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Introduction: Assessing the Future of the Legal Profession Symposium

Alex B. Long

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INTRODUCTION

ASSESSING THE FUTURE OF THE LEGAL PROFESSION SYMPOSIUM

Alex B. Long*

Predicting the future is a dangerous business. The streets are littered with gamblers who were sure they would catch that ace on the river, ex-law professors who were denied tenure because they shouted from the rooftops that employment at-will was on its last legs in the mid-1980s, that there would never be meaningful bankruptcy reform, and that the Model Code of Professional Responsibility would govern lawyers well into the twenty-first century. That is why it was probably a wise decision to name this symposium "*Assessing* the Future of the Legal Profession" rather than "*Predicting* the Future of the Legal Profession."

The "Assessing the Future of the Legal Profession" symposium was the brainchild of Dean Lawrence K. Hellman. Along with many of the speakers, Larry was one of the first to teach the strange new subject known as "Professional Responsibility" (or maybe Legal Ethics or Legal Profession depending on where you taught). One of the benefits of

* Associate Professor of Law, Oklahoma City University School of Law.

having been involved in the Professional Responsibility field since back in the day is that one apparently can accumulate in one's Rolodex the phone numbers of some of the most influential names in the field. (The existence of Microsoft Outlook and Blackberries would have been difficult to predict at the time.) Those numbers come in handy when one decides to host a conference concerning the state of the legal profession. It was almost like Larry predicted he would one day need them.

So, on September 23, 2005, some of the nation's leading authorities on legal ethics assembled in the Homsey Family Moot Courtroom at Oklahoma City University School of Law to assess the future of the legal profession. The speakers discussed a host of issues, including transnational practice, the Ethics 2000 reforms, the regulatory framework for the legal profession, and legal education. The conference was part of Oklahoma City University's Centennial Celebration and was underwritten in part by the law firm of Crowe & Dunlevy. Thus, as the University was commemorating its past, the conference at the law school was a way to take stock of the current status of the legal profession and to debate what the future might hold. The conference attracted a diverse group of attendees, including some from as far as Japan.

As one assesses current trends in the practice of law, it hardly takes any great gift of clairvoyance to foresee increasing globalization in the practice of law. American law firms continue to develop ties oversees, as do American law schools, and the vast potential of the Asian market will surely lure more of those who, until now, have been hesitant to dip their toes in transnational waters. The outsourcing of legal services is already taking place and not just among large firms. Smaller firms are also relying on outsourcing to handle larger and more complex transactions they were previously incapable of handling.[1] The potential for outsourcing of legal services to change the legal landscape is huge. According to the "conservative estimates" of the Associated Chambers of Commerce and Industry of India, the potential market for legal services outsourced by United States firms is $3-4 billion.[2]

1. Taylor H. Wilson, *Outsourced Around the World in a Billable Hour; Associate Raises May Make GCs Look for Less Expensive Legal Services*, TEX. LAW., May 1, 2006, at S4.

2. *India's LPO Business to Grow by 6-7%: Assocham*, HINDUSTAN TIMES, May 15, 2006, *available at* 2006 WLNR 8491457.

Of course, outsourcing of legal services and the globalization of the practice of law more generally bring with them a host of new ethical concerns, including concerns over confidentiality and competence. In his contribution to the symposium, Professor Geoffrey C. Hazard, Jr. addresses one of the most important concerns associated with the globalization of the practice of law: imputed conflicts of interest.[3] Professor Hazard examines how current trends in the practice of law, such as increased size in American law firms, increased specialization in law practice, and the globalization of the practice of law, intersect with conflict of interest rules, both domestic and international.

Another area in which it is easy to foresee major changes on the horizon is the area of judicial ethics. Here, events have transpired so quickly in recent years that the American Bar Association's ("ABA") poor Joint Commission to Evaluate the Model Code of Judicial Conduct has struggled mightily to stay ahead of the curve in its attempt to revise the ABA's Model Code of Judicial Conduct. The Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*,[4] which invalidated the Minnesota Canon of Judicial Conduct prohibiting candidates for judicial office from announcing their views on disputed legal issues, opened up at least as many questions as it resolved concerning the ability of states to regulate judicial campaign speech.

