

# PRESERVING THE SOUL OF A CHANGING PROFESSION

by John W. Reed

*Editor's Note:* Following is the keynote address made by Professor John W. Reed at the 2014 NCBE Annual Bar Admissions Conference held in Seattle, Washington, on May 1–4, 2014. Professor Reed's address marked his fifth appearance as keynote speaker for NCBE's Annual Conference since his first address in 2004. The text of his earlier remarks is included in the following previous issues of the Bar Examiner: June 2011, August 2009, August 2007, and August 2004.

It's an honor and a delight to be among you once again, although the fact that this is my fifth time in this role suggests that the folks in Madison need a longer list of possible speakers. And there is an obvious danger in having a speaker of such advanced years, who may not be playing with a full deck. Perhaps you saw the *Lockhorns* cartoon with the long-suffering wife trying to get her husband out of bed in the morning. She says, "Leroy, why don't you get up? Men your age are already out driving around with their turn signals on."

I am deeply grateful for the warm and sustaining friendships that have grown out of my 40-year connection with the National Conference, going back to the time of Joe Covington and the birth of the MBE, continuing into Erica Moeser's years, of course, and along the way serving on a drafting committee with such talented colleagues as Solomon Oliver.\* It's great to be here with Solomon again. Working with the Conference has greatly enriched my life as a lawyer and a teacher, and I want to express my gratitude for the opportunities I have had among so many good people.

I have learned here such useful things as the critical importance of careful phrasing of questions. You probably have heard of the teacher who asked

eight-year-old Susan, "How do you spell 'crocodile'?" Susan answered, "k r o k o d i l e." "Wrong," said the teacher. "Maybe," said Susan, "but you asked me how I spell it."

To serve as a keynote speaker—that is to say, to sound a single note so that we might all sing in the same key—is a daunting assignment when this conference appears to have multiple themes ranging from the mechanical to the philosophical, from the local to the global, and especially from the old to the new.

There is, however, one concern that surely colors our thinking about anything and everything we might discuss here—and so might well serve as a keynote. That concern is the stunning and accelerating rate of change in our profession and its consequences. To say that the legal profession is changing is so obvious as to be banal. But I have been around a long time, and never have I seen so much change taking place so fast, not only in the everyday practice of lawyers but also in the schools where young women and men prepare for the profession. In his provocative book *Tomorrow's Lawyers*, Richard Susskind makes the sweeping claim that "[l]egal institutions and lawyers . . . are poised to change more radically over the next two decades than they have over the last two centuries." Indeed,

---

\**Editor's Note:* The Honorable Solomon Oliver is the Chief Judge of the Northern District of Ohio and served as a member of the MBE Evidence Drafting Committee that Professor Reed chaired.

the writing of the burgeoning blogs and books about the future of lawyering has become a kind of cottage industry.

All of you are more or less familiar with the many changes being made, and I do not need to deal with them in any detail. Indeed, if I were to do so, the risk is that the detail would bore you to death. Speaking of that danger, you may recall the occasion when a man and a woman, leaving a church service with their 10-year-old son, were being greeted by the minister. Next to the door was a handsome bronze plaque, and the boy asked the clergyman what it was. "It's a plaque honoring our members who died in the service," he said. And the boy said, "Which one, the 9:30 or the 11:00?"

And so I'll rehearse just two or three of the transitions and then suggest a particular concern.

With apology for a kind of verbal "selfie," let me summarize my own experience as a young lawyer as a starting point for a then-and-now comparison. Its contrast with today's profession will highlight some of the changes that have occurred.

I sat for the Missouri Bar Examination 72 years ago this summer. It was administered in humid, hot weather in an un-air-conditioned legislative chamber in the state capitol building, with our forearms sticking to the legislators' desks. I had attended no bar review course. Indeed, I think none was available, but I really didn't need one, because at Cornell our sixth-semester examinations were so-called comprehensives. Although there was some emphasis on the courses we were then taking, the majority of the questions on the multiday exam were drawn from our earlier studies. I do not recall that we thought of that exam as a practice bar exam, and the school certainly did not present it as such, but preparing for it made us feel reasonably ready for the coming bar exam.

