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THE BUSINESS OF THE LAW IN THE 1990s

PHILLIP J. NEXON*

"I went into law to make the world better. I found out early that law is just another business. If I was in business, at least I would make money."

Sumner Redstone, Chairman of Viacom, in an interview shortly after the announcement of the proposed acquisition of Paramount by Viacom¹

"[A lawyer] is someone who speaks for you when you cannot speak for yourself."

A leader of a native Ecuadoran tribe²

"learn'ed profes'sion, one of the three vocations of theology, law, and medicine, commonly held to require highly advanced learning, high principles, etc."

THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. unabridged 1967)

"The term ["profession"] refers to a group . . . pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of a livelihood."³

Roscoe Pound, Dean of Harvard Law School from 1916 to 1936

Is the private practice of law "just another business," as Sumner Redstone put it, or is it something grander, more purposeful than simply a way to make a living? And if, in 1994, the practice is "just" a business, are things any different in this respect from what they were forty or fifty years ago?

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1. Geraldine Fabrikant, *Sumner Redstone Lands the Big One*, N.Y. TIMES, Sept. 13, 1993, at D3.

2. Joe Kane, *Letter from the Amazon: With Spears From All Sides*, NEW YORKER, Sept. 27, 1993, at 54, 75. The native tribal leader was describing his perception of the role of the Sierra Club Legal Defense Fund in the effort to secure censure by the Organization of American States of the Ecuadoran government's action in allowing oil exploration in tribal lands.

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

The focus of this paper is on the law firm engaged in traditional business practice, and the questions set forth above are discussed in that context. Much can be learned from other areas of private practice, but the following comments center on law firms in which the principal arena of activity is the representation of business clients.

My conclusion is that the essential character of the private practice of law in the nineties as conducted by such law firms is not qualitatively different from what it was in the "good old days," which for present purposes means the world of lawyers in practice forty to fifty years ago. The "essential character" to which I refer is the commercial—money getting—attribute of private practice, and the thesis advanced in these pages is that the practice of law in the areas addressed is a business today, and it was a business in the good old days.

I do not intend to suggest that there have not been significant changes in private practice. To the contrary, all would agree that the world of private practice today is light years away from the immediate post-World War II period. Aspects of practice today have been radically transformed, but the differences stem from economic and cultural changes external to the profession, not from some metamorphosis of the practice of law.

I also propose that characterizing the practice of law as a business, as a commercial undertaking, does not mean that the practice of law is "bad" in the sense of being socially undesirable. Those of us who have been in practice over the relevant span of years may (and many of us do) find practice today far more stressful and far less satisfying, but those sensations are attributable to a change in the lawyer's environment—a change in the world we thought we had entered—and not in the nature of the work that then and now engages the lawyer's attention.

To support this conclusion, an examination is needed of the relevant factors external and internal to the profession and the way those factors play out. The objective of this paper is to look at those factors, and review how the changes discussed affect practicing lawyers.

A QUICK LOOK AT THE LITERATURE

The thought that "commercialization" of the law is a new phenomenon is inconsistent with the literature both of the past and present. In nineteenth-century England, for example:

The medical profession was divided into "physicians," who treated internal problems by prescribing "physic," or drugs, and "surgeons," who generally dealt with injuries like broken bones The title of "Dr." was reserved for physicians, who were considered gentlemen; surgeons were called "Mr." and considered to be "in trade"

The same social distinction prevailed in the legal profession. The

solicitor accepted the fee from the client, so he was in trade. The portion of the fee he shared with the barrister was regarded as a gift, which made the barrister a gentleman whose wife could be presented at court.⁴

Professors Marc Galanter and Thomas Palay, in their paper presented in May 1993 to a conference on *The Commercialization of the Legal Profession* sponsored by the University of South Carolina Center for Law, the Legal Profession, and Public Policy, lead us quickly to a representative selection of the past. They quoted, among others, an 1895 article in *The American Lawyer* (an unrelated predecessor of the current journal of that name) that reads:

[The bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honor [F]or the past thirty years it has become increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking.⁵

Other commentators of the period have expressed similar sentiments. Justice Brandeis, before his elevation to the Supreme Court, inveighed against the predilection of able lawyers to work with and for the wealthy instead of the common people.⁶ Justice Harlan Stone said, on the occasion of the dedication of the Law Quadrangle at the University of Michigan:

The successful lawyer of our day more often than not is the proprietor or general manager of a new type of factory, whose legal product is increasingly the result of mass production methods. More and more the amount of his income is the measure of professional success. More and more he must look for his rewards to the material satisfactions derived from profits as from a successfully conducted business, rather than to the intangible and indubitably more durable satisfactions which are to be found in a professional service more consciously directed toward the advancement of the public interest. Steadily the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance. At its best the changed system has brought to the command of the business world loyalty and a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations.⁷

4. Florence King, *Of Raddlemen and Negus*, N.Y. TIMES, July 25, 1993, § 7, at 13 (reviewing DANIEL POOL, *WHAT JANE AUSTEN ATE AND CHARLES DICKENS KNEW* (1993)).

5. *The Commercializing of the Profession*, 3 AM. LAW 84 (1895), quoted in Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905, 905-06 (1994).

6. See LOUIS D. BRANDEIS, *BUSINESS—A PROFESSION* (1914).

7. Harlan F. Stone, *The Public Influence of the Bar*, Address at the Dedication of the

Compare those statements with the 1992 comments of a prominent Boston practitioner, who wrote:

Over the passing years our profession has gradually become a business. Respect, even from fellow attorneys, is all too rare these days. The profession is overcrowded; the supply of lawyers exceeds the demand for their services, and competition tends to be intense. Law firms compete not only for clients but for the "rain-makers" of other firms.⁸

My theme is that every sentence but the first of the immediately preceding comment is on target. There is general agreement that the profession is overcrowded and the competition fierce, but the juxtaposition of the contemporary comment with those of a much earlier day contradicts the judgment that the profession has become more of a business than in the past.

As suggested above, there are, of course, vast differences in the cultural surroundings of the good old days and those of the present, but the effect of those differences on the profession creates an illusion of a fundamental change in the practice of law that has not really occurred. Every period is unique to the contemporary observer. History's light shines ever brighter as the time being written or spoken of recedes farther into the past. Witness the further statements of Justice Stone:

The records of almost any Bar Association meeting reveal our readiness to turn back to these pages of a glorious past, because they portray those ideals of our profession to which we would most willingly pay tribute. Yet candor would compel even those of us who have the most abiding faith in our profession, and the firmest belief in its capacity for future usefulness, to admit that in our own time the Bar has not maintained its traditional position of public influence and leadership. . . .

We cannot brush aside this lay dissatisfaction with lawyers with the comforting assurance that it is nothing more than the chronic distrust of the lawyer class which the literature of every age has portrayed. It is, I fear, the expression of a belief too general and too firmly held for us to shut our eyes to it. One might cite many examples but it suffices that in the struggle, unique in our history, to determine whether the giant economic forces which our industrial and financial world have created shall be brought under some larger measure of control and, if so, what legal devices can and should be selected to accomplish that end, it is a matter of public comment that the practicing lawyer has been but a minor participant.⁹

University of Michigan Law Quadrangle, 48 HARV. L. REV. 1 (1934).