The Court's decision prompted various responses from the states. North Carolina took the drastic step of eliminating the clause that prohibited candidates from making "pledges or promises" of conduct in office,[5] thus throwing the door wide open to a range of campaign speech. Others followed the ABA's initial lead following *White* and rewrote their own versions of Canon 5 of the ABA's Model Code of Judicial Conduct to eliminate the provision prohibiting a candidate from making statements that appear to commit the candidate with respect to a disputed issue - a provision the constitutionality of which is very much in doubt after *White*[6] - and replacing it with a prohibition on making "pledges,

3. Geoffrey C. Hazard, Jr., *Imputed Conflicts of Interest in International Law Practice*, 30 OKLA. CITY U. L. REV. 489 (2005).

4. Republican Party of Minn. v. White, 536 U.S. 765 (2002).

5. Rachel Paine Caufield, *In the Wake of* White*: How States Are Responding to* Republican Party of Minnesota v. White *and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 645 (2005).

6. *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 607-08 (2004) (calling

promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."[7] Still others appear to have simply crossed their fingers and hoped that their preexisting rules regulating campaign speech would not be invalidated on constitutional grounds.

Since *White*, however, the constitutionality of other portions of Canon 5 has been called into question by subsequent federal court decisions.[8] For example, in 2005, the Eighth Circuit Court of Appeals struck down language in Minnesota's Code of Judicial Conduct prohibiting candidates for judicial office from engaging in partisan activities and personally soliciting campaign funds.[9] This caused the Minnesota Supreme Court to recently amend its judicial election rules accordingly, "'subject to additional, broader amendments' that may be adopted" later.[10] This kind of uncertainty in the wake of *White* has called into question the entire philosophy underlying the ABA's approach to regulating judicial elections[11] and the ability of the states to regulate judicial campaigns. Not surprisingly, these and other concerns caused the Joint Commission to delay the submission of its revised code in time for the ABA's 2006 annual meeting.

Judicial conflicts of interest and recusal issues have also generated significant publicity and, in some cases, difficulties for federal judges and nominees as of late. Justice Scalia's much-publicized duck hunting outing and his tendency to speak his mind in public have generated

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into question the constitutionality of the 1990 version of Canon 5(A)(3)(d)(ii)); Am. Bar Ass'n, Report of the American Bar Association Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility, http://www.abanet.org/ leadership/2003/journal/105b.pdf (last visited June 15, 2006) (concluding that Canon 5's "'appear to commit' language was too vague to withstand strict scrutiny" review).

7. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2003).

8. Weaver v. Bonner, 309 F.3d 1312, 1324 (11th Cir. 2002) (declaring unconstitutional Georgia's Canon prohibiting candidates from personally soliciting campaign contributions); Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72, 92 (N.D.N.Y. 2003) (declaring unconstitutional several provisions of New York's Rules of Judicial Conduct pertaining to political activities), *vacated*, 351 F.3d 65 (2d Cir. 2003).

9. Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005), *cert. denied sub nom.* Dimick v. Republican Party of Minn., 126 S. Ct. 1165 (2006).

10. *MN Supreme Court Amends Judicial Election Rules; Attorneys Weigh In*, MINN. LAW., Apr. 10, 2006, *available at* 2006 WLNR 6169052.

11. Elizabeth A. Alston, *Comply with* 'White,' NAT'L. L.J. Apr. 17, 2006, at 23.

recusal questions that have attracted national media attention in a way that judges - even Supreme Court Justices - rarely do. While still a nominee, Justice Samuel Alito faced questions during his confirmation hearings over his failure to recuse himself in a case in which one of the parties was a mutual fund company in which Alito had an account.

