (1) Supply and Demand

Without attempting to elaborate the application of the law of supply and demand to the determination of fees for lawyers' services, it may be suggested in general terms that supply and demand governs the generally current charges for standardized legal work. The customary charges of the bar for similar services, manifestly, is largely similar to the ordinary market price for staple commodities or like the ordinary current wages for stand-

ardized services in most fields of labor. Any individual lawyer's failure to observe these rates or refusal to perform standardized routine legal work for the customary fees will have little if any effect upon the level of the generally current charges since others are always at hand ready thus to perform.

Another possible application for customary charges of the bar that have a currently understood going rate and may therefore be roughly compared with value fixed by supply and demand is the generally prevailing time rate. This feature is not nearly so clear as the generally current charges for standardized work, but nevertheless, there is considerable tendency in many communities for lawyers to regard the value of their time, as governed to some extent at least, by the customary time rate that other lawyers commonly charge and to estimate the charges for their professional services in considerable part on the basis of certain remuneration per hour or per day for the time devoted to the case of any particular client.

These suggestions on the application of supply and demand in the fixing of lawyers' fees do not purport to be unqualifiedly accurate and final. The hagggle of the market is much less noticeable in these aspects in the case of lawyers' fees than it is in the fixing of prices from time to time in the commercial market. It is enough for present purposes to point out that the economic law of supply and demand is present and operative in the fixing of lawyers' fees.

#### (2) Cost of Production

A much more important element for consideration in the long run in connection with lawyers' fees is the element of cost of production. The thing produced is the lawyers' legal service for his client. Its cost of production obviously includes the cost of securing the lawyers' legal training, the cost of his library and office equipment, the cost of his necessary automobile, and the cost represented by his current expenses in maintaining his office and running his automobile for professional purposes. In addition to these items there must be reckoned, before a balance can be struck showing sufficient inducement for the lawyer to remain in the field of legal practice, such remuneration over and above his professional expenses as shall approximately equal what the lawyer might earn in other occupations. It is thus possible to begin the estimate of the value of a lawyer's time given to his legal services for his client on the basis of some very specific items of cost

which enter into its cost of production in order to maintain the supply of legal service.

(a) Original Investment

Taking the items one by one their principal features can be enumerated in order. . There is, in the first place, the time spent for legal education, now ordinarily three years. There is, in the second place, the expense of maintenance during the three years of legal study. The cost of legal training or the investment in legal education which the individual candidate for admission to the bar must make can therefore be stated as three years of time out of his life invested in legal study and the necessary outlay, in addition, to maintain himself during those three years. These two items are in every case specific items for each individual candidate although the amount of cash they may represent in each may be more or less variable.

After the investment in legal education has been reckoned the next item in order is the investment in plant which is necessary before the practice of law can be satisfactorily and efficiently carried on. The items of plant which are relatively indispensable for effective law practice may be roughly indicated as the requirement of a substantial law library as the lawyer's working tools, and the investment in office equipment and means of transportation, usually an automobile. All of these items in turn can in every case easily be reckoned in dollars and cents, but the reckoning from individual to individual will be more or less variable.

Before the lawyer can set out on effective legal practice therefore he must make two very substantial investments. He must invest time and money in securing his legal education and he must invest money or money's worth in securing a library, office equipment, and an automobile. Be this investment relatively large or be this investment relatively small it will, in each case, be a tangible investment of cash value upon which, as a matter of course, interest must be paid if the money to make the investment is borrowed for the purpose or upon which interest is in other respects sacrificed in order to make this investment if the lawyer has independent means with which to begin. The same fundamental facts remain though the investment of cash is made in his behalf by his parents or other relatives. There is therefore in each case a substantial first investment in whatever form it may be found, and therefore as a matter of course, a current interest

charge on that investment which must be earned in the lawyer's practice if it shall be worth while for people to make such investments in order to provide legal services. In other words, the lawyer as a business man in reference to his personal affairs must earn interest on his original investment in the practice of law in order to make it worth while either for him to continue his practice or for others to enter the field of practice.

#### (b) Current Expenses

Nor is interest on the original investment the only current expense the amount of which must be earned in the lawyer's practice. Other definite items of current expenses are equally tangible. A few of these may be indicated as follows. The lawyer must pay the expense of hiring a stenographer in order to carry on his office efficiently. He must pay for current accessions to his library to enable him to keep up with the law. He must pay office rent in order to be accessible to clients for legal consultation. He must pay current expenses for transportation in looking after legal business, whether such expense comes in the form of gasoline and automobile repairs or whether it comes in the form of railroad tickets. Hotel bills also must be included. Some of these items can be charged to individual clients from time to time but most of them must be carried as general expenses. Beyond these items there will always be a margin of incidental expenses for supplies, etc., which must be met from the current earnings.

