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## Educating Lawyers for the Future Legal Profession

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# Educating Lawyers for The Future Legal Profession\*

Thomas D. Morgan\*\*

*Abstract: What today's law students do as lawyers will be profoundly affected by changes their clients experience. Clients are likely to face more global competition than earlier generations could imagine, and they are likely to value lawyers who understand the non-legal aspects of their problems. Tomorrow's lawyers are likely to have to be more specialized than their predecessors, and many will deliver services that are less personal, more commodity-like, and less financially rewarding. Legal education, in turn, faces challenges producing lawyers capable of functioning in that world. Future lawyers will have to be simultaneously more specialized and more capable of responding to change than were earlier generations. To meet these needs, entering students should be introduced to fundamental issues that cut across all fields, including more public law and international material than most students now encounter. Upperclass students should be given opportunities to specialize and study more non-legal subjects that will make them better able to understand clients' needs. Pressure to control costs, in turn, may lead to an increased use of technology to provide some of the instructional content.*

## *Introduction*

Thinking about legal education provides an occasion for thinking about the future of the legal profession. Education is necessarily future-focused.<sup>2</sup> The primary materials that law students examine describe events that have already happened, but each time professors select issues to address, they necessarily look ahead.

It is hard for us to comprehend, but today's students are likely still to be practicing law in the last half of the 21<sup>st</sup> century. None of us knows much about what the world will look like in 2050, but the challenge of legal education is one of helping students navigate toward that indefinite future. To meet that challenge, we must think about what future lawyers will do. Conversely, as we think about coming changes in legal education, we may also get a richer sense of what kind of people tomorrow's lawyers are likely to become.

## *Law as a Derivative Profession*

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<sup>1</sup>This paper is scheduled to be published sometime in 2006 in an Oklahoma City University Law Review Symposium on the Future of the Legal Profession. The conference on which the symposium is based was held at the Oklahoma City University Law School on September 23, 2005.

<sup>2</sup>Legal education itself has a long history, of course. Some of the best accounts are provided in Albert J. Harno, *Legal Education in the United States* (1953), Frances K. Zemans & Victor G. Rosenblum, *The Making of a Public Profession* (1981), and Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983). For an excellent two volume collection of materials on the history of American legal education, see Steve Sheppard, ed., *The History of Legal Education in the United States: Commentaries and Primary Sources* (1999).

I begin with a proposition that may be counterintuitive, even insulting, to many lawyers. Law is a derivative profession; we are not in control of our professional future. Lawyers typically do not like to hear that. We like to think of ourselves as self-governing; indeed, that is part of what it means to be part of a profession.<sup>3</sup> We also like to think of ourselves as helping administer justice, and we like to think that we help define what justice is.

Those high aspirations deserve commendation, but what I mean by describing law as a derivative profession is the same thing economists mean when they say that the demand for golf balls is derived from – i.e., dependent on – the public’s interest in playing golf. Unlike in the movies, it is not true in golf or in law that “if you build it, they will come.”<sup>4</sup> While there is an interchange between lawyer and client, for most lawyers, most of the time, professional activity is dictated by what their clients want and need, not by how the lawyers themselves would prefer to spend their time.

With few exceptions, for example, lawyers do not initiate business deals; clients bring the deals to them. Lawyers may contribute to negotiating and documenting transactions, but the underlying economic activity has little to do with the lawyer’s role. So, too, with litigation. For the most part, lawyers do not initiate disputes. Clients bring them controversies, some of which may lead to litigation, but the level of litigiousness tends to have more to do with the clients’ activities than it does with how lawyers would prefer to use their time.

The necessary implication of this reality is that the future of the legal profession is not in the hands of lawyers. We can tinker around the edges of our rules of professional conduct. We can issue calls for more courtesy and civility in lawyers’ personal and professional dealings. But ultimately, looking back from the perspective of the future, what lawyers want to have happen will likely be seen as tangential to the way the work of the legal profession actually develops.<sup>5</sup>

To bring the point home, think of yourself as a doctor twenty years or so ago. You had independence; you were doing well financially; your patients thought you on a level with God, and cost control was rarely an issue. The problem, of course, was that you and other doctors were not in control of the world around them. You paid too little attention to how you might

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<sup>3</sup>See, e.g., ABA Comm’n on Professionalism, “...In the Spirit of Public Service:” A Blueprint for the Rekindling of Lawyer Professionalism 10-11 (1986), quoting Professor Eliot Freidson, a member of the Commission.

<sup>4</sup>The quoted statement was the much-repeated theme of the film *Field of Dreams* (1989). It conveyed the idea that if the movie’s hero would build a baseball field, baseball fans would materialize and attend games there.

<sup>5</sup>That is not to say there will not be a continuing effort to increase lawyer professionalism. See, e.g., ABA Comm’n on Professionalism, *supra* n. 2; Peter Megargee Brown, *Rascals: The Selling of the Legal Profession* (1989); Robert A. Katzmann, ed., *The Law Firm and the Public Good* (1995); Professionalism Symposium, 52 S. Car. L. Rev. 443– 758 (2001). For a somewhat skeptical view of some of the concerns expressed in those books and articles, see Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 Hofstra L. Rev. 947 (2002).

constructively address the wave of change that was to come, and despite your professional rhetoric, the practice of medicine has been overwhelmed by change. Developments in the legal profession will similarly be driven by the world our clients face, not the world we think we can create.

### *The Future That Clients Will Face*

One can only dimly see the world future clients will inhabit. The real world will have substantially more nuance. But several trends are already underway, and each will have an impact on the law students that we teach today.

