Pace Law Review

Volume 28
Issue 1 *Fall 2007*

Article 1

September 2007

Convocation on the Face of the Profession: Judicial Institute on Professionalism in the Law

Stephen J. Friedman

PACE LAW REVIEW

Volume 28 Fall 2007 Number 1

Keynote Address

Convocation on the Face of the Profession: Judicial Institute on Professionalism in the Law

Re-Engineering Law Practice: Court of Appeals, Albany, N.Y., April 23, 2007

Stephen J. Friedman*

Thank you, Lou. It is a privilege to deliver this keynote address before such a distinguished audience, especially one that is engaged in such a critically important mission. My special thanks go to Chief Judge Kaye, whose wide-ranging dedication to improving the administration of justice in New York State

* Stephen J. Friedman is the president of Pace University and the former Dean of Pace Law School. He received his AB *magna cum laude* from the Woodrow Wilson School of Public and International Affairs at Princeton University, and his JD *magna cum laude* from Harvard Law School, where he was an editor of Harvard Law Review and a recipient of the Sears Prize. Friedman is a former senior partner at Debevoise & Plimpton LLC, commissioner of the Securities and Exchange Commission, deputy assistant secretary of the Treasury, executive vice president at The Equitable Companies Incorporated and the E.F. Hutton Group Inc., and U.S. Supreme Court law clerk. He has been an active leader in the non-profit world.

led her to create this Institute, and to Lou Craco, who has given it such impressive leadership.

I have been asked to consider why some mature lawyers—those that have practiced eight to twenty-five years—leave private law practice and why others "stay in the game." I have extended my mandate somewhat beyond twenty-five years of law practice, because I think that it is when they enter their fifties and sixties that many lawyers reassess their feelings about the profession.

I should say at the outset that a good deal of what I am going to say is mostly applicable to lawyers in medium-sized and larger firms and largely to those with business rather than individual clients. That is a reflection of my own experience, and also because the experience of single practitioners and lawyers in small firms seems to be different – and in some respects more satisfying.

The pace of change in the legal profession since I graduated from law school in 1962 has been very palpable. Many lawyers bemoan those changes and call for a return to the old ways of doing things. Are they right? Harking back to Euclidean plane geometry, I would like to lay before you an axiom and a proposition. The axiom is pretty simple: nothing stays the same, not even the legal profession; and most structural changes in the profession are irreversible.

Next, the proposition, which I call Friedman's law: About ten years ago, I had an interesting conversation with my seatmate on an airplane. He was an architect in his sixties, and he spent the better part of our trip complaining about the decline in the profession of architecture during his lifetime. As he talked, I recalled similar conversations with accountants, doctors and lawyers of the same age, and I formulated Friedman's Law: there is virtually no profession in which the older members do not feel that the profession has declined drastically during their lifetime. Moreover, that seems to be true of successive generations.

Now, we know that is not possible. If we begin measuring the decline in the legal profession with Cicero (who did complain about decline during his lifetime), we would be practicing somewhere in the nether reaches of hell by this time.

Why do so many lawyers think that their profession has declined? Most of us believe that the legal profession and, indeed, our law firms, were just about right when we first joined them. We take our professional world as a given when we first join it, and any major changes are seen as a degradation from that state of Platonic perfection. In short, we confuse change with decline.

Change is inevitable because the needs of our clients change, the economy changes and the structure of our competition changes. Lawyers and law firms must change to accommodate those shifts. It is a mistake to confuse the traditional ways of doing things with the traditional values of our profession. Our challenge is to identify the values in the legal profession that we want to preserve, and to find new mechanisms for protecting and promoting them that are appropriate in this changed world. The problem is that lawyers hate to change the way they practice law and organize their firms.

While we can regret the growth of the notion of law as a business, we cannot deny it or wish it away. In many ways, it is more a lament than an analysis. Law has always been a business in the sense that it involves a personal service rendered for profit. To put my thesis in its most provocative form, the problem is not that the practice of law has become a business, but that lawyers are not businesslike enough. What I mean is that most firms have adopted only part of what it means to be a business – some pretty rudimentary measuring of legal output and a crude system of financial incentives. This is a legal version of nineteenth century capitalism.