8. Irving J. Helman, *Not What It Used To Be?*, HARV. L. BULL., June 1992, at 35.

9. Stone, *supra* note 7, at 3.

Lest any doubt remain that today's practice is commerce in a kind of marketplace, and many feel that somehow the past was better, we need look no further than the California Supreme Court. In *Howard v. Babcock*,¹⁰ the court upheld the enforceability of a provision in a partnership agreement that penalized a withdrawing partner who continued in a competitive practice in the geographical area in which his former law firm was located. The court, in dismissing the argument that a relevant ethical rule should not be applied to restrict a lawyer's right to practice, said:

[O]ur interpretation of [Rule 1-500 of the *California Rules of Professional Conduct*] must be illuminated by our recognition that a revolution in the practice of law has occurred requiring economic interests of the law firm to be protected as they are in other business enterprises. . . .

"The traditional view of the law firm as a stable institution with an assured future is now challenged by an awareness that even the largest and most prestigious firms are fragile economic units" Not the least of the changes rocking the legal profession is the propensity of withdrawing partners in law firms to "grab" clients and set up a competing practice. . . .

. . . .

[T]he contemporary changes in the legal profession . . . make the assertion that the practice of law is not comparable to a business unpersuasive and unreflective of reality. Commercial concerns are now openly recognized as important in the practice of law. . . . [N]o longer can it be said that law is a profession apart, untouched by the marketplace.¹¹

THE ENVIRONMENT OF THE MODERN LAW FIRM

External to the profession is the cultural environment in which we live and which changes and evolves at rate which seems to be ever increasing. The environment in which lawyers work dictates what lawyers do—not, in general, the reverse.

A part of the environment of practice is technology. The influence of the electric typewriter in the fifties, the early computer word-reproduction devices of the sixties, the copier,¹² the word processor, the facsimile machine, and even the cellular phone cannot be underestimated. The increase in productivi-

10. 863 P.2d 150 (Cal. 1993).

11. *Id.* at 156-57, 159 (citations omitted).

12. The revolutionary change in the way in which documents could be copied (goodbye forever to carbon paper and the torture that had therewith been inflicted on generations of secretaries) and processed to produce new versions of documents is easily overlooked in this age of the word processor. The relative ease of use and low cost of copying machines were important elements in increasing paper productivity, and their ubiquitous presence today is testimony to their universal utility.

ty, in terms of document production and the speed in which client demands can be communicated and the work product of lawyers generated, has been profound, though often undesirable.

The relationships between the supply of legal services for business, the demand for those services, and the new and different tasks that lawyers now perform have shifted rather drastically over the time span with which we are concerned. Qualitatively, however, lawyers' motivation and the way they go about their work have not changed. The law firms are bigger—multi-state and even multi-national—but the business of the law and the increased concern over efficiency and client recruitment are only more urgent, not different. There is a greatly expanded availability of legal services from an ever-growing legion of lawyers who are able to work faster with the help of technology and paraprofessionals.

In the immediate post-World War II period, the prestigious law firms exerted a fair measure of control over fees and the way in which legal services were provided. Subject to some ups and downs, the balance of power remained essentially the same until the seventies and eighties, when demand skyrocketed and supply responded,¹³ lagging behind as it always does because of the investment of money and time required to increase supply. Then came the late eighties and the severe drop in demand.

An explanation for what happened to drive up demand during the seventies and eighties requires a look at what lawyers are all about, why relationships among lawyers and between lawyers and clients were the way they were in the "good old days," and why they have changed. Robert C. Clark, Dean of Harvard Law School, in an article providing a positive explanation for the growth of the profession wrote: "[Lawyers] create, find, interpret, adapt, apply, and enforce rules and principles that structure human relationships and interactions. . . . [T]hey are specialists in normative ordering."¹⁴ That is another way of saying that lawyers craft the rules of a society and interpret, enforce, and advise how to work within (or to get around) those rules.

Using this analysis as a springboard, Clark argued that the growth in the number of attorneys is largely attributable to growth in areas requiring the normative ordering skills of the lawyer, pointing to the increase in the numbers of large commercial organizations and the increased complexity of commerce, the internationalization of commerce, advances in the level of wealth in this country, and greater diversity of the population. Clark

13. See Working Group of the American Bar Ass'n Special Coordinating Committee on Professionalism, Final Report on the Ancillary Business Activities of Lawyers and Law Firms 6-7 (Nov. 30, 1990) (unpublished, on file with author).

14. Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275, 281 (1992).

recognized that there is some lawyer-created demand (when there is only one lawyer in town, it becomes necessary to find another lawyer to deal with him), but argued that even in those situations, lawyers add value.

Throughout American history, a process has existed through which rules are made, then interpreted, then perhaps modified to deal with problems presented, much as was the case with the early English common law. This process has occurred at a much more rapid pace in the post-World War II period as a result of the explosive expansion of the economy.

The cascade of new judge-made law and statutory enactments, found to be necessary or desirable by the community at large (and by subsets of that community, *viz.*, state legislatures and city and town governments) for the protection of individuals from personal injury or infringement of personal rights and including the perceived need for regulation of domestic commerce, created a new need for lawyers to help write, interpret, and apply the new rules. In the twenties, new theories of negligence developed. In the forties and fifties, the once immutable requirements limiting recovery for emotional distress were abruptly eliminated. Privity, once the linchpin of manufacturers' products liability, became irrelevant. More recently, the civil rights revolution—outlawing race-based, age-based, gender-based, and sexual orientation-based discrimination and even sexual harassment¹⁵—has created entirely new fields of law requiring the attention of practitioners in general and the development of specialists. The world has indeed changed markedly since Judge Calvert Magruder, late of the Court of Appeals for the First Circuit and a popular professor at Harvard Law School, observed: "Women have occasionally sought damages for mental distress and humiliation on account of being addressed by a proposal of illicit intercourse. . . . If there has been no [physical injury], recovery is generally denied, the view being, apparently, that there is no harm in asking."¹⁶

Lawyers did not advise Rosa Parks to refuse to give up her seat in the front of that bus in Montgomery, Alabama, nor did they create the feminist or gay-rights movements. However, it is certainly true that lawyers helped shape those developments in the courtrooms and the legislatures. Happily, our culture and institutions, with all their failings, tend to prefer shaping changes in society in a manner consistent with the rule of law.

One by-product of the sharp changes in cultural direction has been the concept that every perceived wrong should have a remedy, creating demands for lawyers to carry the battle forward. Judge Kenneth Conboy, at the time sitting in the United States District Court for the Southern District of New

15. See Anita F. Hill, *Thomas vs. Clinton*, N.Y. TIMES, May 29, 1994, § 4, at 11 ("The law of sexual harassment is evolving . . .").

16. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936) (footnotes omitted).

York, wrote:

We have seen the creation of a vast and complex network of rules, regulations, statutes and entitlements that have provided a Dionysian feast of revenues for even the least gifted of our profession.

....

The crowds of lawyers and cases—and the national obsession that any private disappointment is an affront of constitutional dimensions—have altered the focus of trial work.¹⁷

Viewed against this background, the increased need for persons skilled in the normative ordering function that Dean Clark describes is axiomatic. These developments are essentially cultural in nature—demanding, not demanded by, the attention of lawyers. When there are not enough skilled lawyers to go around, financial rewards increase, and the flame draws the moths.

In 1992, Dean Maximilian W. Kempner of the Vermont Law School wrote, in an unpublished paper:

In 1960, Whitney North Seymour, as President of the ABA, appointed the Webster Committee to study the needs of legal education and to consider ways of attracting more college students to law school. It was believed that too many of the ablest students were going into the natural sciences and engineering, and that law schools were not getting their share. Strange as it sounds today, there was also a belief that more lawyers were needed in the United States. . . . The rapid increase in law enrollment since then is evident.

A major change in the legal profession that began to be noticed in 1970 was the increasing number of women attending law school. . . . [T]here are more women law students today than the total number of law students in 1964.¹⁸

If the picture presented is fair and reasonably accurate, it surely becomes relatively simple to explain as being culturally demanded the exponential increase in the supply of lawyers and the substantial rise in the income levels achieved by the “best” of the profession over the last two decades. To be sure, some cross-stimulation exists. Large judgments in cases that many would have thought should be dismissed out of hand encourage a climate in which anyone who suffers from real or imagined injury comes to be certain that the injury must have been the fault of another and resorts to the legal system to afford justly entitled relief.¹⁹

17. Kenneth Conboy, *Trouble in Foley Square*, N.Y. TIMES, Dec. 27, 1993, at A17.

18. Maximilian W. Kempner, *Recollections from 1970-71*, at 2 (1992) (manuscript presented to the ABA Section of Legal Education and Admissions to the Bar, on file with author).

19. Consider, for example, the result in *Cleveland ex rel. Cleveland v. Piper Aircraft Corp.*,

Once the number of lawyers increased, however, serious oversupply in the profession was certain to follow any economic downturn as severe as the recent recession. The supply side of the equation is inelastic. The number of lawyers seeking gainful employment, *i.e.*, lawyers foraging for clients, has not diminished. If anything, supply continues to rise as law schools continue to attract students and graduate the same numbers of recruits to the bar as they did in the eighties.²⁰ Demand is comparably inelastic. Although lawyers' hourly charges have clearly fallen, demand has not risen as the result of diminishing prices.

Consistent with the thesis that the current environment dictates much of what has happened to the profession, I propose that the sheer numbers of lawyers now on the scene and the observable marketing, advertising, and out-and-out competition for clients (and, in the case of individual lawyers, for jobs in the law firms) has created the current sense of commercialization.

THE DEMOGRAPHICS OF THE PROFESSION

Compare the population of the legal community, at least in the urban

985 F.2d 1438 (10th Cir.), *cert. denied*, 114 S.Ct. 291 (1993). After a Piper Super Cub airplane crashed on takeoff at a private airstrip, the injured pilot sought damages from Piper Aircraft Corporation. The jury found the design of the venerable Piper Super Cub to be inherently defective and awarded the plaintiff \$2.5 million. The design in question had been approved by the Federal Aviation Administration ("FAA"); there are currently an estimated 10,000 Super Cubs in the general aviation fleet.

The alleged defects were inadequate forward visibility from the rear seat and a lack of shoulder harnesses for the occupants. The first "defect" is common to all so-called "tail-draggers" (including the venerable Stearman biplane, used as a trainer before and during World War II), in which the passenger or student commonly sits in the front cockpit or seat and the pilot in the rear. A pilot with even the most minimal training learns how to deal with, and cannot possibly be unaware of, the visibility problem. Further, the airplane was equipped with hardware to which, at the owner's option, a shoulder belt could be fastened.

Piper sought dismissal of the case on federal preemption grounds, arguing that the jury should not be permitted to find the design of Super Cub to be negligent. The Court of Appeals for the Tenth Circuit upheld the trial court's refusal to dismiss the case on this ground, and the Supreme Court denied certiorari. In the trial court, the Federal government, expressing the views of the FAA, filed an amicus curiae brief supporting the federal preemption argument. The Association of Trial Lawyers of America also filed an amicus brief supporting the plaintiff. The case is extraordinary in another important respect: The accident that spawned the lawsuit occurred when the plane crashed on takeoff into a truck placed on the runway by the owner of the private airstrip for the express purpose of preventing the aircraft's takeoff. See John S. Yodice, *Product Liability: A Case Study*, AOPA PILOT, Dec. 1992, at 127.

20. There is some evidence that the total number of applicants to law schools of every shape is beginning to fall. See Junda Woo, *Law School Applications Show Decline*, WALL STREET J., Mar. 8, 1994, at B7. Nonetheless, applications to Harvard Law School continue to rise. See Robert C. Clark, Letter to Alumni of Harvard Law School (May 11, 1994) (on file with author). It seems fair to assume that the numbers for the other leading law schools are not disparate.

areas, in the thirties and forties with the demographics of today's population. As did virtually all aspects of American life, the structure of the private practice of law underwent major changes in the post-World War II and post-Korean War periods.

Pre-World War II practice was not a competitive arena. Although there were more members of the bar than could be profitably employed in the law, the number of "good" lawyers, *i.e.*, those sought after by business clients, appears to have been relatively small. During the Great Depression, many entrants to the profession were the graduates of part-time or night schools, and a large number of them wound up in personal-injury or criminal practice or in occupations other than law. By contrast, the graduates of the national law schools were the men (there were practically no women entering the profession until the sixties)²¹ chosen for the firms on Wall Street in New York, North LaSalle Street in Chicago, or State Street in Boston.

The structure of the firms was rather rigid. There were "conventional" (*i.e.*, white Anglo-Saxon Protestant, or "white shoe") firms; there were Jewish firms; there were Irish Catholic and Italian Catholic firms.²² Firms consisting of Jews or Catholics were often only two- or three-man operations that were little more than loose associations of individual entrepreneurs.²³ Not surprisingly, the ethnic compositions of the client bases of the firms were consistent with those of the lawyers who served those clients, except to the extent that various types of practice seemed to be controlled by the Establishment, the conventional firms. For example, in my memory, if the subject matter of a transaction was significant commercial real estate in downtown Boston, it was entirely impractical until around 1960 to complete the transaction without relying on the services of a particular Boston law firm for title and related aspects of the deal. Similarly, the representation of each important institutional lender in Boston was, to a considerable extent, the exclusive domain of two or three Boston firms until perhaps the late fifties or

21. See *No More Token Women*, HARV. L. BULL., Winter 1994, at 6 (excerpts from remarks of Justice Ruth Bader Ginsburg at a Harvard Law School celebration of 40 years of women at the school).