First, lawyers' clients will face a degree of competitive pressure unknown to their parents and grandparents. That pressure is already a reality and will only increase as people in places such as India, China, Eastern Europe, and Latin America become part of markets around the world.<sup>6</sup> The intense competition that results will ultimately benefit customers everywhere, but our clients will experience it in the form of an inexorable pressure for cost control. Many businesses have laid off whole tiers of management, and robots often do work once done by craftsmen. Making the transition to global competition will be hard on many clients and their employees, but it will be necessary in order to keep the clients alive at all. Saying that old ways of doing business will work – and old methods remain unchanged – will not be an option.

Second, and implicit in the first point, clients will increasingly have to think globally. Even what we think of as local businesses will have suppliers and customers – or potential suppliers and customers – all over the world. Have you tried recently to get your telephone or your computer fixed? You find yourself talking to people who call themselves “Pete” or “Sally” but who are talking to you from India. I don't say this to be xenophobic; Pete and Sally have substantial knowledge and ability. I use them as an example simply to say that even people who think they never leave their home town or state deal internationally when they least expect it and that globalization of all kinds of even seemingly local business is likely only to increase.

That reality is seen even when an apparently local client comes in to write a will. When I grew up, almost everyone in even my extended family lived within ten miles of each other. Now, it is not at all unusual for our children to live across the country or around the world, and clients will expect their lawyers to be able to write a will that works wherever the beneficiaries are located.

Furthermore, even many local businesses now have a web site and engage in e-commerce that has them doing virtual business everywhere in the world simultaneously. The day has come and gone when national borders – and certainly state borders – are of primary significance in deciding how a client's transaction should be structured or the client's matter litigated.

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<sup>6</sup>See, e.g., Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (2005); Bill Gates, *Business @ the Speed of Thought: Succeeding in the Digital Economy* (1999).

Third, clients are likely to become increasingly impatient with what they see as the complexity and inflexibility of legal rules. For at least several years into the future, jurisdictions are likely to try in various ways to attract investment and to protect their residents, so legal complexity will be inevitable and compliance with the law will be expensive. Lawyers like to think those developments will make us more important to our clients, but the chances are at least as great that they will make us more resented. Among the major costs clients face are those associated with transactions and disputes, costs represented in large part by lawyers' fees. The days are over when a CEO could say with a half-smile: "Our general counsel's office is the only one with an unlimited budget – and it has already exceeded it!"<sup>7</sup>

Fourth, clients are likely to expect lawyers to understand their business or personal affairs, not just their apparent legal issues. Imagine that your client makes car batteries. The client asks you to help it acquire land for a new manufacturing plant. You will not serve the client well if you think the legal issues will be primarily about real estate law. Closing the land sale will be the easy part. Battery plants use toxic and corrosive materials. The hard issues associated with the new facility will involve zoning, transport and disposal of hazardous waste, and avoiding liability for smells and fire danger. Lawyers who do not take the time – or who lack the background knowledge – to understand what their clients do, how they do it, and what problems realities about the client may create will inevitably serve their clients less well.

This is not entirely new, of course. Lawyers have always brought more to the table than an understanding of the law. Future clients, however, are even more likely to want their lawyers to resemble multi-disciplinary consultants than legal technicians. In the effort to retain clients, it is lawyers with the necessary non-legal understanding that will prevail. Even clients who use lawyers primarily as compliance officers will find them valuable only if the lawyers keep up with rapid changes in the non-legal environment affecting the clients.

Fifth, the need for legal help from those who understand the client's problems well is likely to lead clients to assume more responsibility for their own legal assistance. We are seeing this in the trend for many business clients to bring more work in-house. Doing so lets these clients avoid what they see as high law firm billing rates, but even more, the clients' managers may think that it will also give them access to lawyers who are more sophisticated about the issues the client faces. The downside to this development, of course, may be that such managers will consider personal loyalty to them and their view of what the client's future requires more important than the lawyer's obligations to the client entity. The tension between lawyers understanding the client's needs and lawyers becoming caught up in a perversion of those needs is likely to face future lawyers even more than lawyers in the past.

Sixth, clients are likely to see many legal services as "commodities" rather than as unique and worthy of a premium fee. They are likely to see the services much as one might view a box of detergent, distinguished by brand-name but purchased based on price. Lawyer competition to

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<sup>7</sup>The statement, attributed to the Chairman of the Board of I.B.M. in the 1970s, is quoted in Thomas D. Morgan and Ronald D. Rotunda, *Problems and Materials on Professional Responsibility* (8<sup>th</sup> Ed. 2003), p. 300.

provide those services will be intense.

In part, this development will reflect the impact of information technology on the delivery of legal services. Real estate work, for example, once put food on the table of many lawyers' families. Back in the days of minimum fee schedules, a lawyer could earn up to 1% of the value of the sale just for doing the necessary paperwork.<sup>8</sup> That would be several thousand dollars today. By contrast, some of you may have had my own recent experience when we refinanced our home loan. We had to sign what must have been an inch-thick set of papers, but they had all been generated by a computer program into which a lawyer's assistant had typed key personal information that then appeared as appropriate in the necessary documents. The total legal fee, including for the lawyer's time while we signed the papers, was something like \$250.

The same phenomenon can be seen in estate planning. Many people have the traditional trusts that simplify probate and take advantage of tax basic exemptions, but rarely does anyone sit down and personally prepare the documents. Beyond the lawyer's important judgment about what kinds of documents to choose, the lawyer's output is produced by technology and only customized with the names of the testator and the beneficiaries. These examples should not suggest that the commodity phenomenon will be limited to low cost, personal documents. The same principle can apply equally well to the closing of a merger transaction, a complex commercial deal, or the like. There will be some exceptional situations, of course, but countless matters involve most of the same kinds of obligations, representations, warranties, and other terms as most others.<sup>9</sup>

Changes in the methods of delivering legal services will only increase the competitive pressure on lawyers. Even today, some significant commercial law firms are delivering legal services directly over the internet, selling draft documents, for example, that can be tailored to a client's needs as revealed by a questionnaire that the client completes on-line.<sup>10</sup> Lawyers in such an environment may still have challenging, rewarding careers, but they will not look like the stereotypical lawyers of old. The real estate lawyer to whom I referred has paralegal assistants in each of several closing rooms and he walks from room to room as the documents are being signed. The key to his practice is volume, and his biggest challenge is attracting closings to his office from mortgage brokers around the city. Commodity work will involve legal understanding, but it will tend mostly to be impersonal, high volume, or both.