Incidentally, that sixth semester was the first point at which we were faced with an exam problem that was not labeled as to subject matter, and a couple of faculty members played a dirty trick on us. Lyman Wilson, the Torts teacher, was fond of giving descriptive names to the characters in his problems—for example, the newlyweds were Mr. and Mrs. Otho Sweet; the deep-pocketed defendant, John D. Richman; and the spinster, Lucinda Lemon (a naming practice now frowned upon by the National Conference). These particular teachers got Professor Wilson to name some of the characters in their questions, leading us of course to look fruitlessly for issues from his courses.

In any event, I somehow passed the bar exam and became an associate in a Kansas City law firm in 1942, joining a profession much simpler than today's. Let me mention a few things that are noticeably different.

There was of course a difference in scale. With a mere 25 lawyers, my firm claimed to be the largest between St. Louis and the West Coast. I doubt that anyone knew whether that was accurate, since there were no sources like today's journals and blogs that publish facts and gossip about the business of law firms—their size, their gross incomes, their per-partner average incomes, their defections and lateral hires. I doubt that even the senior partners knew many of those facts; certainly we lowly associates did not. Today, almost nothing is concealed. In any event, an era when a 25-lawyer firm was thought to be very large was vastly different from today, when there are two firms of more than 4,000 lawyers and a large number well above 1,000. Among the many consequences of that change are a loss of camaraderie and, of course, the need for enhanced business-like, managerial skills.

Young associates who made it past the first year had every reason to expect admission to partnership in a half dozen years or so. And at the other end of the spectrum, elderly senior partners, less active than in their most productive years, still participated generously in the firm's profits, continued to occupy their same offices, and were fully honored as members of the firm, though no longer its leaders. Part of their value lay in the deep personal relationships they had with firm clients, often having counseled them for decades; but also of value, their presence contributed to the maintenance of the firm's professional culture.

In what might be called the mechanical side of practice, it was an era of file drawers and bound volumes, typewriters and carbon paper, secretaries with Gregg shorthand notebooks for partners and wax-cylinder Dictaphones for the associates. We placed our completed cylinders on a table, to be transcribed by the next available typist. When, out of an accumulation, the cylinders of a particular associate got picked up and transcribed more promptly than those of the rest of us, we discovered the explanation: he was inserting risqué stories between memos.

Opinion letters written in response to clients' inquiries within several days' time were considered timely and seemed to satisfy our clients. The firm worked at a fast pace, but seldom frantically. Of particular importance was the fact that we young associates worked closely with, and under the critical supervision of, one or more senior partners.

In fairness, I should acknowledge that, while remembering that time with fondness, we tend to forget that the legal culture of those days was not an unalloyed good, because, among other shortcomings, it was sometimes narrow and bigoted. Although my firm changed shortly, it had neither women nor blacks when I arrived. And in many

places, top-tier firms would not hire Jews. It was not an open profession.

Even if you are too young to have known a law firm like that, it once was a common type, and you undoubtedly have some notion of what it must have been like—and what large parts of the profession were like.

Today's firms—and of course there is much variety among them—are vastly different from the simple model I have suggested. And there is a popular consensus that over the last 30 years or so, law has become less a profession and more a business—that its mores have moved closer to those of the marketplace and are less those of a self-regulating profession committed to the public good. That transition from the characteristics of a profession to the modes of a business is the single most frequently stated source of career unhappiness I hear from mid- and late-career lawyers.

The concern I want to express to you is that the shift to a business mentality is not simply something that has occurred and is finished. It continues and is accelerating as a consequence of continuing changes in the way law is being practiced. Let me suggest just a couple of the many, many developments that are pushing law in the mercantile direction faster and faster. Like so many changes in life, they may well offer some improvement, but they carry with them unintended consequences. They remind me of the classic fortune cookie message: "A change for the better will be made against you."

Let me note briefly some effects of technology on professionalism.

