

marriage performed in a place where neither party lived and where license formalities are lax.<sup>18</sup>

The elimination of child marriages, the insistence upon parental consent in the case of the marriage of minors, the prevention of the marriage of the mentally deficient, the mentally unfit and the physically diseased, the elimination of hasty and clandestine marriages through the provision of adequate waiting periods between marriage license applications and marriage ceremonies, the insistence upon residence of one of the parties as a requirement for the issuance of the marriage license; these are some of the changes in the marriage laws of the various states which would materially cut down the extent to which men and women resort to divorce courts. Lax marriage laws and procedures are one of the principal factors in the demand for the dissolution of marriage through divorce. A divorce reformer who has sincerely at heart the interest of the state in the conservation of marriage, must therefore concern himself with improving techniques and methods of entering the marriage relationship, as well as the techniques and methods whereby it is dissolved.

## Public Service By Lawyers in the Field of Divorce\*

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It would probably come as a surprise to most lawyers, and certainly to an overwhelming proportion of nonlawyers, if it were to develop that the legal profession has ever done anything in the field of divorce that might, by some strained construction, be regarded as a service to the public.

Perhaps in the minds of many strict constructionists to whom the very idea of divorce is abhorrent, the lawyer who steers his client through the divorce court is *particeps criminis* with the litigant.

To some people the lawyer is the villain in the piece who in the first instance advised Jane that divorce was the remedy for her ills; who told her just what she must produce in the way of evidence, and how and where to get it; who conspired with her and her husband, or his lawyer, to pull the wool over the judge's eyes so that he would see plenty of evil in the defendant and naught but good in the plaintiff. The lawyer is the knave who pocketed the exorbitant fee for failing to procure enough property and alimony for the wife or support for the children—and who at the same time outrageously robbed the husband, practically driving him into bankruptcy and putting him in a financial straightjacket for the rest of his life!

The prevalence of this attitude would be hard to measure. Perhaps some of it stems from what psychologists would call a very simple projection: Jane is dissatisfied with her marriage; she demands a divorce to remedy her unhappiness; when the remedy turns out to be something less than perfect, she turns against the lawyer.

Most lawyers regard divorce as so comparatively simple in terms of both substantive and adjective *law* that they believe they know all a lawyer needs to know about it. And they are probably right, as far as the law goes. But there are two *facts* about divorce which seem to have escaped the legal profession at large, and the public too. The first is probably not generally known; the second, if known, has been discounted or ignored until recently when, as we shall see later, something definite has been undertaken about it.

First fact: divorce has rather suddenly become *big* business—and this fact is by no means confined to Reno and the other so-called divorce mills. After all, they handle less than 3% of the sum total of all divorce cases.

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<sup>18</sup> See 19 KAN. B. J. 329 (1950-51).

In a great many cities it is true now, and has been true at least since the great depression, that in the courts of general jurisdiction (circuit, district, superior, common pleas, etc.) the number of divorce cases filed annually exceeds the number of all other civil actions combined.

For instance, during the war, in Dayton, Ohio divorce petitions reached a peak of 80% of all the civil law suits filed in common pleas court; in Columbus, 75%. In other Ohio cities, for years one-half to two-thirds of all civil actions filed in the common pleas courts have been divorce cases.

In the states along the Atlantic Coast (except in some Florida cities) the ratio of divorce to other civil cases is lower. But as one proceeds toward the Pacific, the divorce rate increases and in many mid-western and western cities we again find divorce cases outnumbering all other civil actions combined.

Now if divorce is such big business—and it takes always one and sometimes two or more lawyers for every one of the hundreds of thousands of cases—why isn't the legal profession more familiar with the facts of divorce?

Well, for one thing, everybody knows that lots of lawyers "don't take divorce cases," and that in the cities the divorce business is almost monopolized by a small number of lawyers who seem to "specialize" in divorce. The latter constitute what is sometimes referred to as the "divorce bar."

