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Symposium: The Future of the Legal Profession: Introduction

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SYMPOSIUM:
THE FUTURE OF THE LEGAL
PROFESSION

INTRODUCTION

Robert P. Lawry[†]

WHAT THESE PAPERS ARE AND ARE NOT

THE seven papers gathered together for this Symposium were commissioned for the First National Assembly of the Institute on the Future of the Legal Profession, held June 1-3, 1993, at Case Western Reserve University (CWRU) School of Law in Cleveland, Ohio. The Assembly was a joint venture of the American Bar Association's Center for Professional Responsibility, the American Bar Foundation, and the CWRU School of Law. The purpose of the Assembly was two-fold: (1) to bring to the attention of the legal profession key themes and issues it must confront if it is to sustain its vitality and contribute to the good of society into the 21st century; and (2) to encourage and assist leaders throughout the legal community to devise and implement plans and policies to help the profession achieve these goals. The papers were designed to provide a framework for discussion, so they were sent to each

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of the 65 distinguished delegates prior to the Assembly. The authors were asked to be bold, to help us begin to see through the murk of today by envisioning tomorrow.

Three papers were designed to help us see what the 21st Century might look like because of changes in demographics, technology and the increased internationalization of the world's economies. Four papers were designed to provoke discussion and debate in four large subject areas: delivery of legal services, globalization, the role of lawyers in society, and life styles and economics in law firms. Authors of the latter papers were asked not only to be provocative, but also to provide the Assembly with a set of resolutions upon which the discussion and debate might focus. What the Assembly did with the papers and the resolutions is a tale to be told in another place and time. What the Institute itself will do with the outcome of the Assembly and its follow-up work is a tale only now beginning to unfold. It is hoped that the Institute, centered at the CWRU School of Law, will become a place of enormous activity, helping to frame the debate on the vital issues confronting the profession as it moves into the next millennium. The Assembly and the Institute, however, are not appropriate subjects for this Introduction. We believe the commissioned papers are each an important addition to the growing literature on the legal profession. They deserve to be read and studied on their own terms as independent works of scholarship, foresight, and passion. Thus, we present them here, unencumbered by direct association with the Assembly for which they were a practical prod.

THE PAPERS: A DESCRIPTION

As previously stated, the first three papers provide us with important background information on our present world and trends which may have a marked effect on the way law is practiced at the beginning of the next century. Robert Nelson starts us off by coolly profiling a "Changing Profession in a Changing Society." Since the late seventies, the number of lawyers and the size of the legal services industry has grown at a remarkable rate. Rather than attempting a highly speculative assessment of the reasons for such phenomenal growth, Nelson examines the demographics of the client base of the profession and the demographic profile of lawyers, suggesting that studying changes in the profession without studying concomitant changes in society is a sterile enterprise. He notes, first of all, the economic uncertainty that has resulted from a

variety of causes: internationalization, technology, increased government regulation, in general, coupled with the deregulation of corporate finance and merger activity, to name but a few significant ones. Nevertheless, large corporate law firms have shown remarkable stability over the last fifteen years, and given the new uses to which these firms seem to be put, the best guess is for continued stability among the giant firms. The same is not necessarily true of the small and medium-sized firms, nor of the world of the solo practitioner.

While arguing that discrimination is still a factor in the hiring, promoting, and rewarding of minorities and women, it is hard to predict how the economic, demographic, and professional changes will affect practice in the future. The data indicates that lawyers will continue to find financially rewarding work, but the levels of dissatisfaction and uncertainty are not likely to decrease. Nelson is more concerned with how well the changes reported will square with the goals he identifies as those the profession should pursue: access, efficiency, and justice. As the composition of the profession slowly changes, it is hoped that the poor and disadvantaged will be better served, though there is no data suggesting this will be the case. In terms of efficiency, research is greatly needed to examine institutional structures rather than taking these structures for granted. Lawyers should lead in developing new forms of service and delivery, even if this means upheaval in traditional notions of what it means to practice law. In terms of justice, looking first inward to treatment of colleagues and adversaries may spur better outcomes for society in general. While providing a good deal of hard data, Nelson's work is also extremely provocative in terms that specifically relate to matters taken up by the four issue papers.