Seventh, all of these developments will encourage clients to be even less loyal to their

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<sup>8</sup>That was the going rate described in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

<sup>9</sup>Leading firms delivering such services today include Linklaters and Clifford Chance, both based in London, and Blake, Dawson & Waldron, based in Sydney. When the client and lawyer never meet face to face, the location of each becomes irrelevant, except as a matter of court regulation.

<sup>10</sup>For an accessible introduction to such developments, see Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (1996), and Richard Susskind, *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace* (2000).

lawyers than they are today. Today's clients merge and divide so often – or the managers with whom lawyers deal move elsewhere so readily – that client relationships tend to become less like marriages and more like one-night stands. The question clients will ask will not be “What have you done for me year-in and year-out?” It will not even be “What have you done for me lately?” It will be “What can you do for me tomorrow” and “Why should I pick you instead one of many firms promising to do more for less money?” With the ubiquitous availability of world-wide communications, threats that clients will turn elsewhere will tend to dominate every lawyer-client relationship.

Eighth, in all of these developments, there will be many clients whom the future has left behind. We need only think about the mental pictures we have of the people who lost everything in Hurricane Katrina to realize the level of frustration and detail work that will be necessary to help them get the help they need. Quicken Family Lawyer is not going to be able to do the job. Provision of services to the poor and middle class has long been a serious concern for persons worried about justice for all. Lawyer referral services have tried to match lawyer availability with client needs, and group legal service organizations have tried to create pools of clients large enough to justify lawyers addressing those needs, but the need remains.<sup>11</sup> The impact of globalization on those least able to cope with it will be a major reality for future lawyers, and the challenge of providing what we traditionally call pro bono services will only increase as the changes suggested earlier become reality.

#### *Likely Reactions From the Legal Profession*

Over the last century the number of lawyers in the United States expanded almost ten fold, from just over 100,000 in 1900 to in excess of 1 million today.<sup>12</sup> In the first 70 years of the century, the number of lawyers tripled from 100,000 to about 350,000. The number has tripled again since 1970. A consistent fear among lawyers throughout the century was that the supply of lawyers would soon exceed the demand for their services.<sup>13</sup> Some saw the unmet legal needs of the poor and middle class and hoped the new lawyers would address meet those needs.<sup>14</sup> So far the expected lawyer surplus has never seemed to materialize,<sup>15</sup> but changes in the world lawyers

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<sup>11</sup>An excellent treatment of these issues is provided in Deborah L. Rhode, *Access to Justice* (2004).

<sup>12</sup>The figure for 1900 is taken from Richard L. Abel, *American Lawyers* 280 (1989); the current figure is widely assumed to be true based on projections from American Bar Foundation data reported in Barbara A. Curran, et al., *The Lawyer Statistical Report* (1985) and its periodic supplements.

<sup>13</sup>See, e.g., Homer D. Crotty, *Who Shall Be Called to the Bar?*, 20 *Bar Examiner* 173, 175 (1951) (suggesting that permitting use of the G.I. Bill for law school threatens “possible serious overcrowding of the bar”); John C. York & Rosemary D. Hale, *Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook*, 26 *J. Legal Educ.* 1 (1973) (graduates of “new” or “less selective” law schools not likely to find jobs as number of law students expands in 1970s).

<sup>14</sup>See, e.g., Barbara Curran, *The Legal Needs of the Public: The Final Report of a National Survey* (1977).

<sup>15</sup>Economist Peter Pashigian provided what I believe was still the best analysis of the demand for legal

face are clearly now before us.

First, the days of lawyers as talented generalists are likely over. We have long known that no lawyer could be proficient at everything, but we have tended to assume that lawyers are relatively fungible and can adapt to whole new kinds of issues as client needs arise. That is likely to become less true than before. Provision of commodity legal services will become common and lawyers will have to learn to compete for the opportunity to provide them. As discussed earlier, real estate closings are becoming characterized by large-scale use of paralegal document managers, establishment of relationships with mortgage and title insurance companies, and use of specialized software. Much of the software – indeed, much of the work applying it – can and likely will be outsourced to other than U.S. lawyers.<sup>16</sup>

Further, lawyers who become good at closing home sales will not inevitably be equally-effective estate planners for the real estate client who also needs a will. The same will be true in a corporate practice. Lawyers who can develop a routine for Hart-Scott-Rodino filings, for example, will not necessarily be equally good at obtaining routine import licenses for goods of the same clients.

Most lawyers probably will try to distinguish themselves by being the best at delivering unique, tailored legal services that will tend to justify charging premium rates. Even litigators will tend to concentrate their practice in narrow areas. Some will concentrate on white collar