22. *The Report of At The Breaking Point*, a report developed at a national conference sponsored by several sections of the American Bar Association on the quality of lawyers' health and lives, quotes one participant as saying: "When I started there were two Jewish firms in my city. The reason is that Jews were not hired in other firms. Jews were not allowed at some prestigious law schools either for some time. The same type of problem was encountered by Catholics." AMERICAN BAR ASS'N, *THE REPORT OF AT THE BREAKING POINT* 7 (1991). There is no objective evidence, at least post-World War II, for the proposition relative to discrimination against Jews and Catholics in law school admissions. However, hiring practices as described persisted in many cities long after the end of the war.

23. I have not found good statistical data to back up this observation, but Martin Mayer noted in *The Lawyers* that "[b]oth Jews and Catholics . . . [were] more likely to be 'solo practitioners'; and [African-Americans were] rarely anything else." MARTIN MAYER, *THE LAWYERS* 17 (1967).

early sixties.

The 1940 *Martindale-Hubbell Law Directory* discloses that in Boston practically every lawyer in the firms with recognizable, prestigious names was a graduate of Harvard Law School. One firm escaped total homogeneity in this respect only because one partner was a graduate of Yale Law School! The New York pattern was comparable, although Harvard Law School didn't have the same preeminence.

Quite naturally, the companies, banks, and other institutions in the large metropolitan areas, controlled by conventional wealth and peopled by executives from conventional backgrounds, called on their counterparts in the law firms to provide the services needed to carry on their business. By and large, business executives, also quite naturally, preferred to deal with their social and economic peers in law firms, and the most prominent lawyers were those who were most prominent socially or by virtue of their educational background. The supply of lawyers who met the social and economic requirements as well as the test of ability was, I propose, limited. The result was that those lawyers who served financial and other businesses that required heavy use of lawyers were in a position to control both fees and methods of practice.

The limited numbers and the similarity of education and social background of lawyers in the business community created something of a club among those lawyers. The importance of relationships in a relatively small community of lawyers representing opposing clients in litigation or clients on opposite sides of a transaction dictated that lawyers in the club not be overly aggressive or too quick to use their talent to take advantage of their counterparts on the other side. Those not in the club—lawyers in the tort or personal-injury practices, lawyers practicing in the bankruptcy courts, and lawyers on the outskirts of business practice representing new and small businesses—could expect little from those in the club. The world of contingent fees, collections practice (whose participants inhabited the bankruptcy courts), and domestic relations was far different from the world of the club, and its lawyers were much less tolerant of opposing lawyers.

A commonly held perception was that a relatively small percentage of lawyers in major cities had an overwhelmingly high percentage of the "good work" (*i.e.*, business-oriented work for which grateful clients promptly paid). The credo of those in control of the best business was that good relationships among lawyers counted for more than the relationships between lawyers and individual clients. Clients readily recognized their need for the services of lawyers esteemed by other lawyers.

Maintaining good relationships with other lawyers did not mean that lawyers would sacrifice the interests of their clients. It did mean, however, that once a lawyer's word was given on a matter, be it a negotiated point in a contract or a settlement of a dispute, the lawyer would refuse further to represent a client who was prepared to back out of a commitment made with

the client's consent, whether that consent was express or implied by a grant of authority to the lawyer to deal with a problem using the lawyer's best judgment. It meant that lawyers freely agreed to postpone trial dates to accommodate the needs of their opponents, notwithstanding their own clients' desires to get on with the matters. It meant that a lawyer would not permit an opponent to make an obvious error in a negotiation or a document, but would quickly point out the problem. In a now-bygone era, counsel would refer to the opposing lawyer as his "brother" and, more or less, mean it.

Members of the club who observed the club's rules achieved, often enough, good results for their clients. In the world of commerce, where the role of the lawyer is to facilitate the swift and profitable conduct of business, clients benefited materially from being represented by lawyers whose reputations for integrity in dealings with their fellows were well established. By the same token, in working with clients who found their financial backs against the wall or who carried grudges against business opponents, one became accustomed to hearing such a client suggest, for that particular matter, "Let's get Joe Margin—he knows how to go for the jugular," so that the client could obtain the maximum benefit or inflict the maximum pain on the opponent.

The major demographic changes in the legal profession that began in the post-World War II period eroded the exclusivity of the club.²⁴ Many who were attracted to the law schools after the war were drawn there by the same motivations that brought others to the law schools before the war. Family and tradition were then, and continued to be, important factors in the choice of the law as a career. The appeal of the profession to immigrants who arrived at an early age and were educated in the United States and to first-generation Americans was the promise it held of breaking the glass ceiling created by social and economic factors. Many of them were drawn to law school as the best preparation for business careers; others arrived at law school for lack of better alternatives. But the major differences between the pre- and post-war generations of law school students were in their numbers and in their steadily improving intellectual quality, a trend that accelerated in the sixties and seventies. The G.I. Bill had an extraordinary effect, opening up the prospect of college and professional school to many who otherwise never would have had the prospect of higher education and thereby enlarging the talent pool significantly. Inevitably, these developments created new diversity in the profession.

24. The erosion, however, was materially delayed for African-Americans. Black lawyers were formally excluded from membership in the American Bar Association until 1943, and it was not until 1950 that the first African-American lawyer was knowingly admitted to membership. *See TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* 23 (1992) [hereinafter *MACCRATE REPORT*].

Except for relatively brief dips, the demands of the economy quickly absorbed the supply of talent as it came on stream. The new openness of society, coupled with its need for more and more lawyers, toppled many of the cultural and social barriers to employment by the mainstream law firms.

Still another influence on quality was the fact that the post-war crop of students who were veterans were determined to make up for lost time. The failure rate of students dropped dramatically, a statistic which persists today. No longer would the Dean of Harvard Law School, in his opening remarks to each new class, suggest that a third or more of the class members would not survive.

And then came the women, in numbers only a trickle at first, but increasing by leaps and bounds as the sixties arrived and the feminist movement grew. The acceptance of women into practice doubled the pool of intellectual talent virtually overnight with individuals who would never have been admitted to the club.

All of these demographic changes contributed significantly to the sense of great change in the atmosphere in which lawyers now work. The composition of the group of "successful" lawyers is now very heterogeneous as compared with what has been characterized as the club of the good old days. One commentator has suggested:

The good old days always have a quaint appeal, but I for one do not happen to think that they were so terrific. What were then large law firms had more than their fair share of unjustifiably self-assured practitioners. . . . Their highly-touted collegiality had an exclusivity with a real dark side. . . . They would have excluded too many of us and not for the right reasons.²⁵

THE VIEW FROM THE FRONT LINES

Does the foregoing description square with the perceptions of practitioners and others in the law? Is there a way to relieve anxieties and return to a less confrontational practice environment? Is there anything to be done to square reasonable financial expectations with day-to-day practice realities?

