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The Future of Law Practice in the United States

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I. The Future of Law Practice in the United States

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I have been asked to speak about "the future of law practice in the United States"—a very broad and amorphous subject. Yogi Berra once said "the future ain't what it used to be." Berra's pithy remark suggested that life was not likely to be as good as it was in the golden age of the past in which the Yankees usually won the World Series. But Berra, as a happy professional who was very good at his trade, enjoyed work and enjoyed life. And that is my theme today: relax and enjoy our good fortune as lawyers and citizens.

Many lawyers today have a dim view of the future of our profession. They believe there was a golden age in the past when lawyers were independent, autonomous, respected in their communities, and the profession was cohesive and united concerning its core values. Pan to a view of Gregory Peck as Atticus Finch in *To Kill a Mockingbird* with appropriate rousing music. Compared to those idyllic days of autonomy and bravery (but also lynching!), we are thought to have lost our compass. Witness the embarrassing television ads by some lawyers, the frenzied solicitation of accident victims after a mass disaster, the growth of multistate practice, and internal quarrels about such things as MJPs and MDPs (insider lingo for practice across state lines and across disciplines). And public opinion polls tell us that a large majority of Americans view lawyers as shysters who cannot be trusted to tell the truth.

The future, of course, emerges from the past. Thus, I will start by tracing the major changes in the profession during the last half-century and the major causes of those changes. On the assumption that these

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trends are likely to continue, I will then discuss their implications for state bar associations and their leaders.

I.

In 1950, when I graduated from college, there were about 200,000 U.S. lawyers (or about one lawyer for 700 persons). Forty years later, in 1990, the lawyer population had grown to 800,000 lawyers, and the lawyer-to-population ratio was more than cut in half (one lawyer for 310 persons). Since 1990, the profession has continued to grow, but more slowly. In 2000, there were well over one million U.S. lawyers (about one lawyer for 260 Americans). Over a fifty year period, the lawyer population had increased more than five-fold while the population generally had only doubled in size. The massive growth of the legal profession had been triggered by a huge surge in the demand for legal services in the 1970s and then again in the late 1990s with continuing steady growth at other times.

This vast increase in the number of lawyers, however, was not spread evenly throughout all sectors of the profession. Instead, it involved an even more massive growth in the sector of the profession that serves business clients and much slower growth in the sector that serves individual clients. The mid-sized and large law firms that handle the work of business clients grew at a much faster rate. The solos and small firms that primarily serve individual clients grew, but very slowly.

The effects of these changes have been illuminated by the fine empirical work done by Bob Nelson and his colleagues at the American Bar Foundation. Two large studies of Chicago lawyers, one in 1975 and the other in 1995, supported by a number of more general studies by the ABF and others, tell us a great deal about how and why the profession has changed and continues to change. Fortunately, Bob is here and he can correct any of my errors and add his own views. Six changes are worth brief mention.

First, lawyers employed by law firms or other organizations, who were a minority of all lawyers in 1950, became a majority. The Atticus Finch image of the legal profession—the independent solo practitioner—is now a lesser reality than the organization man or woman of today's more bureaucratic practice.

Second, the size of the organizations in which law firm lawyers work has increased enormously in size. Thus, the proportion of such

lawyers working in organizations of more than thirty lawyers or more than 100 lawyers increased hugely. We now have megafirms with thousands of lawyers distributed in offices around the U.S. and abroad.

Third, in 1950 the majority of legal work involved individual clients and was handled by solo or small firm lawyers. Today, a substantial majority of legal work is performed for business clients and is carried on primarily in mid-size and large firms and by house counsel of business organizations. Some legal fields have had great relative growth, such as business litigation. Other fields, such as divorce, have stayed fairly stable in market share. And some, such as probate, have declined sharply in market share.

Fourth, specialization is now the name of the game. Fewer lawyers are generalists who handle a variety of legal problems. Lawyers increasingly spend most of their time working in a particular legal field. Their professional relationships are limited largely to other lawyers working in the same field, and many specialized bar associations now reduce the portion of the bar that joins, or is active in, the state's bar association or the ABA.