At first blush one might consider the divorce bar to be those lawyers who spend most of their time in or derive most of their income from divorce practice. This could be misleading, for one lawyer handling 30 divorce cases a year might have little other business, while another handling 30 divorces might have much other business paying him much more. Yet we must bear in mind that the same number of families, spouses and children, is directly affected by each lawyer. So it might be more helpful to know how many divorce cases are handled by how many lawyers constituting what proportion of the entire bar.

To get some of the facts, we made a little study of the cases handled in the divorce court in Toledo in the calendar year 1950. Toledo and Lucas County have a population of 400,000 and no claim is made that it is typical of anything. A total of 2055 divorce, alimony and annulment cases were filed, and no claim is made that this small sampling is conclusive of anything. However, this little study may shed a faint glimmer of light in a corner that hitherto has remained wholly dark so far as we can ascertain.

The Lucas County Bar Directory for 1950 listed 695 individuals admitted to practice. Of these, 145 appeared to be so situated that they could not or would not handle divorce, e.g., patent attorneys, judges, full-time employes of banks, trust companies and various business

concerns, a number who had retired, some who had studied law but never entered practice, and a number who had forsaken the law for other gainful occupations—(with hair-cuts at \$1.25, one took to barbering!). This left 550 individual lawyers engaged in the general practice, whether singly or in partnerships.

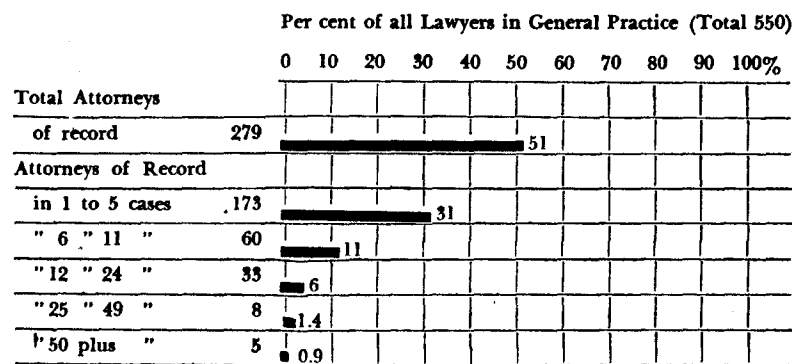
In the 2055 cases filed during the year, there were 2516 appearances of record. Thus, in about 78% of the cases, no pleading was filed and no appearance was entered on behalf of the defendants. Of the remaining 22% in which counsel appeared for the defendants, it almost invariably turned out that the ostensible defense was really to facilitate negotiating settlement of money matters. In all but a handful, the threat of contest was sooner or later withdrawn.

Of all 550 lawyers, 271 or 49% steered entirely clear of divorce court. Of the 279 or 51% who entered an appearance, five-sixths averaged less than one a month. Thirty-three or 6% of the practicing bar averaged one to two cases per month; eight, or 1.4%, had two to four cases per month, and five, or 0.9% averaged one or more per week. One lawyer appeared in 535 or 26% of all the cases filed. The accompanying graph may help visualize the situation.

STUDY OF "DIVORCE BAR" IN TOLEDO, LUCAS COUNTY, OHIO

CALENDAR YEAR 1950

Total number of cases (divorce, separation and annulment) . . . 2055  
 Total number of appearances . . . . . 2516



If the above detailed situation is not too uncommon, how can it be maintained that the legal profession renders or can render any public service in the field of divorce? By steering clear of divorce court and "not taking divorce cases" as half of our lawyers may be doing? That is all very well for the lawyers whose capabilities have won for

them a more pleasant and profitable practice. But what of the litigants whose difficult domestic problems both demand and deserve the delicate and adroit talents and techniques of this capable segment of the bar?

Depending upon our religious indoctrination (or lack of it) some of us must hold that all divorce is evil, that lawyers who obtain divorces for their clients and judges who grant divorces render a disservice rather than a service to the individuals and to the public as well; others hold that the lawyer who aids in mopping up the mess of a mangled marriage serves not only his client, but by making some contribution to decency and morality, serves the public as well.

But whatever our views on divorce, all of us agree that since the family is the unit upon which our society is founded, the lawyer who succeeds in salvaging one foundering marriage and re-launching it on an even keel makes a contribution to the preservation of family life and not only serves the individuals but commits an act of public service.

