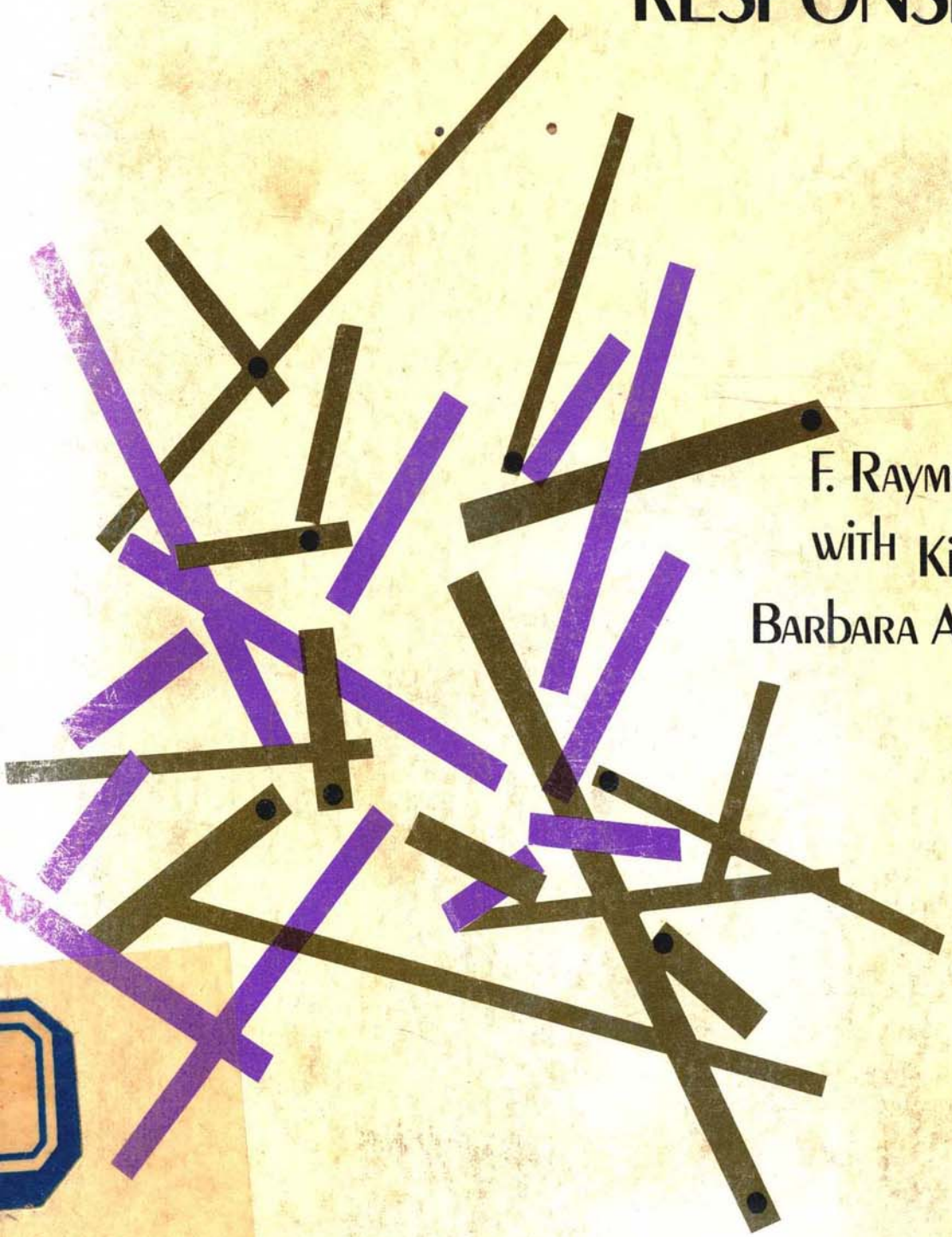
THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY



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F. Raymond Marks
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This book is dedicated to
Susan, James, and Thomas Marks

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Preface

This book resulted from a study, made by the American Bar Foundation, of the public interest responses of the private bar. The study was funded in major part by a grant from The Ford Foundation. Opinions expressed herein are those of the authors and should not be construed as representing the opinions or policies of either the American Bar Foundation or The Ford Foundation. Similarly, conclusions drawn from the data are the authors' conclusions, as is the analysis used to reach those conclusions.

