

Spring 1987

The Legal Profession Today

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Recommended Citation

Rehnquist, William H. (1987) "The Legal Profession Today," *Indiana Law Journal*: Vol. 62: Iss. 2, Article 2.
Available at: <http://www.repository.law.indiana.edu/ilj/vol62/iss2/2>

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The Legal Profession Today

CHIEF JUSTICE WILLIAM H. REHNQUIST

During the past generation the manner in which law is practiced in the United States has changed dramatically in more than one way.

Within the last fifteen years alone, for example, the number of lawyers in the United States has more than doubled, from fewer than 350,000 in 1970 to nearly 700,000 today. This increase is out of all proportion to the increase in the nation's population: in 1960 there was one lawyer for every 627 people in the country, whereas today there is one lawyer for every 354 people.

Lawyers on the average today make considerably more money, even after adjustment for inflation, than they did twenty-five years ago. A recent American Bar Association Journal survey reports that the median income of lawyers responding to the survey is roughly \$65,000.¹ I suspect that the percentage of gross national product going to pay for legal services has likewise increased; current estimates suggest that law firms bill close to \$40 billion a year. The latest headline-making development in this area is the decision of several leading New York law firms to substantially increase their associates' compensation, and to pay additional bonuses to those who had the misfortune to work for government lawyers' salaries as law clerks for one or two years.

The structure of the firms which engage in the practice of law has also changed dramatically. Today, the median law firm size is eight lawyers, and nearly one-quarter of the lawyers work in law firms that billed between \$1 and \$3 million in 1985.² The number of firms with one hundred or more lawyers has increased from only four in 1960 to well over two hundred today. Indeed, in just the last *five* years, the number of firms with over two hundred lawyers has increased nearly four-fold, to about seventy. According to the recently adopted report of the American Bar Association Commission on Professionalism, it is not uncommon to find firms of over three hundred lawyers, with offices not only in many states but in foreign countries as well.³ Twenty-five years ago, firms of that size and geographic diversity were simply unknown.

Young associates in large law firms today apparently work much harder,

1. 72 A.B.A. J. 47, 50 (Sept. 1, 1986).

2. *Id.* at 47, 52.

3. See THE LAWYER'S ALMANAC 1986, at 2-5, 76-78 (1986).

and under significantly different conditions, than they did twenty-five years ago. It is apparently common in some major New York firms to expect associates to bill in excess of two thousand hours per year, and the ratio of associates to partners in some large firms is increasing sharply. There is some speculation that the recent associate salary increases will be paralleled by increased expectations in terms of billing hours.

Institutional loyalty appears to be in decline. Partners in law firms have become increasingly "mobile," feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them.

These strike me as very significant developments that affect not only lawyers, but law students who anticipate practicing law, clients of lawyers, and in some ways the public as a whole. There is nothing intrinsically good or bad about change, and generalized complaints that the profession is "losing its professionalism" may represent only a nostalgic yearning for the "good old days" that people in my age range always seem to have. But it does not appear that the organization of the profession is moving in a particular direction, and that academic institutions concerned with the profession—that is, law schools—should pay attention to and examine what is happening.

I think if similar developments occurred in the field of medicine they would be of considerable interest not merely to medical students but to members of medical faculties, and if they occurred in the field of business they would be of considerable interest not merely to business school students but to members of business school faculties. But for some reason the history of law school faculties is quite different; very rarely do they evince any interest in the sort of empirical studies that might shed light on the sorts of changes I have mentioned. Law school faculties have preferred to devote themselves, by and large, to criticism and analysis of legal doctrine as it is found in the opinions of appellate courts. This is undoubtedly a very worthwhile enterprise, and one which law faculties are peculiarly qualified to pursue. But one wonders whether some of the emphasis of law school study and research might not profitably be shifted to the broad area of how legal services are delivered, and surely the structure of the practice of law is a vital element in the delivery of those legal services.

A very informative symposium on the corporate law firm was recently conducted at Stanford University Law School. Professor Robert W. Gordon described the papers collected in the symposium this way:

Together, they amount to a series of excited reports from explorers returning from journeys into the heart of a vast, mysterious, and almost unmapped interior of American society, its large metropolitan law firms

. . . .

When one thinks about it for a moment, it seems astonishing that law firms should have for so long remained almost unexplored in legal scholarship. These are, after all, social institutions of some prominence.

They have a significant place in the economy, billing some \$38 billion annually

Yet the legal academy from its inception has on the whole made a determined decision to remain aloof from the institutions where most of its students will spend their careers.⁴

And if the "large metropolitan law firm" that was the subject of this symposium is *virtually terra incognita*, the smaller firm in which most lawyers still practice is *totally terra incognita*.

My particular interest today is in suggesting a few questions—questions worth answering, I think—that I see raised by the changes in modern practice alluded to earlier.