The other part of being a business includes the steps that make truly great businesses: developing and transmitting a strong culture and values; taking a great deal of care to guide the career paths of both associates and partners; thinking about how to re-engineer how they do things to be more efficient and increase quality; and many other things. I will come back to this later, but I ask you to compare the amount of time and effort a firm like McKinsey, or a company like General Electric—not to mention the United States Marine Corps—devotes to training even their most senior executives, and to building and inculcating the firm's culture and values, with what the typical American law firm does in the same areas.

We lawyers are superb at dealing with changes in the law; we strive to stay on the cutting edge of new developments for our clients. But we are generally pitiful at thinking of new ways to structure how we render legal services. Re-engineer the way we practice law? It is a foreign concept!

I would like to explore just three or four of the major changes during my professional lifetime and the ways in which we have coped with them. I think that discussion will illustrate how far we have to go and the potential for increasing the quality of life for American lawyers.

I. Growth in Complexity in the Law

Let me begin with the astonishing growth in the complexity of the legal system. The growth in the size of the Internal Revenue Code in the last 30 years says it all.[1] That change is mirrored in virtually every field and amplified by the growth of whole new regulatory systems: environmental law, employment law, intellectual property law and health law are just a few examples. Now, that is a good development! One of the truly great things about being a lawyer is that it is possible to change one's job without changing one's seat. As the law changes and new legal and regulatory systems appear, lawyers have to adapt and master whole new conceptual systems. I have always found that process tremendously exciting and satisfying and, for many of the lawyers I know, it is this evolution in their practice that keeps them challenged and energized.

Complexity has another effect, however, which has made law practice less attractive for many of us. Sophisticated clients, and particularly those who deal with outside counsel through a general counsel, want a lawyer who knows what he or she is doing. Clients want lawyers who have an established reputation in particular areas. They ask corporate lawyers for a deal list and litigators for examples of similar lawsuits they have handled. They are reluctant to pay for on-the-job training for associates and certainly are not willing to do so for partners.

1. DAN R. MASTROMARCO & DAVID R. BURTON, NAT'L SMALL BUSINESS ASS'N, THE INTERNAL REVENUE CODE: UNEQUAL TREATMENT BETWEEN LARGE & SMALL FIRMS 8 (2005).

In the good old days, one of the best things about law practice was the ability to be a generalist. When I was a young associate, I worked on a tax problem one week, some litigation the next and a corporate transaction in the third week. From time to time, I fought a labor election or drafted a will. Perhaps that kind of variety is a figment of my romantic memory, but I don't think so.

While we may still think we have the capacity to practice law that way, it has become increasingly difficult to convince our clients of that. Reinforcing the skepticism of our clients about generalists, the high hourly charges that characterize law practice today have generated intense pressures for efficiency and productivity. As a consequence, many of us have found ourselves knowing more and more about less and less—we have become specialists. This has had a profound effect on the experience and training of young lawyers, where these pressures have created great momentum for early specialization, sometimes at an absurd level of detail. That trend is not confined to large law firms, and I believe that it increasingly affects even single practitioners. It has also, in my view, made the typical "learn to think like a lawyer" approach to legal education manifestly too limited.

Is this trend reversible? No, clearly not. The appropriate response is to recognize the threats of specialization, train our young lawyers appropriately and give more thought to creating career paths for them that will provide constant change, growth and challenge. This is the reason that, at many large companies, the human resources function is recognized as critically important.

In that sense, most law firms do not even have a human resources function. They have personnel administrative offices. They pay astonishingly little attention to the motivation and career paths of their associates and partners. It is assumed that associates will be motivated by the desire to become partners (and in fact they leave in droves), and partners will be motivated by the desire to be successful. Partners are left largely alone so long as they work hard and bring in new clients. And when they do not—I will come to that later. That is not much of a way to run a business or a profession.

II. Increased Diversity in the Legal Profession

A second major trend is increased diversity in the legal profession. In my law school class there were eight or ten women. Today about half of all law students are women.[2] At Pace Law School, about fifty-eight percent of the entering full-time class are women.[3] Half of the lawyers hired at the larger firms are also women.[4]

There the challenge begins. Women associates become partners at a much lower rate than do men, in large part because many of them leave before they reach the point that they are considered for partnership.[5] Both the hiring and the promotion of other minorities, especially African-Americans and Hispanic-Americans, has been much slower.[6]

What is standing in the way of hiring and promotion? In the case of women, firms are losing many of their most talented women associates too early in the process because of the pressures and time demands of law practice.[7] Law firms have simply not come to terms with the fact that the pre-partnership years are also the prime childbearing years. Many firms have introduced part-time programs for both associates and partners, but that approach does not accommodate the needs of most women. What is needed is a means for women who so desire to work on a substantially decreased schedule during those years, but one that permits them to keep their hand in the game. And there must be a way for them to get back on the partnership track when they are ready to do so by working full-time.