Quantitatively, the total number of cases where lawyers have rendered this kind of service may never be known. Instances of it come to light every day in every divorce court of any size. Even members of the "divorce bar" with surprising frequency make some gesture toward mending before mopping up a marriage.

And of course many of those lawyers who seldom or never appear in divorce court are bound to be consulted from time to time by divorce-seekers. Some send them to other offices, some turn them over to their young associates, and some give them good, sound advice and send them home to become reconciled—as in the case of the octogenarian lawyer who writes us from West Virginia. He boasts he has never had to file a divorce case since he discovered 60 years ago the secret of persuading the wife to bake her husband his favorite pie or inducing the husband to surprise his wife with a bouquet of roses.

Qualitatively, it is equally difficult to estimate the efficacy of this type of public service by members of the legal profession. We shall never know how many of these embattled spouses who figuratively had their heads knocked together by the well-meaning lawyer and were sent back home to kiss and make up, sooner or later wound up in the office of some other lawyer who got them what they thought they wanted, a divorce.

This brings us to that second fact of divorce which, as we indicated, has until lately been either discounted or ignored, but about which something is now being done: the problems presented by divorce are largely social rather than legal. Indeed, except in that extremely small minority of cases involving interstate divorce or conflict of laws, the purely legal questions in divorce are hardly abstruse.

Now those lawyers with a social conscience—and fifteen years in an integrated juvenile and divorce court have persuaded us that most lawyers belong in that category—have been trying as best they know

how to do a job of preventia, to reunite estranged couples and thus prevent that final *coup de grace* that severs the legal bond.

For this public service lawyers receive little credit. The remarkable thing is that so many lawyers try so hard to mend broken families while realizing they will get their only reward in heaven (relying on the tenuous assumption that heaven is not out of bounds for the legal profession).

Not only is the lawyer pretty sure to beat himself out of a fee; he is apt to alienate a friend and lose a client. Divorce-seekers seldom consult their lawyers; they tell them! They go to their lawyers to get ridance, not reconciliation, and when they don't get what they want when they want it, they can be pretty unpleasant about it.

Moreover, it can be very time-consuming and altogether harrowing for the lawyer to try to persuade the wounded, frightened, angry, emotionally overwrought complainant—even though outwardly calm—to adopt an attitude of sweet reasonableness.

Most unfortunate of all, the lawyer undertaking the preventive role is pretty much out of his element. True, *legal* preventia is widely taught and practiced. For instance, bar associations conduct radio programs, furnish speakers and other ways try to educate the public to *keep* out of trouble by consulting a lawyer before drawing a will, accepting a conveyance, etc. In the same category would fall our perennial battle against the unauthorized practice of law.

This type of preventia is, of course, a true public service, no matter if some cynics do prefer to believe it is merely advertising in disguise.

Also, in their offices many lawyers actually spend most of their time and effort advising clients how to *keep* out of trouble so they won't have to run back to the lawyer to *get out* of trouble. This, too, is preventia, legal preventia.

But in trying to resuscitate a moribound marriage, the lawyer is confronted not with a legal problem but a social problem. And by training and experience he is a counselor at law, not a marriage counselor. That is why he is somewhat out of his element.

His schooling and his practice have fitted him to counsel on matters of money, property and business, to prevent or recoup the loss of things material—but not of things human, such as husbands, wives. He is skilled in advising a client how to retain or regain his earthly possessions—but not the most priceless of all his possessions, his child.

The lawyer is taught what the law is and how it operates upon a given set of facts—not how it operates upon the people involved, not how it affects human beings. In our quest for certainty, so we may know just how to advise our clients, we of the legal profession may unconsciously crave a court system not unlike the slot machine a Nevada legislator once proposed to handle the divorce business. In would go the facts (our own version, of course) and out would pop

the pre-ordained decree. But until lately the law has not seriously concerned itself with the effect of its decrees upon the husband, wife, child, or society.

Unlike medicine, the law has only recently begun to realize the importance of preventia. A good case could be made out that what we used to call preventive medicine, or public health, is the greatest public service of the medical profession.