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services in the 20<sup>th</sup> century. It is unclear whether it will work as well in this century. Pashigian found that growth in demand for legal services was most closely related to growth in national GDP. That is, if GDP increased 3% in a given year – as it did on average from 1975 to 2000 – demand for lawyers increased about 3% as well and annually absorbed about 30,000 new entrants to the profession. See, B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand For and Supply of Lawyers*, 20 *J.L. & Econ.* 53 (1977); B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 *A.B.F. Res. J.* 51 (1978); and B. Peter Pashigian, *Regulation, Preventive Law, and the Duties of Attorneys*, in William J. Carney, ed, *The Changing Role of the Corporate Attorney* (1982). See also, Thomas D. Morgan, *Economic Reality Facing 21<sup>st</sup> Century Lawyers*, 69 *Wash. L.Rev.* 625 (1994)(updating Pashigian statistics). For another account of the demand for lawyers, see Richard H. Sander & E. Douglas Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 1989 *Law & Soc. Inquiry* 431. The reason for the relationship Pashigian found may be that a lawyer's role in our society most often involves what Dean Robert Clark has called private "normative ordering," i.e., facilitating transactions, planning for their consequences, resolving disputes associated with them, and seeking to affect the regulatory structure in which they are conducted. Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *Fordham L. Rev.* 275, 281 (1992). See also Ronald L. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *Yale L. J.* 239 (1984); Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 *Tex. L. Rev.* 645 (1992). Lawyers' work also includes defending those injured by the impact of economic activity on them, but the concern about equitable allocation of legal services is likely to continue to find poor and middle class victims having a hard time competing with better-paying clients for the time of people offering legal services.

<sup>16</sup>The nation best positioned to provide such services is India, a nation in which English is spoken widely and the common law tradition flourishes. See, e.g., Eric Bellman & Nathan Koppel, *More U.S. Legal Work Moves to India's Low Cost Lawyers*, *Wall St. J.*, Sept. 28, 2005, p. B-1, col. 2 ("squads of experienced but inexpensive lawyers are [already] doing things ranging from patent applications to divorce papers to legal research for Western clients."); Scott C. Harris, *Outsourcing, Offshoring*, *Nat'l L. J.*, Sept. 12, 2005, p. 14 ("By some estimates, 60% of all legal work by 2016 will be done in India. ... A major U.S. firm quotes the cost of \$10,000 to \$15,000 to prepare and file a patent application; that patent application can be prepared for \$2,500 to \$3,500 in India.").

crime – or even tax fraud within white collar crime – and then state tax fraud within tax fraud. Other lawyers will concentrate on personal injury litigation, then focus on plaintiffs’ work or on defense. Yet others will concentrate on products liability cases – or on pharmaceutical cases within products liability – or even on injuries arising from a particular drug.

Transactional lawyers also will tend to concentrate their focus. Some will negotiate commercial deals, others will develop a finance expertise, yet others will become lobbyists. Even then, some will concentrate only on issues affecting a particular industry, kind of product, or particular market. The world will tend to reward lawyers who are the best at what they do, and lawyers will consequently try to find something at which they can be the best.

Second, the days of lawyers specialized in law alone may be ending. Many lawyers are likely to need to develop expertise in areas beyond the law.<sup>17</sup> Management expertise will likely be one valued skill. Lawyers who move to in-house positions in organizations will want to be seen as part of a management team. Other lawyers’ – and non-lawyers’ – futures will depend on the senior lawyer’s ability to assign work and make cost-effective choices. Selections of who will reach those senior positions, therefore, will tend to depend in large part on identification of those who have such non-legal skills. Even lawyers who deliver commodity services will require a level of management ability that exceeds what has been required of lawyers in the past.

Finance issues are similarly likely to be drivers of business success and lawyers who can understand and intelligently address such issues will be more valuable than their less-adaptable counterparts. There is only so much that clients can do in terms of building more efficient machines or designing more efficient production lines. It seems likely that ready and efficient access to capital from several sources will be critical to business clients, and lawyers will play a part in finding and acquiring that capital. Because access to capital markets is often highly regulated – and because the costs of being wrong about the legal requirements are often of bet-the-company magnitude – lawyer will be heavily involved in those efforts. Yet understanding the legal requirements will typically require understanding the financial instruments the client plans to employ. Developing financial understanding sufficient to analyze sophisticated financial instruments has not traditionally been part of a typical law school curriculum.

Foreign language facility is also likely to be central to many lawyers’ practice. We have been fortunate that English has become the international language for many business dealings, but few lawyers will be able to assume that they need not know a client’s customer’s or supplier’s language. Not only will fluency in the relevant language facilitate the kinds of social contact that can lead to an agreement, but if a matter is ever litigated abroad, such fluency will be essential to understand the issues and process. Even in representation of individuals, the assumption that all clients of American law firms are fluent in English is too simple even today.

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<sup>17</sup>See, e.g., Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 *J. Legal Educ.* 480 (2002).

The number of U.S. citizens for whom English is still a second language is high and growing.<sup>18</sup> Lawyers will not begin to hear many of their clients' concerns and objectives without the ability to communicate with them directly, rather than through an interpreter who might distort the meaning of lawyer and client.

Further, local knowledge is likely to be a particularly relevant basis to distinguish among lawyers. Local knowledge can take two forms. Geographic knowledge consists of understanding the hot-button issues in a lawyer's state or city. It includes special relationships the lawyer has with judges, banks and other people with whom a client may deal. It is a basis upon which a client will distinguish one lawyer from another, and such knowledge will be an asset almost any lawyer can exploit. Agency knowledge, in turn, refers to a lawyer's particular understanding of the working of one or more institutions – typically government agencies. A lawyer with a specialized understanding of how to get environmental approval for a project in Oklahoma, for example, can be important for many clients, and future lawyers are likely to spend considerable time developing and communicating that they have that kind of expertise.

Third, law firms have long tended to market themselves as entities – almost as large individual lawyers. Realistically, however, future law firms are likely to perform at least three functions simultaneously and wise firms will tend to break out and try to develop each of them.

One law firm function will be simply to allow lawyers to share the physical burden of delivering services to clients. In a world of instant communication, clients tend to demand almost instant response. No lawyer can respond to all demands from multiple clients, operating potentially all over the world, without suffering physical collapse. Just as obstetricians form group practices so that each does not have to deliver babies every night, lawyers will continue to form firms partly to keep their clients served but themselves sane.

