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The 1988 Vanderbilt Law Review Symposium The Modern Practice of Law: Assessing Change

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The 1988 *Vanderbilt Law Review* Symposium

The Modern Practice of Law: Assessing Change*

INTRODUCTION

The legal profession has long embraced an ironic contradiction: lawyers help clients respond to or create change, yet at the same time lawyers steep themselves in tradition and pride themselves on professional stability. Thus we have the image of the conservative, pedigreed attorney, clad in dark wool, who helps his client accomplish new and daring objectives, but who generally resists changes in his or her relationship with the client. For many years this image has served as the ideal for the legal profession, and rules and standards evolved to preserve that ideal.

For generations the legal profession has adhered to its traditions and lashed out at any legal iconoclast. Pressures on the legal profession, however, have challenged the ability of the organized bar to resist the onslaught of change. While the legal profession was once homogenous, comprised largely of white, male protestants, today members of the legal profession include increasing numbers of women, blacks, Jews, and

* The *Law Review* would like to thank Professor Harold Levinson for his assistance in organizing this Symposium. The *Law Review* thanks those who participated in the Symposium Lectures on January 29, 1988 at Vanderbilt University School of Law: Norman L. Bowie, Professor of Philosophy and Business Ethics and Director of the University of Delaware's Center for the Study of Values; Terry Calvani, Federal Trade Commissioner; James Langenfeld, Deputy Director for Economic Policy Analysis, Bureau of Economics of the Federal Trade Commission; James Jones, Managing Partner of Arnold & Porter in Washington, D.C.; Thomas Shaffer, Robert E.R. Huntley Professor of Law, Washington and Lee University; Jeffrey M. Smith, a legal malpractice litigator, author, and counselor with Arnall Golden & Gregory in Atlanta. The *Law Review* also would like to thank Fred Graham, former legal correspondent for CBS News, for speaking at the Symposium Banquet on January 28, 1988.

members of other ethnic groups. This diversity has been accompanied by a dramatic increase in the sheer number of lawyers, which has naturally raised the level of competition in a profession that once considered itself an exclusive club. An explosion of regulatory legislation over the last fifty years has created new demands on lawyers and clients alike, altering both the needs of the client and the tasks of the lawyer.

These changes have manifested themselves in ways that have alarmed many and spurred a debate within the organized bar about the present and future character of the legal profession. While once lawyers remained with the same firm for their entire careers, today associates and partners commonly move from firm to firm. Indeed, it is not uncommon for whole groups of partners and associates to leave one firm either to join another firm or to create a new firm. While once associates proceeded in lockstep to partnership, today associates scramble towards partnership, hoping that they have billed enough hours and can generate enough business to justify their presence in the firm. While once lawyers worked hard, did their jobs and went home, today a law firm's preoccupation with the bottom line forces lawyers, partners and associates alike, to keep one eye on the client and one eye on the billable hours.

The law firms themselves have changed from stable institutions to dynamos of change. Law firms have grown in sheer size, with the largest firms in major cities employing hundreds of attorneys, supported by the paralegals, librarians, computer experts, and administrators necessary to operate a modern law firm. As law firms have expanded in size, they have also expanded geographically, opening branch offices in cities across the country in an effort to preserve old clients or exploit new opportunities. Accompanying this expansion has been a wave of mergers and acquisitions among law firms, as firms try to establish or strengthen their position in the legal marketplace.

Perhaps caused by or as the result of the large national law firm, firms have developed departments, practice groups, and specialties. This has been accompanied by the proliferation of small specialty firms known as "boutiques." The image of a general practitioner, master of many areas of the law, no longer makes sense in today's complex legal profession. This trend towards specialization extends not just to practice areas, but to the clientele served. The growth of legal clinics, which offer routine legal services to the general public at affordable and fixed rates, recognizes that persons other than wealthy individuals and businesses need legal assistance. Moreover, the growth of legal clinics illustrates that many legal services, like other nonlegal services, can be routinely and efficiently delivered.

Law firms and lawyers have responded to the increasingly crowded

and competitive marketplace not just by tailoring their practice to meet demand, but by advertising and "marketing" their services to ensure that the relevant market is aware of their capabilities. Legal clinics are not the only advertisers of legal services today. Boutique practices advertise their unique services. In addition, firms of all sizes and reputations routinely engage marketing firms to help the law firm attract new clients and develop new practices. The propriety of lawyer advertising has raised a debate in the legal profession which has drawn the attention of the United States Supreme Court.

Like advertising, other changes in law firm operations have caused controversy both inside and outside the legal community. For example, as law firms have become associations of legal specialists, they have also become associations of nonlegal specialists. Law firms have discovered that legal problems often cannot be resolved to the client's satisfaction without the advice of economists, business experts, or other nonlegal consultants. Rather than lose this business to outside consultant groups, several law firms have purchased or developed consultant groups that offer both legal and nonlegal advice to the firm's clients. This expansion of the traditional law firm beyond law and lawyers has not been limited to traditional areas of legal practice. These law firms have considered including nonlegal experts in the professional partnership or corporation. This diversification and the general law firm expansion also requires additional capital. Some law firms have assumed an enormous debt to finance this expansion. Obviously, many law firm managers have recognized the alternative of using equity to finance this expansion. These developments have caused at least two state bar associations to consider revising their rules of ethics to allow nonlawyers to own interests in law firms. This debate over nonlawyer participation in law firm fortunes is a practical question that underlies the larger question of defining the identify of the modern legal profession.