Many lawyers believe that this curtailed and unorthodox time commitment is not consistent with the demands of modern law practice. The question is how long can you afford to think that way if half the people you hire are women? If lawyers brought the same imagination and creativity to solving this

2. Judith L. Maute, *Lawyering in the 21st Century: A Capstone Course on the Law and Ethics of Lawyering*, 51 ST. LOUIS U. L.J. 1291, 1305 (2007).

3. Pace Law School: Quick Facts, http://appserv.pace.edu/execute/page.cfm?doc_id=23350 (last visited Sept. 8, 2007).

4. Timothy L. O'Brien, *Up the Down Staircase: Why Do So Few Women Reach the Top of Big Law Firms?*, N.Y. TIMES, March 19, 2006, § 3, at 1.

5. *Id.*

6. *Id.*

7. *Id.*

problem that they bring to finding new ways for their clients to achieve important objectives, it could be done.

Another approach, which we have adopted at Pace Law School, focuses on women who have stopped practicing law after a few years in order to raise their children on a full-time basis. When they wish to return to law practice ten years later, or more, many of them are out of touch with the changes in the law, have legal skills that have suffered from disuse and find it difficult to make a credible case to law firms about why they should be hired. At Pace, we have begun to offer a special one semester, part-time program to provide intense updating in both skills and selected substantive areas of the law for those who want to return to law practice.[8] Law firms need to embrace this idea!

Other minorities present quite a different set of challenges, and it is too important to deal with briefly. Much more attention needs to be devoted to attracting talented minority students to law school, to creating effective role models, and to intense mentoring and individualized job placement.

III. The Increased Mobility of Lawyers

Another very positive trend has been the increased mobility available to lawyers. The legal profession (along with academia) is almost unique in offering the ability to leave law practice for government service or a stint as a general counsel or in business or academia, and then to return to law practice, often to the same firm. There has also developed an extraordinary mobility for both associates and partners to move from one firm to another. Around twenty-five percent of the associates hired by large law firms depart each year.[9] Even more astonishing, among the American Lawyer's largest two hundred

8. Press Release, Pace Law School, Pace Law to Offer New Directions: Practical Skills for Returning to Law Practice (Mar. 7, 2007).

9. Joan Newman, *Appreciate Your Associates: Associate Training and Development Programs Are Critical to the Success of Any Law Firm Desiring to Be A "Workplace of Choice"*, 26 No. 2 LEGAL MGMT. 47, 51 (2007).

firms in 2004-2005 there were 2,429 lateral moves by partners according to Hildebrandt International.[10]

As lawyers, we use essentially the same set of skills and talents throughout our legal career. To be sure, the importance any one characteristic, like judgment, varies at different stages. Some lawyers find that using the same "muscles" does not provide enough sense of personal growth. For them, this enhanced mobility is a blessing. It provides new environments, new challenges and new learning experiences that refresh and energize one's life. That has certainly been true in my own career.

There is, of course, a downside to this mobility. From the lawyer's point of view, those who leave for government service or to serve as a general counsel find, upon returning to private practice, that the growth in complexity means that they are out of touch with the most recent developments in their fields of expertise. Also, while the experience in government or as general counsel creates new networks, one is nevertheless faced with building a law practice all over again.

From the firm's point of view, the most dramatic effect of mobility has been on the turnover of associates and the loss of partners. A turnover of twenty-five percent per year is highly uneconomic for a firm since it loses many of its best-performing associates within three years, just as they are starting to become real lawyers.[11] The advantages, both professional and economic, of convincing good associates to remain at the firm for six years or so are very significant and often unappreciated. Do you know many firms that are creative enough to offer "stay-pay" bonuses to keep their associates for another three years?

The growth at many firms of a "middle level" of counsel who are senior to associates and less senior than partners has been a partial response to this challenge. But by and large law firms have largely declined to question the traditional "up or out" system that was created for much smaller organizations. Contrast, for example, the large number of fairly senior bankers who are on a career track that will not lead to being managing directors at many of our leading banks. Would this be a good model for

10. David Lat, *Profits v. Partners: Are the Country's Top Law Firms Going the Way of the Dinosaur?*, N.Y. OBSERVER, July 30, 2007, *available at* http://www.observer.com/2007/n-y-law?page=0%2C2.