In exploring these questions and whether the practice of law is just another business, I undertook a series of interviews, in which the purpose of the conversation was made explicit, with many practicing lawyers in the United States and a few in the United Kingdom. Others interviewed included judges, in-house counsel to lending institutions, and a psychiatrist specializing in the problems of legal professionals. Frequently, there were opportunities to talk with real, live clients, more or less spontaneously, and with executives

25. Ronald H. Kessel, *On Matters of the Spirit*, BOSTON B.J., Nov./Dec. 1992, at 13, 15.

who were representatives of corporate clients. The interviews included, among other things, discussions of these questions: (1) Is the profession commercial?; and (2) If so, was it always commercial or is it more commercial now than in the recent past? The implications of the answers to those questions also were considered. The observations recorded, and my impressions of the responses, are supplemented by commentaries in newspapers and other nonprofessional periodicals.

Admittedly, this information has been viewed through my own eyes and filtered through my own biases developed over a forty-year experience at a firm of the type under consideration. Note also that tort, criminal, and domestic relations practices are outside the scope of these comments. The current explosion of lawyers advertising in conventional ways, such as the *Yellow Pages*, is, accordingly, not commented on.

Keep in mind that the results of these interviews do not come from a statistical sample and that the material to follow is anecdotal in nature, and not, therefore, representative in the statistical sense. Moreover, the observations recorded deal as much with symptoms as with the root issue; however, the relative uniformity of response from the many individuals with whom formal interviews were conducted provides some assurance that a representative recitation of the lawyers' lament of the nineties is being presented.

My reporting begins with newspaper and journal materials which are themselves reports of interviews dealing directly with aspects of practice that typify the business atmosphere of the profession.

- A front-page story in the July 7, 1992 business section of *The Plain Dealer* (Cleveland, Ohio) was headlined *Law Firms Recognize the Need to Change*.²⁶ The story was accompanied by the transcript of a panel discussion in which the managing partners (or their functional equivalents) of three major Cleveland firms talked principally of productivity, Total Quality Management, and billing. Some of their remarks were:

On productivity: "The key to productivity in a law firm is to get the same quality product with less manpower and less time involved so the client will end up with the same product with generally a significantly lower price."²⁷ (This was a follow-up comment on the need for law firms to make large investments in technology.)

On Total Quality Management: "I think in terms of service, this TQM

26. Diane Solov, *Law Firms Recognize the Need to Change*, PLAIN DEALER (Cleveland, Ohio), July 7, 1992, at 1-G.

27. *Top Lawyers Discuss Changes in Profession*, PLAIN DEALER (Cleveland, Ohio), July 7, 1992, at 7-G (quoting David C. Weiner, CEO of Hahn Loeser & Parks).

. . . thing is now sweeping through corporations and they're now looking to their law firms and saying, 'What are you doing about that?'"²⁸

On law firm management: "One [element of law firm management] is the business aspect: get your timecards in on time, get your bills out on a monthly basis, collect from clients, control expenses."²⁹

- The current president of the Boston Bar Association recently noted:

There is . . . a fiscal crisis in legal services programs. Lawyers in large firms, mid-sized and small firms, and lawyers in solo practice have become more and more preoccupied with the need to conduct "marketing" activities, and this has the potential to rob us of fully engaged volunteers. As the competition for paying clients becomes fiercer, our level of anxiety rises, diminishing our feeling of professional satisfaction.³⁰

- The managing partner of one of Boston's largest and oldest firms wrote:

In dealing with the economic challenges of the last decade or so, we have paid a non-economic price. It has to do with the ways large law firms responded to market opportunities (they grew even larger) and competitive constraints (their lawyers worked longer and harder) The pressures were enormous to generate more billable hours, raise realization rates, discontinue unprofitable (but otherwise rewarding) work, and develop new business while protecting existing client bases.³¹

- An article in *The Wall Street Journal*, headlined *Grudgingly, Lawyers Try 'Total Quality'*, notes that law firms are, of necessity, playing the Total Quality Management game because their clients demand it.³²
- David Margolick of *The New York Times* reported on the growth in numbers of temporary, part-time lawyers, still another manifestation of

28. *Id.* (quoting John H. Burlingame, executive partner of Baker & Hostetler).

29. *Id.* (quoting Thomas C. Stevens, managing partner of Thompson Hine & Flory). Almost as an afterthought, Stevens continued, "Then there's the legal practice aspect of a firm. Lawyers are individualists. There is a firm culture, and you try to propagate that firm culture." *Id.*

30. James J. Marcellino, *Where To From Here?*, BOSTON B.J., Sept./Oct. 1993, at 2.

31. Kessel, *supra* note 25, at 14.

32. Ellen J. Pollock, *Grudgingly, Lawyers Try 'Total Quality'*, WALL ST. J., Dec. 2, 1992, at B1.

intense economic disarray. He noted that the combination of "a dismal economy, cost-conscious corporations, and legions of disaffected or unemployed lawyers available for comparatively cheap, part-time service ha[s] made legal temping a growth industry."³³

- In August 1992, *Miami Review* (a daily business, law, and real estate journal) printed an unusually candid depiction of the radical change in and downsizing of a Miami firm of some considerable history, standing, and size. The article quoted an executive at Hildebrandt Inc., a management consultant for lawyers and law firms, as saying (not necessarily with regard to that firm): "When times are tough and you have the situation we've been faced with in the last few years, you can start watching the expense accounts and the support staff costs[—]but the real key is the production of gross revenues, individually and collectively."³⁴

The thrust of the above comments has been repeated over and over again in newspapers, bar journals, and magazines, and the views of negative commentators mirror our anxieties, criticizing the profession for its commercial outlook.³⁵ Lincoln Caplan, an author in hot pursuit of lawyers, wrote: "The popular culture has got it right [in lawyer bashing], and the bar has no one to blame but itself. The current ethos among lawyers has led to a race to the bottom."³⁶

Are things really as bad as these commentators say they are? Is practice just a marketing game, with victory going to the best promoter? Do any of us have much by way of positive comment on the direction of the profession?

Distilled from my interviews on the subject, this is what our colleagues say:

1. The subject matter of much of the practicing lawyer's work—in almost any business area—continues to be as inherently interesting as it was when we were in law school or new to practice. If the work to be done is of a transactional nature, whether the skills of the lawyer are addressed to beginning and completing a bank loan negotiation, a business acquisition, or the acquisition of a parcel of real estate or a product line, the process demands thoughtful attention. If a lawyer is engaged in the affairs of a client on an ongoing basis, consulting with the client on a day-to-day basis, the process is itself stimulating and intellectually rewarding.

33. David Margolick, *At the Bar*, N.Y. TIMES, July 23, 1993, at B7.

34. Pat Dunnigan, *Fowler White Restructuring Strips Partners, Spurs Exodus*, MIAMI REV., Aug. 14, 1992, at A8, A12.

35. See, e.g., Nancy Shulins, *It's Not Easy Being a Lawyer Today*, RUTLAND HERALD/TIMES ARGUS (Rutland, Vt.), May 1, 1994, § E, at 3.