Again, the doctor, in his efforts to prevent disease, contagion and all manner of bodily ailments, and to promote the general health of society, does not confine himself to the skills of what laymen regard as the single science of medicine. He invokes the knowledge and techniques of very many sciences — biology, zoology, psychology, chemistry, physics, electricity and all manner of "ologies." Certainly no one could contend that medicine deems itself self-sufficient.

The law, on the other hand, has traditionally shown considerable reluctance to stray off its own reservation. The enterprising lawyer, it is true, calls upon the scientist to prove a point in litigation or occasionally advises his client to verify his facts by scientific tests before proceeding along certain lines. But the legal profession has never been noted for calling upon other skills and professions to help prevent social ills as the medical profession calls upon other professions and sciences to prevent physical ills.

And that is another reason the lawyer is at a disadvantage when confronted with marriage failures and broken families. Little, if anything, in his legal training and experience has taught him to employ these other tools or even to recognize the need for them.

A family may be likened to a watch, with its mainspring, its fine hairspring, delicate balance wheels, etc. When these get out of adjustment, the watch ceases to perform the function for which it was manufactured, to keep accurate time. When the mainspring breaks it ceases to function altogether. The interpersonal relationships of husband and wife, parent and child, are in many respects even more delicate than the nice adjustments of the springs and wheels in the watch. And when these relationships become maladjusted, the family ceases to function properly or may cease to function altogether.

Now, when a watch gets out of adjustment, we don't smash it and bury it; we take it to the watchmaker. He has fine tools and he has know-how. He is equipped to do a repair job.

When a marriage gets out of adjustment it is customary for the spouses to smash it and take it to the law for burial. But the law, unfortunately, until quite modern times has had neither the inclination, the fine tools nor the know-how to do a repair job. Indeed, it is only lately that the law has recognized the advantages of equipping itself to do a repair job. Heretofore it's been something like taking our watch to a watchmaker who had only one tool, a meat cleaver. The law has

had only one tool—a meat cleaver; and when the hapless family has come before it, the law mechanically has obeyed the injunction of the Queen of Hearts—"Off with its head!"

Of course some watches are damaged beyond repair, and some families are broken beyond repair. But nobody knows and nobody ever will know how many of the marriages that have been finally decapitated by the law were still viable.

Lawyers of broad experience develop a knowledge of human nature and a sagacity that sometimes enables them to persuade an estranged couple to bury the hatchet. Their insight plus their personality enables them to do what often looks like a good repair job. But too often the lawyer is known to handle every case from the standpoint of his own personal experience or to ride some pet theory, like the doctor who prescribes the same pill for all maladies. It would be nice if it were as simple as baking a favorite pie or buying a bunch of roses.

Too often when the lawyer relies solely on his own skills to reunite the estranged couple, he merely postpones the denouement. He hears all about the symptoms, the overt acts and omissions. But he does not discover the causal factor or factors and eradicate or change them. He corrects nothing. He effects no cure. He sends the same two people back together, the same as when they separated, and the same underlying cause is still lurking there to get in its deadly work.

The physician cannot cure the patient's fever until he has discovered and eradicated the source of the infection. But not only is the physician trained for this particular job; he does not hesitate to augment his own efficiency by utilizing the knowledge and skills of other professions and sciences.

Now we mustn't be too critical of our system of legal education. After all, who ever heard of a student going to law school with either the hope or expectation of becoming a specialist in domestic relations—a divorce lawyer—still less a marriage counselor? Courses in domestic relations or family law or persons are usually offered but are elective and, unless they have the reputation of being "snap" courses, generally not too well patronized. And courses in marriage counseling and allied studies are available only in liberal arts colleges and graduate schools.

Post law school education is no more helpful. In lectures, institutes, refresher courses and things of that sort, designed for the practicing lawyer, it would be surprising to find one devoted to divorce practice. Attention has been directed almost exclusively to the "masterpiece of confusion" and other evils resulting from the lack of uniformity in our state laws. Whatever attention has been paid to the cause, cure and effect of divorce, as distinguished from the law of divorce, has

been left almost entirely to the tender mercies of lay writers in popular periodicals.