Concerns over the failure of other federal judges to recuse themselves in matters in which the judges held financial interests and the failure of some judges to list on their annual disclosure reports their receipt of air travel, food, and lodging from private foundations recently prompted proposed legislation in the Senate. The proposed legislation would establish an inspector general with subpoena powers who would be authorized "'to conduct investigations of possible misconduct of judges in the judicial branch . . . that may require oversight or other action by Congress.'"[12] Perhaps in an apparent effort to avoid confrontation with Congress over the matter, the Judicial Conference of the United States issued new rules regarding such trips, which require greater disclosure by the organizations that fund such seminars as well as greater disclosure by the attending judges.[13] The Judicial Conference also announced that federal judges will be required to install conflict-checking software to enable judges to better spot when they may be hearing a case in which they have a financial interest. The Supreme Court, however, is unaffected by this new rule.[14] At the same time the Judicial Conference was attempting to lessen concerns over judicial conflicts of interest, a separate report from a panel headed by Justice Stephen Breyer raised some additional concerns over the judiciary's ability to regulate itself. While the report concluded that in the vast majority of cases the judiciary does an effective job of handling complaints about judicial misconduct, it concluded that the federal judiciary's investigation process failed to properly investigate several high profile cases of alleged judicial misconduct in recent years.[15] As these developments suggest, threats to the structural independence of the

12. *Concerns About Judicial Ethics Prompt Bill to Create Inspector General for Judges*, 74 U.S.L.W. 2651 (May 2, 2006).

13. Charles Lane, *Judges Alter Rules for Sponsored Trips*, WASH. POST., Sept. 20, 2006, at A23.

14. Linda Greenhouse, *Federal Judges Take Steps to Improve Accountability*, N.Y. TIMES, Sept. 20, 2006, at A20.

15. Lane, *supra* note 13, at A23; *Progress on Judicial Ethics: The Judiciary Takes Steps in the Right Direction -- But Not Far Enough*, WASH. POST, Sept. 25, 2006, at A20.

judiciary may arise where there is a perception that the judiciary is unable to police itself.

At the same time, the failure of judges to recuse themselves in situations where their impartiality might reasonably be questioned raises concerns over the *decisional* independence of judges. This is particularly true where judges must run for office and raise campaign funds from individuals and businesses on whose cases they may someday have to sit.[16] It is also a particular concern for Supreme Court Justices, for whom there is no oversight on recusal questions.[17] It is against this backdrop that Professor Monroe H. Freedman examines "The Troubling Case of Justice Stephen Breyer,"[18] who served as chair of the committee, appointed by former Chief Justice William Rehnquist, to review and to make recommendations regarding judicial ethics, and what it portends for the future of judicial impartiality in the Supreme Court.

One area of the legal profession that has remained relatively static over the years has been legal education. Since Christopher Columbus Langdell ushered in a new era in legal education over a hundred years ago, there have been relatively few ground breaking innovations or paradigm shifts.[19] To be sure, there have been changes, and sometimes quite substantial ones at that, most of which have taken place in the past forty years. The rise of courses devoted to legal ethics following Watergate, clinical programs, greater attention to skills training following the MacCrate Report, and improved classroom technology are just four examples. But in terms of the fundamental method in which aspiring lawyers are trained, there have been relatively few changes. With minor deviations, the first-year curriculum at Law School X is the same as at Law School Y, and variances in the number and variety of

16. *See* Peter Geier, *Recusal Fight Highlights Judicial Election Concerns; The Appeal of a $50M Verdict Involving Key Donor Draws Fire*, NAT'L L.J., Apr. 24, 2006, at 6 (discussing refusal of West Virginia Supreme Court of Appeals Justice Brent D. Benjamin to recuse himself in a case involving company chaired by an individual who donated at least $3 million to Benjamin's campaign).

17. Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 109 (2004).

18. Monroe H. Freedman, *Judicial Impartiality in the Supreme Court – The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513 (2005).