The interest on the original investment and the items of current expenses in maintaining a law office together constitutes the lawyer's gross expenses. The sum shown by the totals of those amounts represents his actual expenditures which must be recouped out of the earnings of his office before his own current time and labor are in any way compensated.

#### (c) Other Income Sacrificed

Since the lawyer's own time and labor can usually earn substantial income in other occupations the current income from his office must be enough, not only to pay his current expenses, but also, to pay him a net income for his own time and labor which will at least approximate what he could earn in other occupations in order to make it worth his while to continue in the practice of law. This feature is much more important in the case of lawyers

than it is in many other occupations because of the high level of general ability lawyers must possess and because of the success in other occupations which men with legal training can attain. If the lawyer's compensations for legal services do not, all things considered, keep pace with the compensations he can secure in other available occupations he will eventually devote himself to them and the supply of available legal service will be relatively diminished.

It is therefore no understatement to enumerate as some of the principal items in the cost of production of lawyer's services the original investment of time and money in legal education, the original investment in library, office equipment and automobile, the current expenses for stenographer, library, rent, transportation, and supplies, and the sacrificed amount of alternative earnings which other available occupations offer but which are forgone in order to carry on the legal work. In order to maintain the supply of legal services for which there is legitimate demand in the community sufficient compensations must be forthcoming in some form satisfactorily to equal these items of cost on a balance of accounts or the prospective lawyer will turn his efforts in other directions.

#### (d) Specimen Illustration with Actual Cost Figures

So far, these various items which are abundantly tangible for reckoning as specific items in the computation of the cost of production of legal service have been dealt with in their generalized form, leaving the detailed amount to be filled in by each practitioner for himself on the basis of the personal facts in his own case. It will be interesting, however, to state a specific example, taking these various items one by one and giving them a fixed money content derived as a matter of general observation and experience.

Thus concretely visualized the cost of production of legal services may be stated as follows. Three years of time is invested in legal education, sacrificing three years of outside net income at \$1,000 a year as well as the expenditure in addition of approximately \$1,000 a year in the expense of sustenance, etc., during the three years of law school attendance. Three year's time at an actual money loss of \$2,000 per year totals \$6,000 as the original investment in legal education as such. In addition to the original investment in legal education there is the initial invest-

ment in plant which may be roughly indicated as follows. Automobile \$500, library \$1,500, office equipment \$500. At the outset, therefore, there is a total investment of \$8,500 consisting of \$6,000 in legal education and \$2,500 investment in plant. If this investment is estimated at the rate of five per cent interest, which is a very conservative rate, the total interest charge per year is \$425 as the first item of current expense which must be met.

The other items of current yearly expense which must be met apart from the interest on the original investment may be illustrated as follows: stenographer, \$1,000; current additions to the library, \$200; rent, \$600; transportation by automobile (gasoline and repairs) or otherwise, \$300; incidental supplies, \$50. This makes a total current expense account, including interest, of \$2,575.

To this figure must be added as a matter of practical consideration such sum as the lawyer in question could reasonably expect to earn by a year's application to other occupations. For an able and well educated individual such as our supposed lawyer must be, \$3,000 or \$3,500 does not seem extravagant as the net sum which could be earned in other business ventures. Adding this sum to the gross expense already indicated makes a total roughly of \$6,000 per year which must be earned in the law office before the lawyer will find it reasonably worth his while to remain in the practice of law instead of turning his attention to other modes of making a living and accumulating a fortune.

With \$6,000 per year as the rough estimate of what the lawyer's time devoted to his office must earn it is an easy matter of computation to find a day or hour for his time. \$6,000 per year with three hundred working days in the year make \$20 per day. If the time in the day's work which can be devoted to the affairs of individual clients as distinguished from overhead work is reasonably taken to be five hours per day, this means that the lawyer must charge for his time at the rate of approximately \$4 per hour in order to make it commercially worth his while to remain in law practice. In this way one element to be taken into account in the fixing of lawyers' fees can thus be specifically computed and a tangible minimum charge definitely established. The time devoted to any one case of any one client can be carefully kept as a matter of bookkeeping and charged for at the basic rate of \$4 per hour. Below that rate it will not be worth the lawyer's while

as a matter of long run estimate on the data here used to continue to render legal services.

This concrete picture may, of course, be varied considerably in detail. Young lawyers when they begin can frequently make some temporary shift for office rent, library, etc., as by getting some sort of working arrangement with another lawyer, a partner, etc. Further, the individual lawyer's investment in his legal education may not be as large as above indicated and his outside opportunities in business may also be less than in the example here assumed. The gross yearly sum of \$6,000 which must be earned in the law practice may be considerably reduced in certain cases and therefore the irreducible minimum of compensation for daily or hourly time correspondingly diminished. However such details may vary for individual cases it would seem to remain true that the basic items themselves as already enumerated must necessarily be faced and a sufficient income realized from the practice of law to take care of them as they in the case in hand actually are in order to maintain the supply of legal services.