Next, law firms will increasingly become shopping centers for clients. Rather than using one firm for all its needs, clients will look over the list of lawyers at several firms and use those that it wants for the particular needs that arise.<sup>19</sup> Law firms, in turn, will have to diversify their service offerings so as to diversify their risk and keep or obtain the chance to deliver at least parts of a client's legal services. Some law firms today have a common name but seem to be made up of key individuals or practice groups that operate with some autonomy. We know that in recent years, for example, law firm expansion has often been by acquisition of practice groups that have previously operated independently or as part of competing firms.

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<sup>18</sup>In the 2000 Census, 47 million people aged 5 or older, spoke a language other than English at home. That was 18% of the U.S. population, up from 14% in 1990 and 11% in 1980. The proportion of Americans aged 5 or over who reported speaking English less than "very well" has grown from 4.8% in 1980, to 6.1% in 1990, to 8.1% in the 2000 Census. U.S. Census Bureau, Census 2000 Brief 1-2 (2003).

<sup>19</sup>One reason that clients have moved from using a single firm to using several may be the clients' tendency to use a general counsel rather than the chief executive as the person to select outside counsel. A general counsel increases his or her own importance to top executives by giving no single outside lawyer the close relationship with executives that the general counsel has.

We might speculate that the law firms that result from such growth will be less like retail department stores and more like shopping malls, i.e., the firms will share a few common bonds and may operate under one roof, but in other ways the constituent units will have separate clients and agendas. Healthy firms try to cross-sell multiple services to clients, but growth in law firm attitudes that lawyers only “eat what they kill” – i.e., are paid on the basis of billings for which they are responsible – is a predictable result of a sense that practitioners add value to clients primarily because of specialized expertise rather than because of the value of the law firm as a whole.<sup>20</sup>

In addition, however, many law firms will continue to try to provide multiple services and to provide them seamlessly to clients wherever the clients’ activities may take them. Part of that will be done electronically. Indeed, systems now being introduced allow clients direct access – for what is likely to be a fixed price – to law firm files, including billing records, depositions, and legal or factual research on whatever the firms and their clients decide is relevant to the clients’ needs and consistent with the firms’ obligations to other clients.<sup>21</sup> There will always be a need for local firms to provide local expertise and services, but increasingly, such firms will either become part of 1000+-lawyer mega-firms, or they will form joint ventures with firms in other parts of the country or world that give them the appearance and seamless quality of such a firm.

Fourth, in terms of meeting the needs of individual clients, the next significant group of suppliers are likely to be those who will help clients help themselves.<sup>22</sup> Banks and insurance companies, for example, are also likely to want to provide estate planning services or assist lay executors in the administration of estates. Similar kinds of help may come from investment advisors or financial planners. At least in the early years, the services may be provided by lawyers working for the commercial organizations, but the services may soon be standardized and delivered by non-lawyers either in person or via telephone or internet.<sup>23</sup>

Bar organizations are likely to resist such non-lawyer activities with all the resources at their command. It will be said to be not only the unauthorized practice of law by a corporation,

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<sup>20</sup>One implication of this analysis would be that clients as well as lawyers will have a stake in ethical rules that permit law firms to exercise appropriate control over their members so as to preserve and develop the value of the reputation that is an asset that benefits them all.

<sup>21</sup>The technologies are widely advertised in lawyer publications, and even discounted for puffing, the implications are enormous. See, e.g., Neil Cameron, Client Portals: 20 Years Late But Moving Fast, *The American Lawyer*, July 2001 (advertising insert).

<sup>22</sup>See, e.g., Joan C. Rogers, *Cyberlawyers Must Chart Uncertain Course in World of Online Advice*, 16 *ABA/BNA Lawyers’ Manual on Prof. Conduct, Current Reports*, p. 96 (Mar. 15, 2000); Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection of Protection of the Legal Cartel*, 34 *Ind. L. Rev.* 121 (2000).

<sup>23</sup>For a provocative view of members of the legal profession practicing alongside and in competition with non-lawyer “law workers,” see Herbert M. Kritzer, *The Future Role of “Law Workers”*: Rethinking the Forms of Legal Practice and the Scope of Legal Education, 44 *Ariz. L. Rev.* 917 (2002).

but a traditional conflict of interest as well, because the corporate sponsor might also try to engage in various other business transactions with the clients.<sup>24</sup> However, those objections will not necessarily succeed. Insurance company provision of legal services is well established in the context of auto and homeowner liability litigation.<sup>25</sup> Similarly, when a company pays for the cost of an insured's house closing, adoption, name change, or the like, we call it group legal services. In both cases, insured clients receive services from lawyers they often hardly know, but one rarely hears objection to the quality of those services. These developments will be a blow to lawyers who see traditional individualized services turned into relative commodities, but from the point of view of the middle-class clients, the changes may spell the difference between adequate services and no services at all. In that sense at least, they will genuinely expand the sense of justice experienced by those clients.<sup>26</sup>

Fifth, tomorrow's wise lawyers will develop the expertise to maintain the flexibility to stop being lawyers, at least in private firms. Many lawyers today believe they work too hard, yet spend too little time at home or working on matters that make a difference.<sup>27</sup> They may be right, but I believe there is room for optimism that such concerns may prove cyclical. The competitive forces that have made lawyers miserable can be harnessed to provide them hope.

The jump in entry level salaries paid to young lawyers in recent years can be traced to the fact that dot-com companies and investment banks were pursuing many of the same people. At the other income extreme, government offices and law schools have attracted lawyers seeking better ways to balance time demands of work, family and community. My point is not that lawyers must choose between law firms and these other ways to use their training; it is that law firms competing for people who have alternatives will have to offer comparable opportunities or lose the people upon whom they rely for the source of their competitive strength.