19. Harvard Law School Dean Elena Kagan was recently quoted as saying, "Good God, the first-year curriculum was developed 130 years ago, and it really hasn't changed all that much since." Sacha Pfeiffer, *Harvard Law to Refocus the First Year*, BOSTON GLOBE, Oct. 7, 2006, at B5.

courses offered in the second and third years depend primarily on the resources of the institutions in question, rather than upon some kind of fundamental disagreement over which courses should be offered and how they should be taught.

The fact that at least half a dozen new law schools that aspire to obtain ABA accreditation have opened their doors between the years 2004 and 2006[20] alone might suggest that there is a growing sense that the current structure of legal education is not adequately serving the public. Each of these new schools advertises the fact that it offers something different. The Charlotte School of Law and Phoenix School of Law, both members of the InfiLaw Consortium of Independent Law Schools, advertise a "practice readying curriculum . . . designed to equip graduates with the skills of a second year associate;"[21] at the Charleston School of Law the mission is "[t]o teach the practice of law as a profession, having as its chief aim providing public service;"[22] Drexel University College of Law boasts that its "students will actually experience the practice of law in two-quarter externships with many of the region's leading legal employers;"[23] Elon University School of Law focuses on graduating lawyers who are "thoroughly prepared in leadership skills;"[24] and Jerry Falwell's Liberty University School of Law seeks to "integrate faith and reason as a means to the formation of law and a just society."[25]

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20. These schools are the Charleston School of Law, http://www.charlestonlaw.org/ (last visited June 12, 2006); Charlotte School of Law, http://www.charlottelaw.org/index.htm (last visited June 12, 2006); Drexel University College of Law, http://www.drexel.edu/law/ (last visited June 12, 2006); Elon University School of Law, http://www.elon.edu/e-web/academics/law/ (last visited June 12, 2006); Liberty University School of Law, http://law.liberty.edu/ (last visited June 12, 2006); and Phoenix School of Law, http://www.phoenixlaw.org/ (last visited June 12, 2006).

21. Charlotte School of Law, http://www.charlottelaw.org/aboutCSL.htm (last visited Dec. 15, 2006); *see* Phoenix School of Law, http://www.phoenixlaw.org/catalog.pdf (last visited Dec. 18, 2006).

22. Charleston School of Law, http://www.charlestonlaw.org/about.htm (last visited June 12, 2006).

23. Drexel University College of Law, http://www.drexel.edu/law/welcome.asp (last visited June 12, 2006).

24. Elon University School of Law, http://www.elon.edu/e-web/academics/law/about_elonlaw.xhtml (last visited June 12, 2006).

25. Liberty University School of Law, http://www.liberty.edu/academics/law/index.cfm?PID=3813 (last visited June 12, 2006).

At the same time, these new schools and more established law schools are introducing curricular innovations and new teaching methods. At Elon University College of Law, for example, third-year students will "complete a leadership project that they design and implement," such as a "field-placement experience that allows the student to demonstrate leadership capabilities" or "founding a student organization or publication."[26] The Charlotte School of Law plans to have "knowledge bars outside classrooms - a bar-type setting where professors can engage with students."[27] Some of the new schools have non-traditional course requirements, such as international courses[28] or a required interviewing, negotiation, and counseling course.[29] The relatively new University of St. Thomas School of Law in Minnesota offers an innovative Mentorship Externship Program as part of its required curriculum in which students are paired with attorneys or judges and undertake a variety of legal tasks under the supervision of the mentor, all the while developing a relationship that seeks to instill the values of the legal profession.[30] And to great publicity, the University of Dayton School of Law has introduced an option in which students can complete their legal education in five semesters rather than the traditional six.[31]

Each of these departures from the traditional law school model represents the school's vision of the type of training the next generation of lawyers will need in order to be successful and to serve the public. Some of the innovations described may prove to be important in transforming legal education, but the innovations are ultimately incremental in nature. While there has certainly been no shortage of criticism from within legal academia and the organized bar regarding the state of legal education, there have been relatively few frontal assaults on

26. Elon University School of Law, http://www.elon.edu/e-web/academics/law/characteristics.xhtml (last visited June 12, 2006).