By focusing attention on national legal fields, Trubek, *et al.*, intend to capture the effects of global and transnational forces. Case studies in Europe, North America, and Indonesia provide useful avenues for comparison and contrast; and, although business law is emphasized, much attention is also paid to social issues to assure a balanced view. The creation of "Euro-law" due to the growth of the European Community produced a need for the kind of lawyering best described as a hybrid of the large U.S. law firm, the international accountancy firm, and the older European model, with the Americanization of lawyering predominating. This new brand of lawyering will be housed in multinational and multi-disciplinary business service enterprises. Beginning with mergers and acquisitions practices, and moving through changes in the academy,

particularly in France, the authors trace the profound effects of the new "American" lawyering style on a changing Europe.

Moving to NAFTA, the authors demonstrate how the new internationalization has spawned a crisis in legitimacy in North America because of its preemption of national and sub-national law. The increased "juridification" of trade relations has led to profits for the trade bar, a small sector of the corporate elite of the American legal profession. The trade bar both helped to create NAFTA and will also be the experts called upon to interpret its provisions for the benefit of clients. Although public interest lawyers seem to have agreed to work within the confines of the commercial world because of side agreements struck on labor and environmental matters, the social side of lawyering in America may be submerged by the commercial side in the aftermath of NAFTA. It is possible, however, that the increased sophistication of public interest lawyers, because of their involvement in NAFTA, will better aid them in their quest to increase "access to transnational justice."

A brief look at a developing country, Indonesia, rounds out this study of the effects of internationalization. Though a complex set of forces impede the full internationalization of the Indonesian legal field, changes are occurring. It is too early to tell whether the mega-firm will eventually dominate this developing country, but the signs are there.

The paper concludes modestly by suggesting the work is sketchy; but it is also bold. The authors imply that a new concept of comparative law has been formed out of their efforts. "This approach," to quote the authors, "focuses on practices more than rules, links legal to economic and political fields, incorporates both 'international' and 'domestic' factors, stresses the dynamics of fields, and highlights the strategies of key actors."¹ It is an impressive start.

Ron Staudt leads us directly into the 21st century. His electronic course kit is both a set of materials and an environment within which to study. Hypertext is the name of that environment. It is not only a source of information but also a navigational tool. Interactivity and more cross teaching are the hallmarks of this kind

1. David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 497 (1994).

of course. Still, classroom discussion will go on as before, enhanced by more "connections" and increased access to greater amounts of information. So the human aspects of teaching is enhanced, not displaced.

Similarly, the lawyer in the "Digital Law Firm of 2001" will not be replaced by computers, because the lawyer's judgment is in no danger of replacement. Yet, technology is on the rise. In 1992, 70% of lawyers in large firms had computers at their work stations—a rise of 63% from the 1986 total. Moreover, 90% of large firms are using computers to support litigation. Most importantly, communications technology may change the very look of law offices. Lawyers can be at home, on the road, virtually anywhere, and communicate with office, client, judge, or adversary with all the necessary resources close at hand. Research, too, is being changed by the use of systems like Internet, Westlaw, and Lexis. Whatever the changes, Staudt argues, computers will still be tools, needing human beings to wield them for the value they can be to other human beings. Nevertheless, the economics as well as the mechanics of law practice will undergo profound changes as technological changes occur.

These three background papers set the stage for the four issue papers that follow.