One should not be naive about the ease or speed of such market adaptation, but the fundamental point is that lawyers have many more options than they seem to acknowledge even to themselves. Just as technology providers and other non-lawyers will increasingly compete for

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<sup>24</sup>The principal prohibitions are Model Rules of Prof'l Conduct, R. 1.7(b) & R. 1.8(a). The definitive work on unauthorized practice remains Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *Stan. L. Rev.* 1 (1981).

<sup>25</sup>This kind of service has traditionally been justified as an exception to the usual rules permitted because the insurance company seems to be representing its own interest in minimizing the liability of its insured. See, e.g., *Restatement of the Law (Third): The Law Governing Lawyers* § 134, *Comment f*.

<sup>26</sup>Mandatory pro bono service would probably not be practical even if lawyers were willing to assume the burden. Issues of language proficiency, for example, will increasingly define who can and cannot deliver services to our most vulnerable citizens. Service for poor persons from all over the world will probably not be provided on a large scale by part-timers. Legal services for the poor will probably be funded by a combination of public and private sources.

<sup>27</sup>See, e.g., Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *Vand. L. Rev.* 871 (1999).

the work of law firms, people with legal training can increasingly expect to be able to see a better mix of compensation and responsibilities to meet their needs.

### *Educating Lawyers for the Future They Face*

If it is true that the world lawyers face is rapidly changing and the world in which law students will practice will be different than that in which their professors practiced, it should not surprise us that legal education will be called upon to respond in ways that help students deal with the new realities. I will offer five broad propositions about legal education that should be considered by law schools today if they want to be able to help meet the future demand for their graduates rather than be overwhelmed by it.

First, because the era of the lawyer-generalist is over, detailed, specialized understanding will be increasingly critical to a graduate's success.<sup>28</sup> The model in which law schools developed raw material that could be nurtured and shaped in the first law firm job is no longer relevant for most lawyers. About 40% of all young lawyers change jobs within the first three years of their practice.<sup>29</sup> Firms lack both the incentive and the patience to invest in people who will soon depart. Practice organizations want people who can help them immediately, and law schools will have to take that reality seriously.

I am not calling here for what is sometimes called "training" to replace "education." As much or more than today, future lawyers will require a legal education that raises more questions than answers and that leaves more ambiguity than training in specific skills tends to leave. At its best, education provides lawyers with the ability to confront new situations and to deal with them effectively. Tomorrow's lawyers will face new challenges repeatedly over their careers, and only lawyers with substantial perspective will be able to retrain and redirect their efforts to meet those challenges effectively.

Indeed, even recognizing that lawyers will not be generalists, there will be some common understanding that will be appropriate for all persons with a license to practice law. For many years longer than most of us can remember, however, the first year law school curriculum has consisted of courses involving the substantive law (typically the common law) of torts, contracts, civil procedure, property and criminal law. Even a moment's reflection reveals that the content

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<sup>28</sup>Even more troubling, many law students today seemingly want a degree more than either legal training or a legal education. At worst, that attitude is lazy and cynical. However, the attitude may suggest that the only real legal education is on-the-job training. That was the way many lawyers developed their professional skills until well into the 20<sup>th</sup> century. Most states long ago decided that modern lawyers require more systematic education than on-the-job training entails. If it is true that professional demands are changing more rapidly than law professors recognize, that is a serious indictment of law schools. But on the job training is unlikely to be able to stay ahead of the changing professional demands lawyers will face, and students who want a degree more than an education have their values backward.

<sup>29</sup>See, e.g., David P. Wilkins, Proposal for the Development of a Center on Lawyers and the Professional Services Industry at Harvard Law School (2003), included in the reading materials for this symposium.

of those courses has or will have little or nothing to do with how most law graduates think about law, much less how most of them practice their profession. As suggested earlier, for example, today's real property lawyer tends to focus on management of documents, software and people, not the now-largely-discarded fee tail or the rule against perpetuities.

There is no magic in creating new course titles, but sometimes titles convey new content and imagination. Thus, I would suggest that first year courses have titles and substance such as:

i. The Power to Make Law – a combination of jurisprudence and constitutional law, this course would focus particularly on government organization, expressly including administrative agencies. It would also include state constitutions and their delegation of law-making authority to municipal entities.

ii. Sources of Legal Rights – another focus on constitutional and jurisprudential ideas, this course would deal with the Bill of Rights, but it would also introduce civil rights legislation. The course would also address property rights – including rights in intellectual property – and the correlative regulation of those rights.

iii. Enforcement of Agreements – most closely related to the present contracts course, this course would ask when and why the force of law can and should be invoked to enforce private arrangements. It would consider statutory as well as common law responses to these issues, and it would introduce students to issues raised by the creation and enforcement of remedies.

iv. Redress of Wrongs – an integration of issues now addressed in both torts and criminal law courses, this course would ask how we decide to define an act as wrong, and when we use public law, private law, or both to address, sanction or remedy the wrong.

v. Resolution of Disputes – an expansion of the current course in civil procedure, this course would introduce issues of evidence, arbitration, negotiation and criminal procedure in an effort to understand the breadth of available alternatives. The course would also focus on the more general problem of finding facts as opposed to applying the law to assumed facts.

vi. Internationalization of Practice – informed by both comparative and international law, this course would seek to have students see the implications of the internationalization of commerce and human migration, and it would introduce students to other legal systems' approaches to issues the students have seen in their other courses.

vii. Legal Analysis & Expression – most similar to the present course in legal research and writing, this course would concentrate on developing a student's ability to synthesize legal materials, including but not limited to common law cases, and to express findings clearly and persuasively.

viii. Professional Roles and Values – not a traditional course about the content of professional standards, this course would examine what it has meant to be a legal professional,

alternative ways to use a legal education, and the roles of lawyers in society.