27. Mike Drummond, *Law School Nears Reality*, CHARLOTTE OBSERVER, Feb. 14, 2006, at 1D, *available at* 2006 WLNR 2529543.

28. Elon University School of Law, http://www.elon.edu/e-web/academics/law/required_ courses. xhtml (last visited June 12, 2006).

29. Drexel University College of Law, http://www.drexel.edu/law/JD_curriculum.asp (last visited June 12, 2006).

30. University of St. Thomas School of Law, http://www.stthomas.edu/law/academics/mentor_externship/program_overview.asp (last visited June 12, 2006).

31. University of Dayton School of Law, http://law.udayton.edu/NR/exeres/758F4C84-4B12-4957-AD77-B18439595196.htm (last visited June 12, 2006).

the traditional model of legal education in the United States.[32] The ABA's recent decision to permit law schools to offer a five-semester option aside, law school still consists almost everywhere of six semesters beginning sometime after completion of an undergraduate degree. The second- and third-year curricula still consist mainly of electives taught through a mixture of lecture and the case method (albeit with a clinical program option and more skills courses now thrown into the mix). And in the first-year curriculum students are still required to take Torts, Contracts, Property, Civil Procedure, Criminal Law, and (maybe) Constitutional Law just as they did decades ago.[33]

Perhaps the conformity found among American law schools reflects the fact that the traditional law school required curriculum has done a fine job of preparing lawyers for the practice of law during most of the twentieth century and that it is well suited to continue to do so into the twenty-first century. Or perhaps it has more to do with the power of accreditation that the ABA wields over law schools. Whatever the case, at this symposium, Professor Thomas D. Morgan offered an alternative vision of the future of legal education. It is a vision based on Professor Morgan's view of what types of skills the lawyers of the future will need. And it is a vision that has relatively little in common with the curricula found in most American law schools today.[34]

Any discussion as to the future of legal education must at some point confront the unpleasant reality that law students are increasingly graduating with tremendous student loan debt. This debt limits the career options for many attorneys who are forced to forsake the kind of public interest lawyering that may have attracted them to law school initially.[35] That is not the type of "greed" that Professor Lisa G. Lerman

32. Without question, the most innovative move in this regard has been the creation of Concord Law School, "the first institution to offer a Juris Doctor (JD) degree earned wholly online." Concord Law School, http://www.concordlawschool.com/info/custom/concord/schoolinfo/index.asp?GUID=85A6864964D749ED8846149B1C64B768194242263394589999 (last visited June 12, 2006). The school, however, is not ABA accredited, nor is it likely to be in the immediate future.

33. Of course, now first-year students are also required to take Legal Research & Writing.

34. Thomas D. Morgan, *Educating Lawyers for the Future Legal Profession*, 30 OKLA. CITY U. L. REV. 537 (2005).

35. N. William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years*, ASS'N AM. LAW SCH. NEWS (Aug. 2005).

deals with in her contribution to this symposium,[36] but it is a reality that certainly has adverse consequences for the ability of the legal profession to adequately serve those who already have difficulty affording legal services. Moreover, the pressure that many young attorneys feel to seek the highest paycheck possible in order to pay off potentially stifling student loans as quickly as possible has any number of potential consequences for the legal profession, including increased turnover in public service jobs and a reduced sense of loyalty to law firms.[37]

The type of greed that Professor Lerman discusses, however, is of a different variety, although one that is at least potentially as harmful. Lerman focuses on the problem of "excessive materialism" among lawyers and the adverse consequences it has on the profession.[38] The adverse consequences of such materialism, including an increasing sense of disappointment in and detachment from the profession among attorneys, increased substance abuse rates, and declining trust among the public, are many and increasingly have captured the attention of bar leaders. It may be that the next generation of lawyers, which (if some of the stories told by law firm hiring committees and senior partners are to be believed) takes a somewhat different view of work-life balance than its predecessors, may naturally come up with its own solutions. But for the short-term future, at least, the problems triggered by lawyer greed are likely to continue to occupy an increasing amount of time of bar counsel and law firm leadership.