First, there are several questions that spring from what, to the outside observer at least, look to be fairly substantial changes in the life of an associate in a relatively large firm. What are the consequences to the associate, to the profession, and to the public at large if the associate is expected to bill two thousand or twenty-one hundred hours per year? Does such an associate have time to be *anything but* an associate lawyer in that large firm? At the time I practiced law, there was always a public aspect to the profession, and most lawyers did not regard themselves as totally discharging their obligation by simply putting in a given number of hours that could be billed to clients. Whether it was "pro bono" work of some sort, or a more generalized discharge of community obligation by serving on zoning boards, charity boards, and the like, lawyers felt that they could contribute something to the community in which they lived, and that they as well as the community would benefit from that contribution. It seems to me that a law firm that requires an associate to bill in excess of two thousand hours per year, thereby sharply curtailing the productive expenditure of energy outside of work, is substantially more concerned with profit-maximization than were firms when I practiced. Indeed, one might argue that such a firm is treating the associate very much as a manufacturer would treat a purchaser of one hundred tons of scrap metal: if you use anything less than the one hundred tons that you paid for, you simply are not running an efficient business.

How do associates react to this treatment? Is the instinct of the young lawyer faced with staggering hours to favor exhaustive and exhausting research over exercising the judgment necessary to decide whether ten more hours of research will really benefit a client?

What other consequences flow from the apparent move toward profit-maximization? One consequence appears to be an increasing degree of specialization, particularly in large firms. There seems to be little doubt on the part of those in practice that specialization both serves the client and succeeds

4. Gordon, *Introduction to Symposium on the Corporate Law Firm*, 37 STAN. L. REV. 271, 272 (1985).

in maximizing the firm's income. I suspect that it may have the additional effect of making the work of lawyers in these firms more like drudgery than similar work was twenty-five years ago. There is more than a little evidence that while associates are perfectly willing to take the increased pay that they receive from large firms, they do not find the work particularly satisfying. Let me caution that the evidence I have seen in this area is almost entirely "anecdotal," and in the absence of more systematic studies it cannot possibly be otherwise.

A related question that comes to mind is whether the typical client today is paying the same, less, or more than it would have for similar legal services rendered twenty-five years ago. It may be all but impossible to answer such a question because of the inherent difficulties in comparing legal services rendered by two different firms at two widely separated times. But I think the question is worth asking.

A second area worth studying is the apparent increase in ethical difficulties that has come, if not as a result of structural changes in the profession, at least at the same time as those changes. It is only natural, I suppose, that as the practice of law in large firms has become organized on more and more of a business basis, geared to the maximization of income, this practice should on occasion push towards the margins of ethical propriety. Ethical considerations, after all, are factors which counsel *against* maximization of income in the best Adam Smith tradition, and the stronger the pressure to maximize income the more difficult it is to avoid the ethical margins.

I served for a number of years during my practice in Arizona on what was called the "Administrative Committee," which heard complaints against practicing lawyers and recommended disciplinary action against them where appropriate. My impression from this service was that the typical respondent in a proceeding before our Committee was a solo practitioner who was struggling financially; he ended up using for his own purposes trust account money which belonged to his client.

Lawyers in the established firms in Phoenix managed to avoid getting into this trouble, not necessarily because they were more ethical, but because they did not feel a great deal of financial pressure. Indeed, the lawyers in the well-established firms in Phoenix in the 1950's and 1960's were probably rather complacent. Each had regular institutional clients who brought in sizable revenues to the firm each year. The associates were assured of being able to make their house payments, and the partners were assured of being able to pay their country club dues. People in these firms put in a good day's work, but they did not feel, in the words of the song, that "they owed their soul to the company store."

I am sure that from the economic viewpoint of fully exploiting available resources, the changes in the structure of firms in the past twenty-five years probably make a good deal of sense. More work is undoubtedly being done for the client, and logged to the client, by partners and associates in today's

large firms than was done by similar firms twenty-five years ago. But while in business there is essentially one side to this equation—maximization of income—there is another side to it in the practice of law. The greater the pressure of maximization of income, the more likely some sort of ethical difficulties will be encountered—whether the firm consists of a solo practitioner or of several hundred lawyers.

Recent examples abound of big firms running into big trouble. A large Baltimore law firm is currently being sued by an agency of the state of Maryland charging that the firm represented conflicting interests in connection with the Old Court Savings and Loan Association, which played a large part in Maryland's recent savings and loan crisis. A large Miami law firm is being sued by the government of Venezuela, which alleges that the firm knew or should have known about fraud against the government by one of the firm's clients. Another nationwide law firm based in New York recently settled for \$40 million a suit against it by former customers of a client of the firm. Of course, neither being sued nor settling a law suit necessarily indicates wrongdoing. But these incidents, among others, were sufficient to prompt a recent article in the respected magazine "Business Week" entitled "A Question of Integrity at Blue Chip Law Firms: Once Unthinkable, Charges of Foul Play are Hitting Prestigious Partnerships."⁵

If, as Professor Roger Cramton observed in a recent article, the word being passed around some big law firms is that "you only eat what you kill," it is only natural that lawyers practicing in these firms will be more conscious than ever of the need to bring in their share of revenues. It would not be surprising if this sort of pressure led to ethical difficulties. Similarly, if one is expected to bill more than two thousand hours per year, there are bound to be temptations to exaggerate the hours actually put in.