Fifth, lawyer incomes have changed dramatically in ways that are strongly associated with the factors already mentioned. Although inequalities have always existed, they have become more extreme. Since 1970, the incomes of solo practitioners and lawyers working for government organizations have suffered a decline in real income (i.e., earnings adjusted by inflation). Meanwhile, lawyers in mid-size, and especially in large firms, have had steady and large increases in real earnings. And within organizations, the disparity in earnings between associates and partners has widened. The rich have gotten richer and the poor poorer.

Sixth, since 1970 women have entered the profession in large numbers, and blacks and other minorities have entered in increased numbers. Women, who were 4 % of lawyers in 1960, now make up 43% of the profession; and minorities now make up about 14 %. But the nature of their practices has resulted in an income inequality that is large and persistent. Women, for example, are a majority of lawyers for government organizations, a group which is the least well paid. They are also heavily represented in the business practice of large law firms, but largely as associates and only rarely as partners. The story for African-American lawyers is similar. Many observers worry that this income inequality constitutes a troublesome stratification of influence and hierarchy. A similar point is made concerning the lower status and

income of the solo and small firm lawyers in the personal client field, who do mostly family work and a large portion of personal injury plaintiffs' work. The increasing dominance of large law firms in the social and income structure of the profession has important implications for the bar's autonomy, cohesion, and ability to influence future developments.

II.

What were the causes of these changes? First, entry into the profession was limited a half-century ago by bar admission requirements of citizenship and residence, but these restrictions were stuck down by the Supreme Court.[1] Entry was also limited by the time and cost of obtaining two degrees, a problem that was eased by the increased public support of higher education during the last half of the 20th century.

Second, competitive forces in the markets for legal services were also restrained by bar-established rules: minimum fee requirements for common legal work, the prohibition on lawyer advertising, and fairly strict enforcement of unauthorized practice prohibitions. Here also, court decisions removed barriers to competition. In the late 1970s, most lawyer advertising was given First Amendment protection,[2] restraints on solicitation were modified,[3] and minimum fee requirements were struck down as antitrust violations.[4] The elimination of these barriers stimulated competition in legal services markets.

The third and primary cause of the profession's growth, however, was the great surge in demand for legal services of the 1970s and late 1990s as well as continuing high levels of demand at other times. Most of the increased demand came from business clients. A growing economy generated many new transactions; companies grew, established new lines of business, and mergers and acquisitions became endemic. New and expanded state and federal regulations fed the demand. A modest "litigation explosion" in suits against businesses and insurers,

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1. *See In Re* Griffiths, 413 U.S. 717 (1973) (citizenship); New Hampshire v. Piper, 470 U.S. 274 (1985) (residence).

2. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).

3. *See In Re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978).

4. *See* Goldfarb v. Va. State Bar, 421 U.S. 773 (1975).

and among businesses, gave a jolt to both the plaintiff and defense bar.

The profession's accommodation of the increased demand has taken a variety of forms, all of which involved expanding the supply of legal services. Supply was expanded by increases in the number of suppliers, increased competition among suppliers, and technical and organizational innovations that enhanced the productivity of legal services.

Since 1963, the supply of new lawyers has quadrupled by the creation of fifty-four new law schools, the expansion of existing ones (resulting in about three times as many enrolled J.D. students), and a reduction in the rate of flunking out students. These changes resulted in a nearly four-fold increase in the number of J.D. graduates and new admissions to the bar (from less than 11,000 in 1963 to more than 40,000 a year ever since 1983). Competition among law firms for the new lawyers that were necessary to meet the increased demand had the effect of increasing starting salaries, which in turn increased the demand for legal education. Firms also expanded their capacity through new technologies such as the computer and the addition of large support staffs. It is estimated that most large firms employ 1.5 individuals per lawyer, and the ratio may be even higher in smaller firms where the economies of scale are somewhat less.

Although non-lawyers continue to have difficulty in competing directly with lawyers in the individual client sector of the profession, paralegals are used with great effectiveness and economy by legal services organizations and small law firms in the individual client sector, and by law firms and other organizations in the business and government sectors of the profession. Non-lawyers do a lot of legal work in today's world, but almost entirely as paralegals or other employees working under lawyer supervision.