36. Lincoln Caplan, *The Lawyers' Race to the Bottom*, N.Y. TIMES, Aug. 6, 1993, at A29.

Whether the client will want, much less pay for, the care and thought deemed necessary by the lawyer is another matter. The combination of pressure to complete the work and the resistance to payment for the level of work that the professional thinks is appropriate to the task creates professional dissatisfaction, the intensity of which escalates as the experience becomes repetitive.

2. The "cold call" appears to have found its way into the practice of law. In-house counsel will not necessarily ignore the importunities of an outside firm that inquires whether the services of counsel not previously utilized might be considered. If the inquiring firm is recognizable by name and reputation, consideration of such a solicitation is no longer unheard of.
3. The increased complexity of virtually every transaction, even the purchase of a one-family residence, requires considerable thought and time to complete properly. However, clients commonly think, sometimes correctly, that they know the amount of work required. They want their work done quickly and without what they think of as excessive expenditure of time. Clients often truly believe that they are willing to accept the relatively small risk that something will go sour in exchange for speed and a lower bill than would be rendered for a more thoughtful approach to the task. How often have we heard a client say: "All we need is a simple, straightforward letter agreement. Just skip the warranties and representations; we're dealing with people I know and trust, and besides, I don't want to run up a big bill."

The rub, of course, is when that small level of risk turns into a real problem or the failure to give adequate thought to a matter leaves unturned the stone that conceals disaster. How many clients are there, sophisticated or not, who would be prepared to say that they had accepted and evaluated the risk that materializes into an actual problem unless the specific risk was identified and quantified. It is, of course, the unidentified or relatively remote risk that often comes home to roost when adequate time and reflection have not been given to a problem.³⁷

37. Consider the implications to the lawyer (and the risk of error assumed in obeying the client's injunction) of the handbooks and detailed letters of engagement now commonly provided by corporate clients to outside counsel. The following quotation is taken from one such handbook (substituting "Client" for the name of the company):

In all matters in which outside counsel is engaged, both [Client] and outside counsel will use a "cost-benefit" approach to the pursuit of [Client's] interests—the weighing at the earliest feasible moment of the anticipated benefits of a particular course of action, discounted by the chances that such benefits can actually be achieved, against the estimated cost of achieving such benefits.

4. A lawyer's perception of the quality of work that comes the lawyer's way is closely related to the "quality" of the client. It makes a difference to a lawyer if the lawyer is representing a prominent and favorably viewed client in performing any task. The desirability of the work is directly tied to the importance and prestige of the client for which the work is to be done. But the "big, important" client will, as often as not, exert heavy pressure to get the job done quickly and impose significant constraints on fees.³⁸

The push for Total Quality Management (read "cutting down on fees and reimbursable costs") originated with clients who recognized their importance to the firms they retained. The economic importance of the prestigious major client in the generation of a large volume of work and the cachet that is conferred on the firm by its representation is not lost on the client. The client reacts like a businessman who remembers the lessons of Adam Smith.

5. Increased turnover at the executive level in large business entities has significantly changed the relationship of the private law firm to the client with repeated, sometimes rapid changes in the executive suite. The consequent disruption of personal relationships between the lawyer and the key personnel of the client dilutes the loyalties of both the executive and the lawyer, and depersonalizes the relationship. Rapid shifts of personnel at law firms as partners move from one firm to another do not help.
6. When asked, none of my respondents commented helpfully on the question whether the relationship of the work to be performed to accepted societal goals is important. However, Lincoln Caplan, in his previously cited attack on lawyers, commented: "The problem is simply what lawyers do for a living. They define themselves primarily through their

38. In the handbook referred to in the preceding footnote appears the following:

Law firms are retained because of their expertise. Accordingly, time spent educating lawyers within the firm on applicable substantive law should not be billed to [Client]. . . .

. . . .

Unless approved in advance by [Client], [Client] will not pay for time spent by more than one attorney attending the same deposition, hearing, oral argument or meeting, or for travel by more than one attorney.

[Client] will not pay for any charges reflecting meetings or conversations among attorneys within the outside law firm unless those meetings or conversations were an essential part of an activity directly related to the legal engagement (*e.g.*, preparation of a brief).

[Client] will not pay for time spent in preparation of responses to inquiries from its outside auditors about the status of pending legal matters.

relationships with clients, not with society.”³⁹ It seems clear from the context of this quote that Caplan thinks that such identification is inherently bad, but I think that lawyers, consciously or not, believe, as Harvard Law School Dean Robert Clark does, that their work is necessary and is consistent with social imperatives.

7. An aspect of practice which is disappearing, at least in the representation of fair-sized businesses, is the counselor-client relationship. The level of the professional's satisfaction with the practice of law is greatly enhanced when that relationship exists. Better results for the client are often achieved, and more gratification for the lawyer almost always occurs, when the lawyer deals with the “whole client” and the client consults with the lawyer as a confidant, seeking the judgment of the lawyer rather than mere technical advice on an issue presented by a particular problem or transaction.

On the contemporary scene, the counselor-client relationship has commonly given way to consultation by the business executive with lawyer-specialists on specific issues, in specialties that are understood and identified by the executive. If the problem presented is a tax problem, then, of course, the self-prescribed referral is to a tax practitioner; if the problem is an employment discrimination claim, then the choice of an experienced practitioner in that field is sought, and so on.

The increased sweep of the law by reason of the expansion of rights and remedies dictates such an approach. Often enough, the specialist may do the job the client wants done, and do it efficiently. But, in the process, the generalist feels left out and less useful, and the specialist's satisfaction with the role assigned is limited by the sense that the specialist is simply a technician.

8. An important function of the counselor is to take a broad view, to borrow from experience with varied clients and businesses and to counsel the client in the long view. For larger enterprises, the principal recourse is now to in-house counsel, but in-house counsel may lack one of the most important attributes of the outside practitioner, viz., broad and varied experience with other enterprises. Another difficulty with the in-house route is the pressure the in-house counsel may feel to give advice palatable to the “clients” who are, in general, the attorney's superiors (unless the in-house counsel is a power center in his or her own right).
9. Whatever the merits of the independent counselor, the fact is that events have overtaken the role. With the trend towards reliance on

39. Caplan, *supra* note 36, at A29.

specialists comes an erosion of client loyalty. The parallel in medicine is too obvious to ignore. Although once the family practitioner was the principal caregiver and the focal point for referrals to specialists, the explosive development of medicine produced specialists in the care and treatment of individual diseases or organs, to the point that the primary caregiver was on the road to extinction. That development has been stunted only by the absolute economic necessity of controlling the parallel explosion of health care costs. One way or another, we are clearly on the managed-care road, to which the paying agency, primary care physician, or other entity that serves the same purpose will be the gatekeeper.

That result will not occur in the law. The "patient" foots its own bills and will, therefore, decide how the triage effort will be conducted. The oversupply in the business legal services market will keep costs down. And note that the client often does have a very good idea of the nature of the services needed, although the client may not be able to evaluate the quality of the service rendered any better than the well-informed medical patient.