11. Newman, *supra* note 9, at 52.

law firms? I am not sure, but it is one that would be worth some experimentation. If more lawyers stayed in roles like these it would reduce the number of new associates hired each year and provide experienced lawyers to handle work that is done by partners today.

IV. Growth in Firms, Fees and Earnings: Law As a Business

Next, I'd like to turn to the real elephant in the room, the growth of the notion of the practice of law as a business. When lawyers talk about this, they are putting together a number of different concerns.

One concern certainly revolves around an erosion of those factors that make the profession of law different from ordinary commercial businesses: a special code of ethical behavior, the lawyer's obligations to the courts and the justice system, the importance of a lawyer maintaining his or her independence from the client, the historic commitment of the legal profession to public service, the tradition of civility among lawyers and the like.[12] The erosion of those values does not follow inevitably from a desire to be profitable; it comes from a failure to communicate effectively the importance of professional values and a failure to reward those partners and associates who embody those values. If a firm rewards only the ability to produce higher revenues, that is what it will get. If it gives those rewards notwithstanding the lack of civility, or public service, or candor, it is sending a clear message.

Another part of the problem arises simply from the size of law firms. Large firms *feel* like more of a business. Size brings many advantages. For mid-sized firms, growth has afforded those who used to practice in much smaller firms the advantages of diversification of practice, partners with expertise in many areas, geographical diversification and additional financial stability. For the very large firms, it has provided worldwide diversification, the ability to bring enormous resources to very large and complex projects that would otherwise be beyond the capacity of a single firm and the freedom to develop real

12. Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 728 (2007).

expertise in narrow areas that are nevertheless important to their clients. In a phrase, the drive for better client service has led to much larger firms.

But many lawyers feel that it is simply not as satisfying to practice law in a very large group as it was when firms were smaller. Large personal service organizations need to be managed with more formal techniques than small firms. Levels of work and other contributions need to be monitored in a systematic way, and expectations need to be explicitly stated, whereas in small firms everyone knows how hard the others are working and displeasure is communicated in a variety of ways when one of the partners is not doing his or her share. Those of you in larger firms will be familiar with the exponentially increased likelihood of conflicts as firms grow. Size requires major investments in technology. Office space around the world becomes an obligation that can amount to hundreds of millions of dollars, for which each partner is personally liable; so they seek to limit their liability.[13] In a small firm, the information exchange and the formulation of policies are informal, and the creation of the firm's culture flows from constant interaction among the partners. This approach simply does not work as a firm grows larger.

We need to look at the techniques used by some of the larger non-legal personal service firms to keep their most important employees committed, energized and satisfied. Every good management strives to create a system of financial incentives and social rewards that will align the objectives of its important executives with the values and objectives of the company. Law firms are no different. They need to build a culture that combines professional values with the profit motive; assemble a mosaic of skills to produce very high quality legal services; teach partners how to manage major projects; strive to not only provide high-quality legal services but to do so at the lowest relative cost to clients (how many firms are there that teach their associates that keeping the total cost of expensive legal services as low as possible is a primary value?); think broadly about how to motivate both partners and associates;

13. J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW & PRACTICE § 14:1 (2007).

plan the career tracks of partners as well as young lawyers; and focus on how to make each partner the most effective lawyer possible. These things receive little or no attention.

Let's turn now to the impact of money. The role of money is often decried in discussions of the legal profession; some identify it with greed and unprofessional values. But it's not "bad" that many lawyers are now afforded an opportunity to be quite comfortable and that the most successful lawyers are given the opportunity to make a lot of money—although not, I hasten to add, by the standards of hedge fund managers.[14]

Its effects can be pernicious as well, sometimes just as a result of economics. For example, the very high salaries earned by associates create strong economic pressures for high hours and the productivity that comes with specialization. That is not greed, it is the simple impact of high salaries.

Those firms which reward only new business find their partners endlessly squabbling over who "owns" a client—a phenomenon that can never be hidden from clients, who hate it with a passion. Partners in such firms are reluctant to work on another partner's projects, because they are not rewarded for doing so. Similarly, firms that reward aggregate hours worked find that partners' hours magically increase, often at the expense of client acquisition and development activities.