As the legal work of business organizations grew, companies have found it profitable to create and then expand large in-house legal staffs. When efficient to do so, work that formerly was given to law firms is performed inside. Even when the work is given to a private firm, as is usually the case, the in-house staff monitors the firm's performance and adopts practices designed to result in better and cheaper services. For example, in-house counsel often require firms to submit competitive bids for legal work, play firms off against one another in "beauty contests," and thus negotiate better rates.

Increased competition has had its rewards. Since 1970, the price of legal services has fallen in real, inflation-adjusted terms. But the

competitive pressures have had other effects. Escalating costs and competition have resulted in greater focus on the bottom line and higher billable hour requirements. Partnership means less and is harder to obtain. Recent law graduates face a tough job market with higher debt burdens than their predecessors. Strong and continuing relationships between a law firm and a major business client are less frequent and more anxiety-ridden than before. Getting and keeping legal business has become a vital and anxious endeavor for nearly all firms.

The division of labor caused by increased specialization also expanded the delivery of legal services. Lawyers had to learn new and more specialized skills, such as working in teams and cultivating marketing and management skills. Working longer and harder is a characteristic of firms in a competitive world, as are the processes of rapid growth, merger, acquisition and, not infrequently, failure, the latter evidenced by the number of established law firms that have gone belly up.

As Richard Posner says, work in a competitive market has unpleasant psychological aspects. Greater uncertainty, more strain, sudden change, a more structured and bureaucratic work environment—all of these characteristics lead many lawyers to say that they don't enjoy the practice of law as much as they once did. As Posner puts it, "competitive markets are no fun at all for most sellers; the effect of competition is to transform most producer surplus into consumer surplus and . . . to drive the less efficient producers out of business."[5] Yet, as Nelson and his colleagues have discovered, most lawyers still express reasonable satisfaction about their job.

III.

So what does the future hold for U.S. and Connecticut lawyers? As the American economy continues to expand and the population grows, the experience of the last half-century tells us that the legal profession will grow at least as fast as the growth in the economy and population, and probably at a somewhat higher rate. The income of lawyers serving business clients will increase, and the gap between their incomes and those of lawyers serving individual clients and working in government

5. RICHARD POSNER, OVERCOMING LAW 92 (1995).

offices is likely to continue to widen.

Voluntary state bar associations, such as that in Connecticut, will continue to be concerned with many of the issues that have confronted them in the recent past: multi-jurisdictional practice, multi-disciplinary practice, ancillary business activities of firms, personal solicitation of clients by lawyers in all sectors of the profession, and unauthorized practice of law. But the profession is segmented and divided in ways that limit its ability to deal with these and other issues. State bar associations lack legal authority today to reimpose competitive restraints or substantially reduce lawyer advertising. And they no longer have the cohesion to agree on regulatory measures that might be within their authority and would roll back the competitive forces that have contributed to the profession's growth. Some things, of course, could be done by revising the profession's rules of professional conduct and enforcing them in disciplinary proceedings. But doing so is difficult and may be counterproductive. Consider multi-jurisdictional practice.

Everyone knows that Connecticut is the home office of many large national and international companies, all of which have large in-house counsel staffs. My guess is that only a portion of the lawyers in those offices are admitted to the Connecticut bar despite the high likelihood that nearly all of them are practicing law in Connecticut. As is the case in many states, disciplinary authority extends only to lawyers admitted in the jurisdiction. But even if Connecticut amended Rules 5.5 and 8.5 to give it disciplinary authority to proceed against a lawyer admitted elsewhere who is engaged in practice in Connecticut, would the bar have the will and resources to start a large policing effort aimed at some of its largest employers and taxpayers? Would it make sense to do so?

My view is that a crusade against this form of multi-jurisdictional practice would not be in the best interest of either the public or the profession. The inside lawyers are representing their employer on company business, and there is no credible argument that Connecticut citizens will be hurt by the work of these unlicensed lawyers. The companies have a strong interest in hiring, training, and supervising highly qualified lawyers and the resources to do so. Moreover, companies, using employment sanctions or discharge, will punish staff lawyers who harm their interests or behave improperly. My guess is that this free market deterrent to improper conduct is stronger and more effective than the slight likelihood that the limited resources of Connecticut's professional discipline system might be brought to bear. Why should Connecticut, under these circumstances, initiate disciplinary

or unauthorized practice proceedings against these staff lawyers, irritating and angering business organizations that are a major contributor to the state's high average income and educational levels?