Many professors would object that they have long used the teaching of first-year courses to help students think about issues broader than their course subject matter. Further, some issues addressed under my new headings would likely be the same as in current curricula. Both responses are valid, but my point is that if we were to think afresh today about what 21<sup>st</sup> century lawyers will in fact be doing, we would not propose to teach primarily the common law torts and property.<sup>30</sup> We would focus on helping our students “think like a lawyer,” but our model would be a 21<sup>st</sup> century lawyer. Such a lawyer will have to reason from more than traditional cases, and we should make constitutions, legislation, regulations and treaties part of students’ earliest introduction to law.

The upperclass curriculum should then permit, indeed encourage, students to concentrate their work in particular areas of law and on the development of particular legal skills. Rather than having everyone take a course in real property, for example, those issues would become part of an upperclass course for those interested in learning about its principles and practice. The same would be true for many substantive issues now addressed in criminal law, torts, contracts and civil procedure. Courses such as income tax, corporations and professional ethics might be taken by most or all students because the issues they raise will be applicable in whatever substantive practice area the lawyer may choose, but advanced work in most areas would tend to be taken by those who want to concentrate their practice there.

This should not be taken as a call for only “practical” training in upperclass courses. Good theoretical background in the area of one’s specialty will be even more important than it is in the first year courses. My point is simply that one cannot go into depth in all areas of law, and today’s random smorgasbord of upperclass courses will prove neither nourishing nor filling. There should be room for students to change direction midway through their education, and there should be clinical and externship experiences in which to obtain hands-on experience, but the overall object should be to give students a grounding on which to build a career and make students as ready as possible to contribute in their practice organization from the time they arrive.

Second, the push toward law school homogeneity over the last fifty years should end. That effort was effective as a way to improve the quality of law schools that in years gone by were not very good. Lots of law schools obtained new libraries, larger faculties, and the like, based on the threat of losing ABA accreditation. In the future, however, most law schools will be unable to do everything well. Large law schools like George Washington may be able to be better in more fields than smaller schools will be, but if it is true that many Oklahoma lawyers will tend primarily to market their local knowledge and their association with local institutions, it might make sense for one or more Oklahoma law schools to focus intensely on graduating

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<sup>30</sup>For an only-partly tongue-in-cheek account of the current first year in law school, see Michael C. Dorf, The Five-Minute Law School: Everything You Learn in Your First Year, More or Less, in FindLaw’s Legal Commentary, Aug. 3, 2005, at <http://writ.findlaw.com/dorf/20050803.html>.

lawyers with those unique strengths.<sup>31</sup>

The reality most likely to delay such a development is the annual ranking of law schools published by U.S. News & World Report each March. Schools' preoccupation with the tier into which they fall, or their spot within the top tier, has already led to conduct pushing the envelope of honesty,<sup>32</sup> and ratings concerns are likely to discourage innovation that might have unintended but unavoidable rating consequences. However, the diversity of student interests and the range of potential uses of a legal education are so great that, ultimately, the demands of law students and a recognition of schools' self interest are likely to require law schools to concentrate their efforts in subject matter areas where they can quickly be seen as among the very best.

Third, schools are likely to need to find more efficient ways to deliver a legal education. The cost of legal education for most students must come down, or at least not continue to rise as rapidly. The cost of a year's study at several American law schools now exceeds \$40,000. Aggregate educational debt for many law graduates exceeds \$100,000.<sup>33</sup> Those figures may seem tolerable for graduates who expect to start their legal career making over \$125,000 per year, but such starting salaries are available only to the very few. The average lawyer makes only a little over \$100,000 annually,<sup>34</sup> and many law graduates find themselves spending many years digging out of the financial hole that the cost of their education has created.

Part of the cost and breadth of law study can likely be reduced by distance learning.<sup>35</sup>

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<sup>31</sup>There is evidence that some law schools are taking this reality seriously and writing mission statements to guide their future developments. See Gordon T. Butler, *The Law School Mission Statement: A Survival Guide for the Twenty-First Century*, 50 *J. Legal Educ.* 240 (2000).

<sup>32</sup>The New York Times reports, for example, that LexisNexis and Westlaw provide their electronic research services to law schools for flat rates ranging from \$75,000 to \$100,000 per year. Because the U.S. News ranks schools more highly if they "spend" more per student, however, the University of Illinois College of Law reports its "spending" for the services as \$8.78 million per year, a sum it says is the "value" students receive from the services. Alex Wellen, *The \$8.78 Million Maneuver*, July 31, 2005, Sec. 4A, p. 18, col. 1. Needless to say, if the University of Illinois College of Law were a publicly-traded company, its dean would face charges of securities fraud.

Another common law school practice has been the creation or expansion of part-time evening programs, the grade point averages and LSAT scores of whose students are not considered by U.S. News in its calculation of a school's selectivity. This characteristic of the ratings thus has led several schools to admit their poorest-predicting students – up to as many as 1/3 of their entering class – into the part-time category so as to avoid admitting the true composition of their class.

<sup>33</sup>See, e.g., John A. Sebert, *The Cost and Financing of Legal Education*, 52 *J. Legal Educ.* 516 (2002); June Knonholz, *More Students, Higher Prices, Tougher Competition*, *Wall St. J.*, Jan. 31, 2005, p. R4.

<sup>34</sup>Average lawyer incomes are hard to determine. Bureau of Labor Statistics, *2004 National Occupational Employment and Wage Estimates*, p. 211, reports the median earnings of all lawyers to be \$108,790.

<sup>35</sup>See, e.g., Peter W. Martin, *Information Technology and U.S. Legal Education: Opportunities, Challenges and Threats*, 52 *J. Legal Educ.* 506 (2002); Linda C. Fentiman, *A Distance Education Primer: Lessons From My Life as a Dot.Edu Entrepreneur*, 6 *N.Car. J. Law & Tech.* 41 (2004).