Roger Cramton's essay looks at the continually nagging question of the delivery of legal services to individuals who seemingly cannot afford the cost of law and lawyers. He begins with the Heinz-Laumann findings that there are two hemispheres of lawyering, one for individuals of modest or below modest means, the other for corporations and wealthy individuals. Each need to be governed by separate rules, Cramton argues, because of the nature of the problems which exist in each sphere. Although it is not easy to document what the public demand for lawyers realistically is, it is clear that only a small portion of private lawyering time is spent on service to low income clients. Public interest lawyers do most of this work, and there are few of those. Restricting his sights to civil legal assistance, Cramton argues that market imperfections that seem to call for the kind of regulatory scheme we have, can be better overcome by a number of reforms, most notably by increased competition both from within and from without the profession. Cramton presents an astonishing array of arguments both for and against most of the changes that are currently debated in the literature. He adds detailed discussion of pro bono and publicly funded services to the mix as well.

Before announcing his specific reform proposals, Cramton addresses an important underlying issue: the criteria to be used to evaluate the suggested changes. His criteria are the values of professionalism as traditionally defined in the sociological literature, and summed up tersely in Roscoe Pound's description of professionalism as the pursuit of "a learned art as a collective calling in the spirit of a public service."² However, Cramton provides some modifications to that traditional view. Arguing that "social conditions have eroded and transformed the traditional claims of lawyer professionalism,"³ Cramton rests his renewed vision on three elements: (1) lawyers who care about clients, engage them in moral dialogue and see that their interests are protected; (2) lawyers who care about equal access to justice and strive for efficient legal service delivery; and (3) lawyers who bring conscience to bear on their own lawyering.

Cramton's actual recommendations are more in number and more extensive in detail than any of the others in this volume. Among the most far-reaching are suggestions for mandatory malpractice insurance coverage and a shift in federal legal services programs to a *Judicare* model. There is much more and much of the more will be controversial.

Equally controversial are many of the proposals made by Professor Carrie Menkel-Meadow in her paper on the economics and work environment of legal practice. These proposals stem from a focus on the culture-clash between practice as a business and quality of life issues.

Professor Menkel-Meadow begins by giving a brief history of the changes in the legal profession, which has been largely marked by exclusion and economic protectionism. During the past thirty years, the profession has experienced unparalleled growth, and entry barriers, though still subtly there, have begun to fall. Nevertheless, minorities are still grossly underrepresented and, though the number of women has increased greatly, occupation segregation within the profession remains the rule. Increased unhappiness with internal work life at large law firms is now a well-documented phenomenon, and various economic patterns do not suggest improvement.

2. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

3. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 *CASE W. RES. L. REV.* 531, 607 (1994).

Still, some changes offer new possibilities. Although the data is mixed and open to contradictory inferences, the huge influx of women into the profession may signal significant alterations in the use of ADR and more collegial managerial styles, to name but two. Economic pressures, however, are a countervailing force. In the current recession, the emphasis is on leaner and meaner, not flexibility and innovation in accommodating work and personal needs. Second generation discrimination continues to be a problem. Thus, social change working through law practice will not be easy. Professor Menkel-Meadow argues for a non-discriminatory fair hearing for feminist claims, at the very least. Her specific recommendations move directly from that modest argument, but also champion reform proposals that accent a recognition that economic concerns must be better balanced with family and personal ones.

She begins by asking that discrimination end. Period. Educational endeavors are given a high priority. We must learn to manage diversity better, and better mentoring programs must be introduced. Her suggestion that specialization be reduced and mandatory CLE in different fields be adopted, while controversial, stem from her view that education is the way out of the bog of the status quo. Work hours should be limited and teams of lawyers trained, so flexibility can be attained. The long-term should be preferred over the short-term. New legal work units should experiment with different ways of organizing work. Alternative billing practices must be introduced to get away from the time crunch lawyers suffer from. Law firm structures need to be re-thought. The specifics are in Professor Menkel-Meadow's last section. They represent a dazzling array of possibilities for moving into a more humane set of practices in the 21st century.