I also expect that a number of law firms in Connecticut have engaged in ancillary business activities, such as owning an enterprise that assisted businesses in acquiring and developing real estate. Presumably that is permissible under Connecticut's current ethics rules. Why shouldn't Connecticut, like the District of Columbia, go further and allow principals of the ancillary business—accountants, for example—to become partners of the law firm if the firm believes that is in its best interest. Now we have multi-disciplinary practice rather than multi-jurisdictional practice. The basic issue here, in my view, is the continuing application of the profession's quite strict conflict-of-interest rules. If the profession maintains those, it can tolerate multi-disciplinary firms. If it does not, we may suffer some of the consequences that flowed from Arthur Andersen's conflicted relationship with Enron.

A strong regulatory approach to these and other issues would require changes in state law and a willingness by the state to enforce them. The profession is so segmented and divided that it is unlikely to have sufficient cohesion and clout to persuade the public that it is acting in the public interest and not that of its current lawyers. And that is as it should be. Competition in legal services is in the interest of consumers and the people of Connecticut. Law firm partners who shudder at a personal injury lawyer's graphic or obnoxious T.V. ad soliciting business should bear in mind the time and effort they put into marketing the services of their firm through publications, outreach activities, and country club conversations with members of the business community.

I will close with some words of informed observers of the profession: Deborah Rhode, Robert Nelson, Richard Posner, and Patrick Schiltz:

> For the contemporary bar, these are "the best of times and the worst of times." In no country do lawyers enjoy greater power, wealth, and status. The number of lawyers has [increased much more rapidly than the population]. Law is the second highest paying occupation and a common path to leadership in both the public and private sector. Demand for corporate legal services has continued strong, corporate lawyers' income has remained high, and the profession continues to expand.

> Yet that overall economic prosperity has also been accompanied by increasing insecurity, acrimony, and pressure . . . . [A]mong practitioners who represent primarily individual rather than corporate clients, the demand for services has been relatively weak, lay competition has increased, and average earnings [in real terms have declined]. The consequence has been to widen income disparities within the profession. Dissatisfaction with the quality of professional life is reflected in lawyers' exceptionally high rates of stress, depression and substance abuse.
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> [The result is a sense that] lawyers, both individually and collectively, have lost control over forces that are reshaping the markets in which they compete, the law firms to which they traditionally devoted their careers, the pace and quality of their work lives, and their status in society.[6]

Many lawyers wish that they worked in more stable markets with more stable relationships with their clients. They wish that the professional values exemplified by an Atticus Finch were the center of attention rather than the necessary concentration on billable hours, cutting costs, and "the bottom line" that are part of a competitive marketplace. But this option is not really available to the profession for the reasons previously mentioned.

A wise profession, like a wise person, does not get excited about things, such as the weather, that it cannot control. The path of wisdom is to be good at what you can do well—the practice of some form of law—and relax and enjoy the lively circus that goes on around us. Competition in legal services creates anxieties and stresses for lawyers, but it brings great benefits to clients and society. It forces lawyers to keep their eye on the ball, as Yogi Berra would recommend, and hit the good pitches. To enjoy those we work with in the office and the courtroom. To give the best we can and enjoy the rewards of a relatively high status, high income job. To give thanks that we live in a free

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6. The three paragraphs are a condensation of DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 41 (4th ed. 2004). The first and second paragraphs are from DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 4, 25, 215 n. 4 (2000), and the first sentence quotes ROBERT L. NELSON & DAVID M. TRUBEK, NEW PROBLEMS AND NEW PARADIGMS IN STUDIES OF THE LEGAL PROFESSION, LAWYERS' IDEALS/LAWYERS' PRACTICES 14 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon, eds., 1992). The second paragraph relies on Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999). The third paragraph, also quoted by Rhode, is from NELSON & TRUBEK, *supra* at 14.

country in which this is possible. And, as Yogi might say, although the future "ain't what it used to be," the present is pretty damn good. Relax and enjoy it.