Such courses take two forms. Synchronous distance learning occurs when the law teacher and law students are in different places but talk over what is essentially a picture-phone. The class takes place in real time, and in such a class, students at a school like Oklahoma City could be taught by a professor in Washington, or Oxford, or Tokyo. The professor can see, question and answer questions just as if he or she were here. There is an up-front cost to creating the communication capability, but with the development of new voice-over-internet protocols, I understand that the per-hour cost has come down.

Asynchronous distance learning, on the other hand, does not involve real-time contact. It uses CD-ROM or on-line technology to convey lectures and recorded classes. At the very least, such technology represent a useful way to provide substantive information from a single instructor to potentially thousands of students at a reduced cost. The technology can also allow students to do interactive drills with new material, and it is even promising as a way for students to do legal research and writing exercises.<sup>36</sup>

There are obvious drawbacks to the technology. Student using such materials cannot ask the professor a direct question, although e-mail can make even that possible on a delayed basis. One can properly be concerned about a legal education received wholly from packaged or on-line materials; contact with faculty and other students is often important to a student's development in ways that can never be measured. But as a supplement to live teaching in upperclass courses, and as a way for students to build upon a groundwork laid in more traditional classes, it seems inevitable that law schools and their students will turn to such technology.<sup>37</sup>

Compressing the time required for the law school experience may prove to be another way to reduce costs. Tuition and living expenses, high as they are, typically are only part of the cost of going to school. Often the greater cost is income not earned in the three years of law school. The ability to complete law school in two years or less could substitute the relatively high salary of a first year lawyer for the relatively insignificant salary of most students.

The change in ABA accreditation standards allowing for 13-week semesters now facilitates scheduling three semesters in each calendar year.<sup>38</sup> Thus, a student could complete the traditional six semester legal education almost a full year early. The University of Dayton has taken the rules to their limit and initiated a five semester program, i.e., two years plus the

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<sup>36</sup>The exercises can be graded and commented upon by adjunct instructors working from home, wherever in the world home might be.

<sup>37</sup>Currently, ABA Standard 306(b) treats both synchronous and asynchronous distance learning the same way and provides that a law student may earn credit for such courses only after the first year and may apply no more than 12 credits in such courses toward a degree in law. For a view of technology in higher education more generally, see John L. Lahey & Janice C. Griffith, *Recent Trends in Higher Education: Accountability, Efficiency, Technology, and Governance*, 52 *J. Legal Educ.* 528 (2002).

<sup>38</sup>ABA Standard 304(a) requires that a law school academic year consist of at least 130 days, typically 26 weeks of 5 days each.

intervening summer.<sup>39</sup> Such a compressed approach will not be attractive to everyone; it would deny students and firms the summer many use to size each other up before offering or accepting a permanent position, for example. What these developments recognize, however, is that time is money, and cutting costs will be an important competitive factor as students select law schools.

Fourth, law schools should move beyond teaching law to recognizing that education about non-legal matters will be increasingly important to lawyers. If I am right that a lawyer's knowledge about a client's substantive issues will be at least as important for many lawyers as a knowledge of the law, law schools ultimately will have to acknowledge that reality.<sup>40</sup>

Calling upon our earlier examples, learning corporate finance will be equally or more important for a student than taking another course in corporate taxation. A year in China learning the Chinese language will set a future lawyer more apart from her contemporaries than taking a half-dozen courses in real estate or trusts. My point is not to disparage legal study. It is to reiterate that a lawyer's task will be to give clients and other lawyers a reason to seek out that lawyer rather than someone else. As communications technology, as well as multijurisdictional practice rules, make it increasingly possible for an Arizona client to work with a lawyer in Oklahoma City almost as easily as with a lawyer in Phoenix, or vice versa, a lawyer can live where he or she chooses and practice as far away as his or her unique abilities attract clients.

With this in mind, I would suggest that universities consider a move to a three-four pattern of law study, with the fourth year in law school consisting of non-law courses. Under this plan, a student would take his or her first three years of college as they now do. Then, the student would take the first year of law school, and as was once the common pattern, receive a bachelor's degree based on the total credits earned.

At that point, the student would take three more years of graduate level and law school courses to earn a Juris Doctor degree. If the study is also sufficient to earn another degree (e.g., an MBA), or a non-degree certificate, that would be awarded as well. The point of this approach to legal study would be that the usual work of the law student's senior year in college would not

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<sup>39</sup>ABA Standard 304(e) provides that a student may not do more than 20% of his or her coursework in a single term. Thus, Dayton students apparently take exactly 20% of their requirements in each of five semesters.

<sup>40</sup>This is by no means a new insight. See, e.g., Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("For the rational study of the law, the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics").

precede the legal education; it would be taken in the context of that education and be taken at a more advanced level than would ordinarily be possible.

Fifth and finally, law schools will increasingly have to recognize that continuing legal education will be a larger part of their program than it traditionally has been. Many law schools have delivered continuing education only as a public service or as a way to keep in touch with alumni who might be solicited for gifts. However, lawyers now live longer – and practice longer – than ever before, and at the same time, legal needs and opportunities are likely to change more quickly. Both facts will make keeping up and even redirecting practice much more common than it has been, and a law school’s substantive contribution to that process of a lawyer’s continued growth will mark one of its highest forms of public service as well as a potentially important source of revenue.

### *Conclusion*

Ultimately, the point of this article is that the shape of today’s law schools can best be determined by the shape of the world the next generation of lawyers will face. We cannot know all the details of that world, but both law schools and their graduates are likely to play a key role in it, and we can know enough to start planning how our law schools should respond.

Change will not be easy. There will be a chicken–egg problem as schools wait for teaching materials for the new courses, for example, while authors and publishers wait to know that schools will offer the courses in which the materials might be used. What is most likely to happen, however, is that once the transition begins at a few “first tier” schools, a rush will begin, and those who are ready to respond will have an inevitable advantage. It is thus not too early for law schools to begin to plan for those likely changes.