10. The disappearance of civility among lawyers representing adverse interests has reduced some negotiations to pitched battles. Litigation is more and more a struggle to secure the most minute of perceived advantages, with a considerable disregard for fairness and sometimes little or no attempt at reaching a reasonable, negotiated solution to the conflict. The proliferation of continuing legal education seminars on such esoteric subjects as trial techniques, jury selection, and maximization of damage awards in personal injury cases does not suggest much concern with whether a just result is reached. Litigation increasingly is becoming a battle of technicians.
11. The competition internal to the contemporary law firm has greatly diminished collegiality and further reduced the satisfaction level of practice. When the people with whom one works do not provide comfort and support in tough times, and intellectual stimulus day to day, the experience of being a member of a firm is bound to be unpleasant, and the work produced in that environment will suffer.

As work inflow has declined, young partners are competing with associates for the assignment of work. Current methods of measuring productivity—usually centering around billable hours—relentlessly dictate that the up-and-coming lawyer produce according to those measures, without regard for the firm-wide implications of the resulting internal competition. The compounding effect of the client demand for the use of expertise at the minimum (read "lowest hourly charge") level required for

the job,⁴⁰ cannot be ignored.

12. Lawyers who have been members of firms with “lock step” compensation schemes reported that the value of that approach was to reduce and perhaps eliminate destructive competition among peers. As those lawyers saw it, the occasional sluggard, content to ride out life until retirement, was a problem to be dealt with on an ad hoc basis, but the occasional problem was not enough to damn the system.

Lock-step schemes fell out of favor in the eighties as firms prospered beyond the expectations of most practitioners. The only explanation for that change is the insistence by rainmakers for compensation for their efforts and successes at the office, in court, or at the country club. However, the consequence of abandoning lock-step didn’t present too much of a problem until the roof fell in during the late eighties and early nineties.

The ease with which the lock-step tradition was broken is probably attributable to the fact that everyone was doing so well on an absolute basis that the incipient problems were concealed. When the recession of 1989-90 arrived, however, an explosion followed. Perceived contribution to the firm (*i.e.*, rainmaking) quickly became the litmus test for retention. When there ceased to be so much work that everyone was profitably busy and when the cost of carrying a partner not carrying his own weight was no longer concealed by high levels of prosperity, fingers quickly were pointed at those who did not bring in the work. Thus, for example, in firms where real estate transactional work had been a significant contributor to the bottom line, real estate partners who found themselves out of work when the recession hit found their partners unsympathetic. One lawyer from an important Wall Street firm commented that his peers apparently seemed to be unaware of the phenomenon known as the business cycle.

13. An experience closely related to the sense of diminished collegiality within law firms is the constant shifting of allegiances as lawyers move more and more easily from firm to firm within the same metropolitan area. In the old pyramidal structure of law firms, large-firm lawyers who did not make partner within the specified time period were expected to leave for other pastures, much as the junior officer in the military who fails of promotion to higher rank is forced out of the service. Often enough, those who did not make the grade in the New York firms wound up as in-house counsel to clients of the firms, a turn of events that solidified the position of the law firms with their clients. Others found

40. See *supra* observation 3.

their way into smaller firms where large-firm training proved marketable and useful. Referrals to the law firm from which the individual had come were frequently generated in specialized areas or for major matters requiring large-firm expertise.⁴¹ On the contemporary scene, however, the shifts from law firms run the gamut from individuals leaving firms for what appear to be better opportunities, in law or in business, to phalanxes of lawyers shifting as groups from one firm to another,⁴² as well as the associate who doesn't make partner.

14. When the concerted efforts at cost controls on lawyers' fees surfaced in the late eighties, a common reaction by lawyers was grumbling acceptance of the client mandate, at least for the time being, with the hope and expectation that such demands would soon fade when the economy rebounded. The first manifestations of ceilings on hourly fees and requests for fixed-dollar bids on some types of transactional work probably occurred at the institutional level and were directly related to the severe economic climate and the precipitous fall in the real estate markets. However, all categories of work in business-oriented practices quickly became subject to fee negotiation and client scrutiny—or flat-out declarations of maximum amounts that would be paid, if the client was strong enough to impose its will.

No lawyer with whom I spoke denied that his firm now feels it appropriate to negotiate and sometimes fix fees for specific transactions. It is also now clearly the case that in the process of "business development," or prospecting for new clients, a firm will offer significant financial concessions, presumably in the hope that once the client is inside the tent, more profitable work can be developed.⁴³

15. The new, competitive atmosphere has generated more overt criticism of practitioners for conduct seen by clients to be either inefficient or simply not responsive to their interests and concerns.⁴⁴

16. One result of external and internal professional pressures has been a

41. Possibly to drum up these types of referrals, in the fall of 1993 one major New York law firm began publishing an alumni newsletter, in which recent successes and new practice areas are enthusiastically chronicled and newly acquired stars from other venues are advertised, for distribution to former associates.

42. See, e.g., *10 Lawyers Switch Firms*, N.Y. TIMES, May 7, 1994, at 40 (reporting on the shift of three partners and seven associates from one well-known New York firm to another).

43. See Laura Mansnerus, *Lawyers More Willing to Discuss Their Fees*, N.Y. TIMES, Jan. 30, 1993, at 34, for a discussion of fee issues.

44. See Ellen J. Pollock, *Competition Forces Law Firms to Heed Their Clients' Criticisms*, WALL ST. J., Oct. 23, 1992, at B8.

sea change in retirement policies. Increasingly, retirement at age sixty-five, subject to exceptions but never beyond age seventy, is a pattern firms say they are following. A reported variation was "scaling down" from age sixty-five to age sixty-eight, at which time full retirement is expected. Retirement compensation patterns were not reliably reported. At one major London firm, retirement at age sixty-two, subject to delay but not beyond age sixty-five, is the rule that is, I am told, strictly followed, much as is the case with the major accounting firms in the United States. One suspects that in a firm in which there are a few principal rainmakers, any formal policy which has been promulgated will be bent if the rainmakers insist, but the general climate will eventually have its effect even in that instance.

Following retirement or quasi-retirement, the facilities made available to retirees are bound to be reduced over time as firms mature and the middle ranges of partners, in which often several partners reach retirement age in the same year, retire. The practice of maintaining retired seniors in their own offices with private secretaries will not last much longer, with change hastened by the flowering of the word processor, E-mail, and all the new computer-based tools; the consequent reduction in secretarial staffs; and the imminent demise of the private secretary.

17. Solo practitioners and firms in smaller communities seem to be somewhat less affected by the aspects of practice that members of larger firms in conventional business practice find so difficult to accept. The regular business clients of sole practitioners and small-town firms operate on a smaller scale than the clients of the conventional firms in large metropolitan areas. One important consequence is that solo and small-firm practitioners still fill the role of counselor.