The lawyers whom we interviewed gave generously of their time and shared with us the insights they had derived from thinking about and practicing public interest law. We are indebted to each of them. A list of their names and firms appears in the Appendix.

A book of this kind is always the product of interchange with and enrichment from colleagues and others. A few people, however, merit special mention. We can never thank them enough. One of my colleagues, Barlow F. Christensen,

read, critically commented on, and contributed throughout to the several drafts of the manuscript. In my judgment, his understanding of the problems of the American legal profession is unequaled by any other scholar.

Prior to the submission of the report to The Ford Foundation, Kathleen McCourt read and edited each draft for sense as well as style. Her insights were helpful.

Fe Logan and Jo Muster, often under pressure, deserve special recognition for their untiring typing. So also do Pat Gorai and Richard Clifton, who were of special help in preparing the manuscript.

Jean Luther has been the nurturing and fussing editor from the date of the report to The Ford Foundation, March 1, 1971, to the ultimate production of this book. Her skill and judgment have contributed much to the book; her patience and determination have contributed much to my state of mind.

Finally, the felt presence of Dallin H. Oaks, the Executive Director of the American Bar Foundation, must be acknowledged. Dallin Oaks embodies, by his integrity and standard of excellence, the best qualities of a director of a research institute. His trust in us was invaluable. His standard of excellence influenced *us* greatly, but there was no attempt to influence the content of the work. He has seen to it that both administrative and moral support were available to those engaged in the research enterprise. He was particularly helpful in his comments about the penultimate draft of this book, and was equally objective about those conclusions with which he agreed and those with which he disagreed. He has left the Foundation to assume the Presidency of Brigham Young University, and his presence will be missed.

The love, patience, and support given me by my wife, Sharon Dunkle Marks, was and continues to be both a joy and an inspiration.

F. Raymond Marks
Project Director

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PART ONE

The Context of Public Interest Response

Introduction

Recent developments in the private sector of the legal profession[1] suggest that either the profession has begun a process of "agonizing reappraisal" or it is making token gestures to appease both the sound and fury of current social and political upheaval and the discomforting tensions located within the person of the practicing lawyer. It is too early to tell which.

New forms of organization have emerged; among them are the public interest law firm, the "community," "public interest," and "pro bono" departments, sections, or partners within major establishment law firms, and the law commune. The forms are new, but the underlying issues are old. The question of professional responsibility to the public has been raised with cyclical regularity—particularly over the past one hundred

1. In this book we define the private bar—the private sector of the legal profession—as covering all deployment of legal skills, techniques, and talent not distributed, supported, or offered under the auspices of government. The public sector of the bar is governmental deployment at all levels—local, state, and federal. For a fuller explanation of our working definition of the private bar, see page 52, *infra*.

years. So, too, have questions about the ways in which the profession can meet this responsibility.

The questions are not merely institutional. They are personal—excruciatingly personal—when asked by the individual lawyer. He not only has to deal with levels of responsibility as defined and accepted by the profession, he also has to define himself in relation to society and deal with the questions of what he would like to do and what he should do. He must resolve or ignore the possible conflict between his view of the lawyer's role and the rewards which presently reflect the way law in fact is practiced. He must ask the ultimate question: Am I a professional in the true sense of the word if I do not accept public responsibilities which I perceive to be part of my role?

The organization of the legal profession and the predominant system for delivery of legal services by meeting price demand in the marketplace have, to a great extent, frustrated satisfactory answers to both the institutional and the personal questions. Economic self-interest has been seen as an opposite of—or at least in conflict with—service of the public interest. And unhappily there is no indication that either the organizational or marketing features of the legal profession have changed sufficiently to encourage hope for satisfactory answers. On the contrary, despite the sincere and remarkable efforts of a small percentage of the private bar, despite a new type and degree of pressure from the young lawyers just now emerging from law schools, and because of the trends toward concentration and bigness within the profession as a whole—trends which reflect similar ones in the worlds of business and finance—there is cause to despair over whether permanent and satisfactory answers to these questions have been found or, under the circumstances, can be found. Law firms, like business organizations—or, perhaps, like *other* business organizations—have been getting larger. Today's middle-size firm is big by yesterday's standards. The large firms of today are beyond the limits of the imagination of twenty years ago. As clients have grown in numbers, and enterprise in degree of

economic concentration, so too have the economic units which serve them—the law firms. The increasing demands for legal services by business interests have caused those services to become both highly organized and specifically reactive to the clients' needs for specialized services.