Deborah Rhode's paper "explores the terms" of "chronic problems of professionalism" by focusing on issues of the institutionalization of lawyer's ethics. What concerns her are problems of overrepresentation, underrepresentation, and nonrepresentation. Rhode's first target is overzealousness. If all things were equal, the system might work; however, all things are not equal—and neutral partisanship is a serious problem. Overprotective rules regarding confidentiality compound the harm. That is Rhode's first point. Her second deals with the problem of underrepresentation; when a client's interests are "undervalued in comparison with the profession's own interests."⁴ Unlike the first problem, at least

4. Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 676

"underrepresentation is generally inconsistent with the profession's stated values."⁵ Typically, client resources are non-existent or inadequate to afford counsel. On the other hand, when resources are adequate, lawyers may overcharge or deceive clients, or prefer good relations with other lawyers to giving clients good lawyering. No good mechanisms exist to protect against such abuse.

The problem of nonrepresentation has always been looked upon as a serious matter, one crying out for solutions we do not find. The problem with these problems, Rhode concludes, is that we cannot and will not confront the problems realistically.

Rhode's call is for changes both in ethics rules and in enforcement structures. Lawyers, with their built-in myopia and prejudices, dominate the regulatory scheme. Of course, the bar itself sees no difficulty in this. It asserts its independence from government control as crucial to its functioning, while ignoring the accountability issue. Admission, discipline, and malpractice areas all need revision, for a host of specific reasons which Rhode details. The need for better internal oversight and protection for whistleblowers are particularly stressed. Structural changes are also advocated. Procedural abuse, more disclosure to courts and third parties, better fee structures, and class action reform appear to Professor Rhode as particularly promising subjects for change.

Another set of pleas is to provide more procedural alternatives and to change market incentives. More serious ADR mechanisms are one hope. Another attempt to make resources more equal lies in fee shifting schemes, allowing litigation to be financed and, warily, to increase competition.

Will strategies for a change in the socialization of lawyers work? Although not unduly optimistic, Rhode argues that changes in ethics codes and in legal education (including educational culture) can make some difference. The literature is replete with alarms, signaling that lawyers are too competitive, confrontational, and adversarial. Too little attention is paid to "the development of interpersonal or collaborative skills and alternative dispute resolution."⁶ Silent messages in law schools and inadequate continuing legal education courses emphasize a list of horrors that are too familiar to those also versed in legal education criticism. These and

(1994).

5. *Id.*

6. *Id.* at 734.

all the other problems Rhode sees are addressed with particularity in her proposed resolutions. Agree or not, each one provides an insight into our current malaise.

Richard Abel explains both the patterns of transnational practice and the constraints imposed by governmental regulation. Admitting that there is no theory to explain the extraordinary growth of transnational practice, Abel, nonetheless, suggests a number of hypotheses that warrant empirical testing, though he files no brief on behalf of any. He is more interested in facts. For example, the first clear pattern to be observed is the dominance of law firms from common law countries (of the top 40: 25 are American, 10 British, 4 Australian and 1 Canadian). More idiosyncratic patterns explain why a certain firm or a certain country's lawyers obtain a foothold in one area of the world or one area of practice.

Another pattern is that transactional lawyering, not advocacy, is the coin of the transnational realm. United States lawyers have the edge here because they have been "at it" much longer than their counterparts elsewhere. Abel also notices that firms must become national to succeed. Federalism of one kind or another helps to explain why. A neat trick is to find a way to blend local lawyers with "home" lawyers in order to maximize advantages which one or the other group may have in terms of expertise and coordination. This need may make multinational partnerships an inevitability. Governance, of course, is a real challenge. Patterns of referrals are not easy to understand. Distance referrals seem most satisfactory, but there is often no way to tell whether there is a good match at the other end. Alliances form and break up willy-nilly.

An important structure for transnational practice is the large, multinational accounting firm. The competition of these firms has caused a lot of countries to try to regulate against them. Protectionism is a continuing factor to watch as firms jostle for competitive advantages.

Ethics issues are to be noticed too. The new legal journalism measures success in terms like billings, profits, size, and growth. The race to status with this criteria as a guide may lead to increased pressure to bill and less to do things in the public interest. People's interests are lost in the effort to serve wealthy businesses. Abel reports chillingly that so far as he knows, "foreign branch offices perform *no* public interest work."⁷ Moreover, lawyers in

7. Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 749

the transnational arena seem less independent, more beholden to one client. Finally, international professional associations are weak, and therefore are "significantly deprofessionalized."