As in almost every other human activity, those who deal with the law are both benefitted and bedeviled by technology. Instant communication, digitized libraries, almost magical access to vast

stores of searchable data, efficiencies and economies of scale, ease and accuracy of document creation even by low-wage workers on the opposite side of the globe—you well know the marvels of the microchip. Indispensable and irreversible as all these technological creations are, they often replace face-to-face relationships between lawyer and client, and of course among members of firms. Indeed, there has risen a breed of so-called virtual lawyers—lawyers who never meet clients in person, who have no bricks-and-mortar offices, and who rely on the Internet and computers for all their practice needs. Because of its impersonality and speed, electronic communication is not well suited to exploration of issues of professionalism and nuance at the times when they are most at issue.

And speaking of virtual law practice makes me think of Bitcoins, a form of virtual cash. A *New York Times* essayist recently listed a series of questions he supposedly had been asked about Bitcoins, one of which was, “Are any of them, maybe, lodged between my sofa cushions?” His answer: “No, unless you also have a virtual sofa.”

On the plus side, I must concede, the efficiencies of technology may help us address the scandal of inadequate access to justice. At a time of unemployment and underemployment of lawyers—erroneously characterized as “too many lawyers” when, instead, it is maldistribution of those lawyers—the vast majority of our citizens cannot obtain affordable representation when needed. That is due partly to the poor circumstances of the lower economic classes, but it is due also to the high cost of traditional full-service representation. Commentators lately have taken to calling that level of service “artisanal” representation. Others refer to a “bespoke” lawyer. To break through that cost barrier and make legal services available to more of our citizens, it is

increasingly proposed that the lawyer’s services be unbundled and digitized (or, in contrast to bespoke, commoditized), all done with maximum use of technology. Obviously, such an approach will blur the lines of so-called unauthorized practice, and there are other problems as well. Especially when compared with the artisanal approach, this threatens professionalism. But professionalism obligates us to make legal services available to the public, and we are doing an inadequate job of that now. Technology will help us do it better.

Undeniably, the practice of law has now adopted many of the modes and values of the business world—perhaps of necessity in troubled economic times. Also undeniably there has been a concurrent decline of professionalism. The most troubling contributor to that decline is the weakening of the age-old process of passing a culture of professionalism from generation to generation. The reason it is the most troubling is that its consequences have the longest reach.

Through history, professionalism has not been taught. Rather, it has been passed down—from partners to associates, from elders to the young. But when the profession began to move toward a business model, hastened by a faltering economy, clients (as you well know) became reluctant to pay for the services of beginning associates that were a continuation of the associates’ basic training. Firms understandably began to lean on the law schools to provide students with some of the skills the firms had been teaching their newly hired graduates, and many schools rushed to add as many so-called practice offerings as they thought they could afford. That is somewhat tricky for several reasons. First, there is skepticism that practice skills can be well taught in an academic setting; second, relatively few law teachers have had significant practice experience

themselves; and third, these courses often are expensive because they require individual attention.

When a faculty is debating how to align the school's curriculum with the needs of a changing bar, I think of a wonderful *New Yorker* cartoon from last month. It is an office scene—I assume it is a congressional office because of a flag behind the desk; a view of the capitol dome through the window; and three staff members with notebooks, standing before the congressman at his desk. His question to his aides is a classic: "Have you figured out how I can be on the right side of history without being on the wrong side of now?"

The extent of this movement amid the evolving pattern of legal education has been a matter of some tension between the Association of American Law Schools (AALS) and the ABA's Section of Legal Education and Admissions to the Bar, with the AALS seeking to distinguish between "training" lawyers and "educating" them. But controversy aside, the movement toward more skill courses is well under way. I believe most American law schools are sending out graduates who are better prepared to begin practice than ever before. What this year's graduates know about law and lawyering is clearly broader than what my classmates and I knew in 1942, and probably what you knew when you graduated.