The above description takes no account of the further complication of the computation which is produced by the element of joint cost which is involved at practically every step.

#### IV. CONCLUSIONS

It may thus be observed how very intricate is the problem in its reality of estimating what the value of the lawyer's services is to be. Canon No. 12 of the *American Bar Association Code of Legal Ethics* says his service should be neither undervalued nor overestimated. Its suggestions, however, as to how those values are to be reached are too vague and general for much practical assistance. The single element of the time involved which has here been dealt with involves in its valuation a somewhat intricate reckoning of the cost of production. That reckoning in the case of the time involved, it is possible to make on the basis of certain specific and generally recognized facts which are involved in each case. It seems natural, therefore, that the time element in the estimation of the value of legal services is frequently taken as a rough starting point for the fixing of the actual charge to be made.

The other elements mentioned in Canon No. 12 as proper to be taken into account are more elusive and less susceptible of specific computation than is the element of time involved. This writer

has no information on the basis of which corresponding computations getting back to the cost of production can be made in reference to them, nor does the average member of the legal profession seem to be any better informed. While it is stated as a generality that those various other elements can properly be taken into account in fixing the amount of lawyer's fees, their practical application seems to come not in the form of any seriously undertaken computations approaching exactness but their application seems to come experimentally in a sort of informal haggle in the legal market when the lawyer submits his bill for services. He charges, beyond the matter of computation for his time, what he thinks the client can, all things considered in a vague way, be expected to pay, while the client on his part protests that the charge is exorbitant and demands settlement on a compromise basis.

The general conclusion therefore must be that the application of the elements recognized by the *Code of Ethics* as involved in the justifiable charge for legal service is not one of rational computation and charge based thereon but an experimental bargaining to eke out as well as may be what the lawyer can demand based on the currently standard charge for standardized routine work and the estimate based on the value of his time as fixed in the long run by the cost of production which in his case must be carried.

An additional conclusion may be tentatively suggested, that in the interest of social economy the intricate problem of lawyers' fees should be brought home to prospective young men at the beginning of their course of legal preparation. The time and expense given to securing legal training is, for each of them, investment. What the conditions of return on that investment are likely to require should be known, so far as practicable, before the investment is made in order to avoid the economic waste of misdirected effort and mere blind experimental feeling out of the problem of occupational choice of youth. While the calculation on the return required to cover cost of production in this matter is not the only information that is necessary it is one of the items of information which are vital to intelligent choice and an item the definite perception of which at the beginning of legal training would avoid a great deal of waste and misdirected energy.

Finally, a question may be suggested whether the present general practice of charging the entire expense of the necessary counsel fees wholly to the individual clients concerned in the

particular litigation is not fundamentally unsound. It is not many generations ago that the cost of ordinary education was similarly charged entirely to the few receiving it in total obliviousness of the public importance of the general diffusion of education throughout the entire population. To-day we provide free schools for general education at the public expense, considering the expenditure a wise investment in future good and efficient citizenship. In times gone by, criminal prosecutions for murder were carried on at the instance of the family of the murdered man. To-day public security is seen to require a public prosecutor. Even outside of the enforcement of the criminal law it is now coming to be recognized that the practice of law is in a very real sense a public profession. That the community welfare is closely involved in the judicial settlement of the cases of individual litigants is clear not only from the fact that one decided case becomes a precedent fixing the law for future similar cases, but also from the fact that the doing of justice or injustice in the individual litigated case nourishes the feeling of respect or contempt for law as the preserver of social security and guardian of ordered progress in the quest for general welfare. The estimate of cost of production of legal services outlined above makes it reasonably clear that competent legal service is necessarily totally beyond the reach of many of the poorer groups in the community. This fact has recently been forcibly illustrated from another angle in Mr. Smith's, *Justice and the Poor*, where development of legal aid work and a public defender are dealt with as a remedy. Is there not occasion to consider even more far-reaching provisions to assure at least a fair chance that every legal controversy may be properly given a hearing? Is it sound policy to leave the vital public matters of the investigation and presentation of legal controversies which from step to step make the law and nourish or impair the community's respect for law entirely to the chance of whether the particular litigant has means to employ competent counsel? We insist in legal administration that everyone must be presumed to know the law. Shouldn't the availability of competent legal advice be matter of right instead of matter of charity? Members of the bar are technically recognized as officers of the court. May there not be some proper place in legal administration for a system of public counsellors as there has long been a proper place for a system of public prosecutors?