But as any lawyer knows, ethical violations do not necessarily require knowledge on the part of any one lawyer in the firm that the canons of ethics are being violated. Size alone can lead to ethical problems. A partner in one branch of the firm may be representing one client while another partner in another branch of the firm represents another client; if it turns out that these two clients have "conflicting interests," there may be an ethical violation even though neither partner actually knew that someone else in the firm was representing the conflicting interest. Despite the blessings of modern communications, it simply must be harder to keep track of the activities of a firm consisting of several hundred lawyers in several different cities than it would be of a significantly smaller, local organization. Obviously this fact alone does not counsel against expanding successful small organizations into successful large ones, but it again suggests that a law firm cannot treat the question of expansion precisely the way a business organization does. Careful

5. Crock, Engardio, Glaberson & Tycer, *A Question of Integrity at Blue Chip Law Firms: Once Unthinkable, Charges of Foul Play are Hitting Prestigious Partnerships*, 293 Bus. Wk. 76, at col. 3 (April 17, 1986).

study in this area could expose developing systemic ethical problems and bring the search for solutions.

It can scarcely be doubted that the changes in the structure of the legal profession to which I have referred have a profound effect on lawyers, and therefore a very significant effect on law students who are being trained in law schools to practice law. They may well affect the cost of legal services, the concept of a reasonable fee when a court is making a determination as to what fee is reasonable, and many other matters connected with the law generally and the delivery of legal services in particular.

Perhaps one response to the curiosity which I have expressed is that so long as the clients are willing to pay the bills, and the insurance company is willing to insure, no outsider need question what is going on. I do not think that is an adequate answer. Even the most devoted advocate of the free market speaks in terms of an informed seller as well as an informed buyer. And yet the information we have about many of these developments is either non-existent or largely anecdotal. Surely more information in this area would be of benefit to the profession at large and to society as a whole.

I would also add that while we may prefer the free market model for many forms of enterprise, the legal profession, always heavily regulated, has never been one of these enterprises. The profession of law is not like the manufacture of widgets in which the widget manufacturer presumably pays its own way: hires its own labor, furnishes its own plant, ships its own products. The education of almost every law student in the country is subsidized by the law school which the student attends. And the ultimate distinction between lawyers and non-lawyers, though many of them may not take advantage of it, is the ability to appear before a court and advocate the cause of the client. The courts of the United States are subsidized by United States taxpayers; the courts of the state of Indiana are subsidized by Indiana taxpayers. It is certainly not amiss to wish to have more information about the structure of a profession which relies so heavily on the use of publicly subsidized institutions for the conduct of its business.

I once asked a good friend of mine who is the dean of a law school why law professors did not conduct more empirical studies of the profession and the way law actually affects people, and his reply was that legal academics were just not very good at dealing with empirical studies. It struck me later that this would have been an entirely appropriate remark for the dean of a seventeenth century medical school in Western Europe to have made; after all, Galen, the great Roman physician, had long ago explained largely as a matter of abstract inquiry how the body worked, and why on earth should someone like William Harvey bother himself with experiments on real human beings to see how blood circulates?

Practitioners of law have long lamented that law is getting to be "more and more like a business"; Louis D. Brandeis made that observation in 1905, and it has been made periodically since. If present complaints meant

no more than that lawyers are more careful about keeping time sheets, using firm manpower, and the like, no eyebrows would be raised. But the practice of law has always been a subtle blend between a "calling" such as the ministry, where compensation is all but disregarded, and the selling of a product, where compensation is all important. The move over the past twenty-five years has been to increase the emphasis on compensation—to make the practice of law more like a business. Whether or not it has "gone too far," or bids fair to "go too far," I have neither the necessary information nor the necessary expertise to say. But I think that these changes over the past twenty-five years would be a very sensible subject for careful examination by law schools.

I like to think of the profession of law as a multi-legged stool—one leg is the practicing bar, another leg is the judiciary, another leg is the academic lawyers, another leg the government lawyers. No leg of the stool can support the profession by itself, and each leg is heavily interdependent on the others. The practicing bar has always been greatly concerned, and rightly so, with the quality of education given in the law schools. The judiciary is concerned with the quality of the practicing bar; the practicing bar, the government lawyers, and the academic lawyers are concerned with the quality of the judiciary. It seems to me entirely fit and proper that the law schools should concern themselves, perhaps more than they have in the past, with the structure of the practicing bar. But whether or not the academic lawyers at the Indiana University School of Law choose to follow my suggestions today, I have no doubt that they and the Law School will continue to flourish as they have in the past, in the finer and more spacious surroundings which we dedicate today.