Nor would we have our thesis construed as reflecting upon the willingness or eagerness of the legal profession to engage in preventia or to seek to avail itself of the skills of other professions and sciences. Conspicuous examples belying such a thought are the legal aid movement, inaugurated and promoted *by lawyers* to *prevent* the denial of justice to the poor and underprivileged; its companion movement, the establishment of lawyer reference bureaus, likewise undertaken and promoted *by lawyers*; probation and parole, promoted and fostered *by lawyers* in co-operation with other professions for the *prevention* of crime and the repetition of crime; the juvenile court movement (characterized by Dean Roscoe Pound as the most outstanding improvement in the administration of criminal justice since Magna Charta) inaugurated *by lawyers* of the Chicago Bar Association in co-operation with social workers and social agencies to *prevent* juvenile delinquents from becoming adult criminals. (In passing, it is interesting to note that the legal profession has supported and stood behind the juvenile court movement more staunchly than some prominent social workers.)

The latest instance of the lawyers' recognition of social problems involved in the law; of their efforts to improve the law as a social instrumentality; of their determination to engage in preventia; of their eagerness to avail themselves of the skills of other professions and sciences, happens to be found in the field of divorce and is demonstrated in the establishment of the Interprofessional Commission on Marriage and Divorce Law in 1950.

The Interprofessional Commission is a direct outgrowth of the National Conference on Family Life which convened in Washington in May, 1948. That Conference comprised mainly sociologists and social workers plus representatives of all sciences and disciplines in any way connected with family life. One of its ten sections was the Legal Section, piloted by a delegation of the American Bar Association under the chairmanship of Reginald Heber Smith, of Boston. Although the lawyers were overwhelmingly outnumbered, all press reports indicate it was they who carried the ball with their definite proposals for concrete action. As one correspondent put it, they stole the show with their exciting and challenging report.

This report scathingly denounced the evils of present divorce laws and offered challenging suggestions for their basic reform and for the establishment of family courts to implement them. Among them was a proposal to abolish adversary procedures in divorce cases, to minimize emphasis upon "grounds" and guilt or fault as the sole criterion of divorce, to do away with several other traditional legal concepts, and to adopt the standard juvenile court philosophy of

diagnosis and treatment—all with a view to conserving family life. Suggestions for the improvement of marriage laws, such as putting the brakes on hasty and ill-advised marriages, were included.

The Legal Section adopted a resolution for the formation of an interprofessional commission, to comprise leaders in the fields of law, religion, medicine, psychiatry, psychology, education, sociology and social work to study the proposals in this report.

The American Bar Association appointed a special committee to succeed its delegation to the Family Life Conference. In undertaking the establishment of the Interprofessional Commission, this special committee tried to enlist members of the Family Life Conference for co-operation. Of the half dozen national agencies which responded, all but one were legal in nature. Again it was mostly lawyers who carried the ball.

The Commission was duly organized, incorporated, and is at this writing conducting research necessary to the drafting of a model act or series of acts designed to achieve its general objective, which is stated as follows:

The ultimate purpose of this organization shall be to bring about improvement in the laws of the several states relating to marriage and divorce and allied phases of family life, to the end that the law, in both philosophy and procedure, may tend to conserve, not disserve, family life; that it may be constructive, not destructive, as to marriage; that it may be helpful, not harmful, to the individual partners and their children; that it may be preventive rather than punitive as to marriage and family failure.

Public service by lawyers in the field of divorce? It is too early to predict what degree of success the Interprofessional Commission will achieve. However, one thing stands out clearly. Although divorce may be both unpleasant and unprofitable, and although neither legal tradition nor legal education equips the lawyer with a peculiarly social conscience or with special interest in the preservation of family life, nevertheless the legal profession has demonstrated that it does have a social conscience, that it is anxious to improve the law as a social instrumentality, and that in the field of divorce it is sufficiently concerned with the protection of family life to take the initiative and assume leadership in invoking the co-operation of any and all other professions that may have something to contribute toward this goal—this goal whose compelling importance is concurred in by *all* professions, *all* faiths and *all* classes!