These problems, like many of the trends identified by the participants at the symposium, have significant implications for the regulation of law practice. Self-regulation has always been one of the hallmarks of the legal profession. Professor Ted Schneyer and ethics expert Lucian Pera both address the regulatory aspect of the future of the legal profession. However, Professor Schneyer foresees a future in which increased specialization among attorneys, globalization of the legal services

36. Lisa G. Lerman, *Greed Among American Lawyers*, 30 OKLA. CITY U. L. REV. 611 (2005).

37. *See* Thomas J. Charron, *Law School Loans and Lawyers in Public Service*, PROSECUTOR, Jan./Feb. 2006, at 6 (attributing high turnover rates in prosecutors' offices in part to high education loan debt); M. Todd Henderson & James C. Spindler, *Corporate Heroin: A Defense of Perks, Executive Loans, and Conspicuous Consumption*, 93 GEO. L.J. 1835, 1855-56 (2005) (attributing high law firm turnover in part to the repayment of student loan debt).

38. Lerman, *supra* note 36, at 614.

market, and increased federal regulation of the practice of law will result in a regulatory landscape markedly different than the one that currently sets the standards for attorneys today.[39] If current trends continue, this new landscape is likely to result in even greater changes in the ways the organized bar regulates its members, the ways the bar relates to the federal government, and the ways attorneys relate to their clients.

While Professor Schneyer's focus is on regulation of the day-to-day practice of law, one issue that underlies perhaps every piece in this symposium is the extent to which the ABA and state bar associations are capable of responding effectively to the emerging changes in the legal profession. For example, in an age where law is increasingly practiced not just across state borders but across international borders, how willing will the ABA be to continually revise its conflict of interest and multi-jurisdictional practice requirements to reflect the new reality? For that matter, as part of an issue Lucian Pera addresses in his contribution to the symposium,[40] how effective will it be in selling its changes in this regard to state bars? Looking to the future of the judiciary, the ABA has long opposed the popular election of judges and its rules relating to judicial campaign activities largely reflect that opposition. But how much longer can the ABA continue to champion its restrictive approach to judicial campaign speech in the face of increasing popular sentiment in favor of greater judicial accountability and mounting judicial challenges to the ABA's approach? Looking to the future of legal education, there are any number of reasons why the price tag of legal education continues to grow, bringing with it increasing student loan debt and the problems such debt creates. Yet, some in legal academia have not hesitated to identify the ABA and some of its law school accreditation requirements as part of the problem. How much longer will economics permit American law schools to offer the model of education employed at virtually every law school today?

Each speaker at the symposium did his or her best to identify issues that are likely to pose new challenges for the legal profession in the future. Of course, if predicting the future were a simple matter, a young

39. Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559 (2005).

40. Lucian Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637 (2005).

fighter known as Cassius Clay would never have been a 7-1 underdog to Sonny Liston, no one would have laughed when Joe Namath guaranteed a Jets victory over the Colts in Super Bowl III, and the Portland Trail Blazers would have used their first-round pick in the 1984 NBA draft on Michael Jordan rather than on the largely forgotten Sam Bowie. But speculation often provokes increased debate. And debate occasionally produces solutions or at least plans for addressing problems. While hindsight may prove that the speakers at the "Assessing the Future of the Legal Profession" conference do not own crystal balls, at a minimum, their predictions as to the future and their identification of emerging issues certainly triggered a lively debate when they were presented in front of an audience. Hopefully, they will continue to do so when they reach a larger audience through the publication of their articles in this symposium.