These lawyers continue to cover the broader range of practice characteristic of the old-time practitioner. In personal-injury and criminal work, the lawyer is the person who knows the score. To the defendant in a criminal case; the person from whom the tax collector is attempting to extract additional taxes, interest, fines, and penalties; or the defendant in an employment discrimination case, the lawyer is indeed the confidant of the client. In these contexts, the lawyer is the protector—the person who prescribes the treatment and from whom the client asks for and expects fair treatment. There is plenty of overt competition in smaller communities, to be sure. For the most part, however, the lawyer who provides effective representation and takes the time to communicate with his client will be the winner in the long run. The bedside manner of the successful physician has a ready parallel in the general practice of law.

Lawyers in smaller practices in smaller cities seem genuinely to find great satisfaction from much of their work and to sense that they are providing an important service to clients—without, however, the sense of

being servants that comes with the competitive pressure experienced by their big-city brethren. They are plagued with some of the economic problems of big-city lawyers, including difficulty in turning receivables into cash and the ever-increasing cost of technological advances in practice methods. Nonetheless, the satisfaction level of the small-town practitioner seems higher. I ascribe that result to the closer personal relationship between lawyer and client.

18. A psychiatrist who has made a specialty of consulting with law firms made much of lawyers' sense of not being in control of their careers. He pointed out that successful lawyers *expect* to be in control of their clients, the matters at hand, their methods of practice, and their lifestyles. The pressures under which the profession now works tend to destroy that sense of control. After all, if a client can successfully prohibit (by refusing to pay for) consultation with a colleague, or if a client's demand for reduced staffing is thought by the lawyer to be inappropriate but is nonetheless acquiesced in, what is left of the independence of the professional?

The psychiatrist also reflected on the desires of the prospective young associate and the prospective employer to please each other and to say what each thinks the other wants to hear. Innocent but erroneous characterizations of the world of private practice by the interviewing firm and the enthusiasm communicated by the aspiring lawyer to the hoped-for employer create a climate that breeds unhappiness and a sense of unfulfillment when the reality of everyday practice sets in.

One more "interview" deserves mention. It is the interview one conducts silently upon entering the reception area of leading firms in the major cities. An observant regular law firm visitor will have noticed over the past few years a major change in the reading material in those reception areas. The new feature is a brochure detailing the diversity of experience, the high level of skills, the community prominence, and other professional attributes of the members of the firm.⁴⁵ Some brochures include elaborate inserts from which the reader can select biographical material relating to individuals or whole departments of the firm. In more than one reception area the brochures have

45. The offspring of the brochure explosion include bulletins and letters of every variety to clients, reviewing new developments in the law, new areas of activity in the law firm, and services that the law firm may be able to provide to its clients. The publications may, depending on the jurisdiction, be required to carry legends that they "may be considered advertising" and are not intended as legal advice. In other words, the materials are advertising, plain and simple.

virtually displaced all other reading material, even the ubiquitous *Wall Street Journal*. The contribution of the firm or its members to pro bono work, or to charitable and civic activity in general, may also be noted in the brochure or in some other visible monument in the entrance to the firm's offices. In one law firm, an award for excellence given periodically by the firm to a selected member of the firm is displayed in the reception area.

Self-trumpeting is not confined to the United States. A visitor to the offices of leading solicitors in London may encounter wall racks similar to those found in travel agencies, filled with glossy folders advertising individual members of departments in the firm, complete with pictures of solicitors and carefully staged photographs of those same individuals "in action" with clients who are occasionally identified or are readily identifiable by logos appearing in the picture.

WHERE ARE WE? IS THE BUSINESS OF LAW SO BAD?

I propose that what has happened to the profession over the last fifty years is to be expected so long as the law of supply and demand remains unrepealed. The supply of quality has come to exceed the demand, with predictable effects on pricing and the level of competition. Much of the lawyer's discontent and uncertainty about the future of the profession can be readily explained as frustrated expectations and a sense of diminishing personal prestige, arising from the surplus of talent. The profession was and is a business, and right now, it's a buyer's market.

Nonetheless, there are other factors not strictly economic that fuel our discomfort. The ogre of specialization and the breakdown of the traditional one-on-one lawyer-client relationship have turned lawyers into technicians, robbing us of intangible, but nonetheless real, personal fulfillment in our work. Confronting hard economic choices and facing the need to lower our expectations of personal economic reward requires some adjustment in mindset.

However, the profession has not yet been reduced to the level of the anonymous mechanic operating the machinery of commerce. Lawyers need not, and must not, leave behind the values and ethical standards that are the legacy of the profession. In law school, we learned from case law that the result to be reached in a judicial decision is the one that is fair in the circumstances—otherwise, in the long run, the common good would suffer, and the value of precedent would ultimately be rejected.

In representing clients, no business imperative requires us to assist in obtaining an unfair bargain. The interests of the client are often best served by following a fair and reasonable course of action. The lopsided bargain or transaction is the one most likely to fall apart. In any event, one of the benefits of practicing in a law firm setting is that because one's practice rests on the economic base of many clients, it should be possible to decline to

represent a client whose standards of conduct fall below the lawyer's standards. When it becomes impossible to make that choice, it may be time to find another way to make a living.

Much is written critically of the reputation of the U.S. court system as permitting, even encouraging, the growth of litigation in the name of affording aggrieved litigants an opportunity to right every wrong, while lining the pockets of the chorus of lawyers who plumb the depths of newly created and elaborately embroidered rights. At the same time, however, we have seen the law in this country, in the hands of dedicated judges and lawyers, become an instrument of social change profoundly altering our society into one that is more open to individual differences and protective of what have become fundamental civil rights. Lawyers *qua* lawyers do not deserve credit for initiating these changes, but as each opportunity was presented, lawyers provided the framework on which to build each advance.

Chief Justice Earl Warren and Justices William Brennan and Thurgood Marshall, as students in law school, shared the same educational background as those students who went on to Wall Street, LaSalle Street, and the other legal highways in the large cities. Each of those individuals made their way successfully in the practice of law or in politics, even as they developed their sensibilities about individual rights, as distinguished from property rights or the interests of the wealthy.

As the MacCrate Report noted: "The profession has successfully created for itself a loosely defined but distinct identity in learning, skills and values with which most lawyers can identify."⁴⁶ Being engaged in business does not mean that the lawyer has abandoned the truly inspiring attributes of the law or the nonlegal routes that might be taken utilizing the lawyer's skills. An advantage of the law is that, like medicine, its training and acquired expertise equip the individual to pursue either money-getting or entirely eleemosynary efforts, as the practitioner may choose. And, happily, many practitioners find it possible to go in both directions without impairing their ability to function in either arena. There are many lawyers who, notwithstanding the fact that they spend all of their professional lives in the private sector protecting the wealth of their clients, support the efforts of their colleagues in other spheres of practice. Similarly, many lawyers devote their skills to civic endeavors vital to the health of the community. One great benefit of being a lawyer is to have that choice.

46. MACCRATE REPORT, *supra* note 24, at 111.