But there is one thing that has not changed, and that is the need for the influence of our good example—the example of teachers and individual members of the practicing bar—as the new lawyers become stewards of our profession. The traditional early years of practice, which were a quasi-apprenticeship, had two elements: introduction to practice skills and an acculturation to the professional role. Though some of the responsibility for the skills aspect of a beginning lawyer's apprenticeship is increasingly being transferred to the law schools,

I put it to you that the professionalism aspect is not being passed off—indeed, cannot be passed off. Law schools do speak explicitly about professional ethics, of course. Ever since the profession's dismay at the role of lawyers way back in the Watergate debacle, we have tried to be sure that our students appreciate the essential ethical core of the profession, and so we make sure that the rules are read and discussed. But the true meaning of professionalism goes far beyond mere compliance with specific ethical rules. (You may have heard of the witness's answer to the question "Have you been faithful to your wife?" "Frequently.")

Although law and lawyers, and the public we serve, will continue to benefit from the increased and increasing excellence of the typical law school and law student, that greater excellence benefits mostly the graduates' knowledge and skill sets. Excellence is, of course, a core aspect of professional responsibility. Improving knowledge and skill, however, improves the mind and the body of the profession but not necessarily its heart and soul. Its soul, its essence, is its commitment to the service of others, to justice in matters great and small.

To their credit, most law schools try to remind their students that high ideals are essential to high professionalism. Cornell University Law School's website, for example, proclaims that it produces "lawyers in the best sense." On its website, Cumberland School of Law proclaims itself a school "where good people become exceptional lawyers." But no matter how sophisticated the curricula, no matter how high the student LSAT scores, no matter how earnestly the schools try to instill ideals of service and of social responsibility, the preservation of the profession's soul, and its elevation, is inescapably your task and mine as models for the young who follow us. The schools may be concerned about it

and may try to support it, but nothing—I say again—matches the critical influence of interactions between us and those who follow us.

You and I surely came to the bar with the intent to do good—to do well, of course, but especially to do good, to serve. Now, these years later, we need to remember with what intent and hope we began this journey. We can't afford to be like Phyllis, the jaded showgirl at the cast reunion in Steven Sondheim's wonderful musical *Follies*, who says, "I wanted something when I came here 30 years ago, but I forgot to write it down and God knows what it was." It is important to recall the hope that called us to this profession. But to be our best selves, and therefore the best models for the young, it isn't enough simply to recall what we intended at the beginning. We've got to interpret that intent in the light of our experiences since that beginning. As T.S. Eliot put it in his famous poem "Little Gidding,"

We shall not cease from exploration

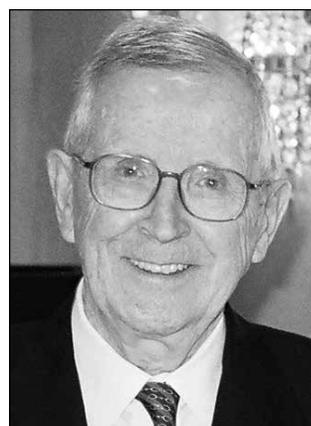
And the end of all our exploring

Will be to arrive where we started

And know the place for the first time.

I hope that being in this good company of wonderful colleagues and friends over the years has reminded us of what nobility there is in being a really good lawyer and a really good person. If these

encounters have perhaps led us to a fresh and more mature understanding of what our early commitment means now—if, in Eliot's words, we have come to "know the place for the first time"—then we can go from here with optimism and hope, determined to be stellar exemplars to those who will determine the future of this changing profession to which we are giving our lives. 📖



JOHN W. REED is a longtime member of the faculty of the University of Michigan Law School, where he is the Thomas M. Cooley Professor of Law Emeritus. He has served as dean at the University of Colorado and Wayne State University and has held visiting appointments at Harvard, Yale, and the University of Chicago, among others. A fellow of the International Society of Barristers, he served as the society's administrator and editor for more than 30 years. He was a member of the National Conference of Bar Examiners' Drafting Committee for the Evidence portion of the Multistate Bar Examination from its inception until 2007, serving as the committee's chair until 2003. Reed received his LL.B. from Cornell and his Jur.Sc.D. from Columbia.