Is the emphasis on money inconsistent with traditional professional values? Certainly some of these practices can interfere with the quality of service to clients and poison the relationships among members of a firm. But it need not be so. Many lawyers have a quite misguided idea that an emphasis on profits, on keeping track of the contribution of each partner and associate and on providing financial incentives for high-performing partners means that they are operating as a business. Commercial businesses that take this route often end up like WorldCom. In fact, as we have seen, operating as a business involves much more.

14. *See, e.g.*, Ronda Muir, Inst. of Mgmt. and Admin., Inc., *Keeping Current: Junior Lawyers*, 07-8 PARTNER'S REPORT 5, August 2007, at 5.

V. The Growth of General Counsels' Offices

Finally, I would like to spend a moment on the growth of corporate law offices; the significance of this change for law practice has been too little appreciated. First, it has some real benefits. Being a general counsel is a wonderful job, one that taxes a wide range of talents of the best lawyers. The general counsel is an adviser to the senior management and the board.[15] He or she is also the executive with principal responsibility for managing the level of legal risk assumed by the company.[16] The general counsel is the primary decision-maker on most legal matters, a legally trained client.[17] He or she is much closer to his or her clients than virtually any outside lawyer; a relationship of trust and confidence grows that can be enormously satisfying and deepen greatly the "helping" role that is at the core of the lawyer-client relationship.

These attributes are present, in varying degrees, throughout the corporate law department. Jobs in corporate law departments have provided wonderful alternatives for both associates and partners in law firms. The corporate law department also often offers a much more attractive career path for women. An astonishingly high percentage of the best resumes that cross the desk of the typical general counsel come from women. And a brief perusal of any list of general counsels of our largest companies contains a high percentage of women.

Just as the corporate counsel's role has become more interesting and challenging, there has been a parallel and related drop in the quality of the relationship of outside lawyers to the senior management and board of corporate clients.[18] At the most basic level, this has meant that the clients of many outside lawyers are in-house lawyers. That is a relationship that many outside lawyers find considerably less satisfying than having "real people" as their clients.

More importantly, the growth in the importance of the role of general counsels, and the fact that many of our most talented

15. Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1003-10 (2007).

16. *Id.* at 1003-20.

17. *Id.* at 1003-10.

18. Duggin, *supra* note 15, at 997-1001.

lawyers are becoming general counsels, has put a substantial distance between the typical outside lawyer—even the most senior ones—and the board, the senior management, and even division heads at corporate clients. When an outside lawyer appears at board meetings to discuss a major corporate transaction or a major litigation, in many cases there is not a strong pre-existing relationship between the lawyer and the board. At the highest levels, the effectiveness of the lawyer-adviser depends upon his or her ability to inspire confidence in the client. That level of trust cannot be built in a single meeting. While the senior decision-makers value the experience, intelligence and independence of their outside counsel, as a practical matter they often look to their general counsel for confirmation on the judgment issues.

I think this changed relationship to their clients is one of the important reasons that many lawyers in their fifties and sixties are unhappy and frustrated. Today, many lawyers in their fifties and sixties find themselves doing pretty much the same thing that they were doing in their late thirties and forties: drafting and negotiating documents in corporate transactions and handling litigation in a very hands-on way. The natural evolution of a lawyer's career, from the learning years, through years of technical mastery, ending with a very satisfying period of being a senior adviser to the board and senior management of clients has been cut short. That senior adviser's role is now occupied by the general counsel.

What is the solution employed by most firms? Early retirement! While I am a supporter of mandatory retirement, early retirement creates quite a different set of personal and social problems. Many lawyers who find themselves in this position are highly experienced and quite capable. They are simply getting bored. In how many firms is careful attention given to the career paths of senior lawyers? A well-run business would look carefully at new ways to leverage the talent and experience of those lawyers.

* * * * * * *

There have been a lot more important changes in the legal profession, and I wish that I had more time to talk about them, but I have already used up more than my allotted time. My

conclusions are simple. Size and money are not the basic problems confronting the legal profession today. It is the failure to recognize that the preservation and transmission of the values that have made this profession such a remarkable institution in American life cannot be accomplished without a conscious effort. It takes careful thought, effort and resources. That effort is not primarily the job of the organized bar, but of the leaders of American law firms. Those leaders have much to learn from the best American businesses. If we learn those lessons well, and meld them with the core values of the legal profession, it will continue to offer a life of unparalleled flexibility, personal growth and satisfaction for American lawyers.