Over the same period, the United States and the world have changed similarly. The population is larger; the strains on society are greater; the biggest corporations are bigger and more diverse than ever before. Just as national and international law firms have developed, multinational conglomerates have become a fixture in the business world. In short, the changes in the legal profession just described are not necessarily alarming: they simply reflect changes in society as a whole.

Nonetheless, many commentators, both inside and outside the legal profession, decry the contemporary legal profession as a pale reflection of what it once was. These commentators argue that lawyers have transformed a learned profession into a mere branch of commerce. In so doing, the modern lawyer has endangered the integrity of the profession

and the society that the profession was intended to serve. At the heart of this criticism is the contention that lawyers and the profession as a whole have lost sight of the public purpose inherent in the practice of law. In the fray of the legal marketplace, lawyers have traded the public interest for financial gain.

Either or none of those propositions may be true. The purpose of this Symposium is to examine the modern legal profession in an effort to evaluate objectively the condition of the modern practice of law. At the heart of the controversy over the condition of the legal profession is a battle of talismanic words. While it may be true that lawyers are less "professional" today than yesterday, this assertion merely begs the question if the word "profession" is not first defined. Similarly, it is not helpful to denigrate the modern law practice as a "business" without first defining "business."

Compounding the talismanic use of "profession" and "business" is the tendency to draw significant distinctions about certain elements of legal practice, but not to explain the basis of the distinction. For example, the organized bar has criticized advertising but permits marketing. Yet does a meaningful distinction exist between advertising and marketing? Does this distinction make a difference? Similarly, all states forbid law firms from raising capital by selling interests in the firm to nonlawyers. Yet no state forbids law firms from borrowing capital from banks. If the issue is finance or the effect of leverage on a firm's choices, then there might not be a valid distinction between equity and debt financing. If the issue is external control over the choices that lawyers make, there may be a valid distinction between the two.*

It may well be that these are valid distinctions. But the validity of the distinction depends on the rationale behind the rule. Similarly, there may be a distinction between a profession and a business, and perhaps the two should never be mixed. But the validity of that distinction also depends on the purpose, function, and role of the legal profession. Thus, without a coherent understanding of the legal profession and careful analysis of how various commercial practices affect the practice of law, any attempt to assess the modern practice of law would be meaningless.

This Symposium intends to encourage lawyers to examine the legal profession with the same rigor with which they examine other areas of human endeavor. The Articles presented in this issue are intended to raise questions about the nature and purposes of the legal profession. It

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* This point about verbal distinctions without differences and the two illustrations, was made at the Symposium by panelist Jeffrey M. Smith, a legal malpractice litigator and counselor with Arnall Golden & Gregory in Atlanta, author of *Preventing Legal Malpractice* (1981).

is hoped that through a process of questioning and reflection, inspired by the Articles presented at this Symposium, lawyers will be able to respond to changes in society while preserving what they conclude is necessary and valuable about the practice of law. This Symposium therefore is a point of departure for future debate and discussion. The Articles presented in this issue offer a variety of insights into the state of the legal profession and suggest a variety of methods by which to evaluate the profession.

The Articles in this Symposium suggest that members of the legal profession first must enunciate a coherent mission for the profession. James W. Jones, the Managing Partner of Washington, D.C.'s Arnold & Porter, states that this is the major challenge facing the legal profession. He argues that the role of lawyers has changed from strictly legal advisors to solvers of complex problems which have both legal and nonlegal dimensions. This changing role demands changes in the rules governing the legal profession and the way law is taught. FTC Commissioner Terry Calvani, James Langenfeld, and Gordon Shuford use attorney advertising to illustrate that many of the traditional distinctions between lawyers and nonlawyers are without merit and that the legal profession is, in many respects, very much like other "businesses." Professors Norman Bowie, David Luban, Thomas L. Shaffer, and L. Harold Levinson all argue that the practice of law necessarily includes a public dimension which requires lawyers not to blindly do their client's bidding, but to balance the client's wishes with some recognition of the public welfare. Professors Bowie, Luban, and Shaffer each offer an interpretation of how the legal profession should recognize its public responsibilities. Professor Luban argues that this public dimension of the legal practice is best defined by the *noblesse oblige* tradition of Progressive Professionalism that requires lawyers to use their unique position and training for the public good. Professor Shaffer argues that this dimension is recognized by adherence to a republican legal ethic rather than the adversary ethic. Professor Bowie urges the legal community to become a profession and he describes what "profession" means. Professor Levinson argues that the duties that lawyers owe both to clients and to the public should serve to limit the expanding practice of law.

Together these Articles challenge one's assumptions about the usefulness of the adversary ethic, the distinction between a "profession" and a "business," regulations restricting attorney advertising and nonlawyer ownership of law firms, the origins of the modern legal profession, and the scope of the legal profession's public responsibility. It is especially important that lawyers and other participants in the legal system face these challenges and examine the profession. Regardless of

change, lawyers continue to serve the law and the law continues to define our society. This unique position imposes a duty on the legal profession to continue to govern itself in such a manner that preserves what is valuable about the legal profession while allowing lawyers to progress along with the rest of society. This Symposium is offered to help the profession face this challenge with the intelligence, objectivity, and moral responsibility that traditionally have been the hallmark of the legal profession.

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