We do not mean to suggest, however, that all is lost, that there is no hope for lasting answers about the role and behavior of lawyers with respect to public interest and public responsibility. Some of the new sounds and sights are too healthy and too bold a departure to allow for such resignation. We simply mean that the new sounds, new energies, and new forms and styles of address to the public interest or *pro bono publico* questions must be viewed with a critical eye. Judgments will have to be made as to whether the new forms are compatible in the long run with existing patterns of professional organization—and professional ethos—and whether such efforts can be sustained by dependence on voluntarism.[2] The possibility must be entertained from the outset that a more radical change in professional institutions may be necessary even to sustain present levels of effort. Redefinition of role and responsibility may be involved.

2. Brennan, J., "The Responsibilities of the Legal Profession," *The Path of the Law from 1967* (A. Sutherland ed., 1968), warns that "dabbling" in public interest work or reliance upon permissive support for voluntary efforts will not be enough to discharge the bar's responsibility to the public.

CHAPTER 1

The Profession and the Public: Historical Antecedents

This book, the result of a study undertaken by the American Bar Foundation, under a grant from the Ford Foundation, is an examination of the nature, the causes, and the viability of the innovative responses of the private bar to new demands for representation and new challenges requiring the deployment of lawyer skills. Originally the study was designated as "the *pro bono* project." The data for the study were obtained principally from interviews with lawyers engaged, full or part time, in conscious response to public need. After completing the field work, we had a strong feeling that the term *pro bono* obscured more than it revealed—from the viewpoints both of the researcher and of those involved who too lightly used the term, ignoring what it had come to mean, i.e., voluntary dispensation of skills on a nonfee basis. The term "public interest," which is used with greater frequency to refer to the new forms of endeavor, seems to be more explicative, but it, too, obscures; it oversimplifies. An understanding of the emergence of a public interest language and of the historical back-

ground of present effort provides some important clues not only for testing the initial assumption that something new and innovative is occurring within the private sector of the legal profession but also for determining what kinds of tasks are seen by the profession—particularly by those operating public interest and *pro bono* efforts—to be demanded by unrepresented or underrepresented groups and interests or indicated by contemporary social, political, and economic circumstances. A self-portrait of the legal profession is involved.

"Pro bono publico," shortened to *"pro bono,"* is a term that the profession has long used to refer to that portion of a lawyer's efforts or work which has a public quality or aim. Its literal translation from Latin is: "for the good of the public." More often than not it has been used to designate work for which the lawyer is not paid or paid at a rate lower than a lawyer or firm applying the term customarily receives. Free and *pro bono,* therefore, have been used synonymously. Furthermore, the term has not always been applied to the legal representation of clients. Frequently it has been used to designate hours spent or work done "for the public" on projects remote from the lawyer's skill base (but not necessarily remote from his influence base), such as serving on the boards of symphony orchestras, opera associations, hospitals, and school districts—even umpiring in Little League.[1] Time spent by lawyers in a more direct application of their skills which, nevertheless, was not spent on behalf of particular clients has also received the *pro bono* label. Many respondents in our study designated time spent serving as a bar association officer or on a bar association committee as *pro bono* work.[2]

After we examined lawyers' usage of the term *pro bono,* it seemed clear that the term, as it has been applied in the past, involved an intricate separation in the user's mind of the

1. All these examples were cited to us by respondents as types of *pro bono* commitments of either the respondents themselves or partners in their firms. See also E. Smigel, *The Wall Street Lawyer: Professional Organization Man?* 10 (1964).

2. It is assumed that the applying, on behalf of community boards, of lawyer skills by lawyers, such as cited at note 1 *supra,* is *pro bono* work.