On the constraint side, Abel argues powerfully for fewer regulations. Regulation is justified by market failure, and for lawyers, market failure is a function of informational asymmetries. This is not a problem for transnational lawyers who have sophisticated clients. Therefore, there needs to be little or no regulation. In addition, Abel notes, regulation is not at all similar across national boundaries, so efficiency is impossible. Nevertheless, regulations, as a set of protectionist rules internal to a country, abound.

Other constraints are not directly governmental in origin and are often embedded in language and cultural differences. On the flip side, interaction between and among legal cultures may help to create a common style, particularly for the same client or in similar areas of legal service.

Transnational lawyers are regulated either by being admitted as local lawyers or as a foreign legal consultant. The first allows the lawyer to do a good deal of lawyering, but is more difficult to achieve. While many jurisdictions continue to try to regulate foreign lawyers, the rules are easy to evade and transnational lawyering remains largely unregulated. So when Abel gets to his recommendations, he has prepared the reader for the particulars because they flow from his general plea that transnational lawyering should be, in general, a free market system, unencumbered by mettlesome regulation.

CONCLUSION: THE PAST INTO THE FUTURE

Whatever one thinks about the substance of the papers presented in this Symposium or of the specific recommendations offered by any of the authors, these are surely provocative and intellectually stimulating efforts to push us into thinking about possible changes in law practice. Some will not like the directions towards which one or more of the authors push. Others will think the authors do not push us hard enough or go far enough in envisioning the changes necessary to confront the challenges of the next century as they have begun to be envisioned. Let the debate on these and other futuristic topics continue.

My own concerns are as much with the past as they are with

the future. I wonder if, as we debate the changes and challenges ahead, how much of the past we are prepared to jettison. To put the matter precisely: What values do we want to carry with us, even as we realize they must be applied in new ways to new problems? Are there specific professional virtues that we need to emphasize as central to the mission of lawyering even as the world around us changes?

As noted by Jaroslav Pelikan, James Wildman and Timothy Terrell, the problem is one of continuing a tradition (the "living faith of the dead") rather than clinging to traditionalism ("the dead face of the living").⁸ Sorting out the differences between tradition and traditionalism is no easy task. That is because the principles or values are difficult to disengage from certain practices or forms of life. For example, the cry has been made throughout this century that lawyers too often prefer their own economic interests to the interests of their clients or to the public good.⁹ This, of course, is contrary to the avowed professional idea. In the rhetoric and in the rules of the profession, advertising was long thought to be a "commercial" practice unworthy of a true profession. However, it does not follow that advertising automatically entails a preference for the professional's economic interests over the client's or in ways contrary to the public good. Advertising, in itself, is an attempt to obtain paying clients' business, but arguably, so were practices as otherwise innocent as joining a country club or being a visible civic volunteer. Moreover, wanting clients is not a professional evil. Preferring one's own economic interests to the interests of the client or the public good was, *and is*, the professional evil. Nevertheless, the bar has had a difficult time disengaging the principle from the practice because it was assumed—without evidence or argument—that the practice of advertising entailed the professional's preference of self over others.

The examples could be multiplied. What would be useful in the debate about the future would be a careful scrutiny of just such illogical entailments and a series of empirical studies designed to show how intention, rule, action and professional ethos combine or

8. See Timothy P. Terrell & James H. Wildman, *Rethinking Professionalism*, 41 EMORY L.J. 403, 405 (1992) (citing JAROSLAV J. PELIKAN, *THE VINDICATION OF TRADITION* 65 (1984)).

9. See Rayman L. Solomon, *Five Crisis or One: The Concept of Legal Professionalism, 1925-60*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 144, 173 (Robert L. Nelson et al. eds., 1992).

depart from one another in the actual "practices" of the practice of law. But that is a subject the Institute on the Future of the Legal Profession perhaps ought to take up. There is plenty in these articles to ponder without looking to the next step just yet.