Spring February, 2014

Taking Back the Legal Profession

Lee T Nutini
Introduction

We have long been told that this is a nation of laws. It would then appear to me that we are also a nation of lawyers. And while the law has a place and existence all its own, it cannot speak; it cannot act; it cannot honor itself. We must speak for it.

It appears to those of us within the legal profession that we are playing a game whose dice have been loaded in a house that will always win, and that someone—not us—is truly reaping the benefit of our playing. Even those of us who have yet to play, intelligent minds waiting in the wings, can sense that there will be few chips left to cash; we will realize that the game is played out.

With the sharp rise in awareness of the crisis in legal education and in the market for legal services (both in supply and demand), various voices have weighed the value of traditional legal education. Indeed, voices in the public as well as academia have determined that the problem requires a radical restructuring of legal education (with proposals such as the two-year option approach and the invention of Limited License Legal Technicians (“LLLTs”), among others). However, these approaches do little for the current surplus of well-trained JDs and for the thousands of students currently in law school.

Thus it seems that any successful fix for the legal market must avoid further stratification and, most importantly, cannot seek to abandon the current wealth of bright legal minds eager to practice in an effective system. But it will require great foresight and much creativity to harness the legal market and efficiently employ current and future JDs in a system that is currently led only by Big Law corporatism and law school profiteering.

Now, it appears to me that many of my colleagues sit slack-jawed, wondering what type of hero or villain will finally end the slow-motion-tragedy that is the legal profession. It has not, however, become apparent to many that we are the saviors of this profession, and that it is time to take it back.

---

* J.D. Candidate 2015, The University of Tennessee College of Law; M.A. Liberal Arts 2011, St. John’s College-Annapolis; B.A. Philosophy 2009, Transylvania University; Second-Year Editor, Tennessee Law Review. © Lee T. Nutini 2014. All errors attributed solely to the author.
The Problem

The problem is best demonstrated by way of example. Consider today’s law school. The school itself admits no unsteady or irrational minds. In fact, its ranks—from top to bottom—are intelligent members of the American intellectual class. At the very bottom, they understand rational arguments, can write reasonably well, and have a basic sense of social awareness. While these students enter as classmates, most become nothing short of enemies. Their instinctual competitiveness is not just piqued; their law school rewards it. The majority of friendships and good deeds seen across the campus are mere next-step responses to competitive atmospheres: that unavoidable realization that one attracts and captures more bees with honey, and that much capture needs to be done. But this view, for all of the progress it may create, is also sadly myopic. It does nothing to hide the dog-eat-dog reality of eventual employment in a depressed legal market. Most of these students, some wielding honey and others wielding fire, will ultimately fail to locate meaningful employment in their own profession. Innumerable numbers, charts, and articles have displayed as much. Abandoning true professionality for the top (which also happen to be the only) jobs does little to secure one’s interest. In fact, it appears to dismantle it. In this classic version of a Race to the Bottom, those lucky few who find meaningful employment have not been trained to be lawyers at all; they have been trained to be automatons of yearly billings; low-risk investments in profit-horses. Moreover, this organizational mentality is now universal. The profession (the actual profession) has long been sacrificed for the billings-or-bust approach, as if any profession were defined by something besides the interactions of its own constituent members.

Law schools have long been complicit in this failure. Law schools and law firms have become mirror images of the same pay-to-play scheme, acting out a horrific “Reverse Robin Hood,” in which the organization robs the poor to save the rich. Not only are students with only modest prospects in the legal job market charged full price, those with backgrounds calculated to succeed in the legal market are attracted to the schools with increased scholarship money. It seems that law schools (and all colleges for that matter) across the board are playing this game in the hope that some successes might fall to their alumni, and thus to them. What is not considered, however, are the vast majority of

2 Indeed, the ABA has reached the conclusion that law schools “chase certain high LSAT/GPA students by offering substantial discounts without regard to financial need.” By contrast, the ABA reports that “other students . . . receive little if any benefit from discounting and must rely [on loans].” ABA Task Force on the Future of Legal Education, Draft Report and Recommendations 2 (Sept. 20, 2013).
low- to moderate-achieving law students who will take on enormous debts to play the riskiest game in American higher education. At the University of Tennessee College of Law, for example, compared to its 2012 class, approximately forty more first-year law students were allowed to enroll in 2013 in order to meet rising budget demands.\(^3\) Of course, this decision in no way reflected actual or perceived demand on the part of the administration: in fact, fewer law firms had been traveling to campus to recruit its graduates than ever before. Thus, in an act of ignoring simple economics, Tennessee Law, like most others, sought to boost its income at the expense of the very legal profession it vows to protect. Bolstered by its having cornered the market on the legal market’s barrier to entry—the J.D.—it thus seems out of place to ask law schools to take a stand for the legal profession.

It would then seem that it is the exclusive province of the national, state, and local bar associations to rally around their constituent legal professionals in order to effect change in the system. Starting from the belly of the beast and the pit of legal market depression is hardly ideal, but rather than focus on Access to Justice programs (which seem to be trendy for both law schools and private firms—no doubt for the creation of an additional iteration of the Reverse Robin Hood mechanism), the focus should be on taking back control over a profession that, at base, is about its people. How have we come so far from Atticus Finch models of the profession, with the inevitable, entrancing drama of the Life of the Law? We must ask ourselves at what point the people—both the attorneys and the clients they serve—disappeared from the legal market’s core.

**The People are the Profession**

With both law schools and private law firms playing the same game, it seems that the people (both attorneys and clients) of the legal profession must act to reform the profession. This logic is hardly novel: those who provide and consume legal services at the point of sale should rightfully have the loudest voices in any call for change. The ABA itself has sought to address this crisis of legal education by looking at the functions of law schools as well as the delivery of law-related services.\(^4\) It created a Task Force that recommends, among numerous other things, that law school financial practices stand “in need of serious re-engineering.”\(^5\) Taking a top-down approach, the ABA’s Task Force

---


\(^5\) *Id.* at 2.
on the Future of Legal Education recommended in September 2013 that accreditation standards in American law schools are far too rigid, failing to meet the needs of the new legal market. Thus, the ABA recommended that a “dramatic liberalization” take place in order to reconnect the law schools’ purpose and the needs of its lawyers’ future clients. To avoid delving too far into the specifics of the Task Force’s suggestions, the overarching focus of the ABA Report is the recommendation to bring back to light the need-driven connection between lawyer and client. The Task Force strongly highlighted the need for broad skill development that actually allows legal service professionals to efficiently meet the legal needs of any community. This “broadening” of the legal service market is, however, narrow in its purpose: that those individuals requiring legal advice or representation should be able to easily afford and locate an effective counsel.

This point-of-sale approach should be the saving grace of the legal community. In fact, it marks the return of the recognition of the people-based profession of which “The Law” was once comprised. The profession that was once face-to-face with its client (“my family’s lawyer”) has gone faceless, and long-since corporate. And in the age of corporation-on-corporation legal attacks, I shudder to think of the number of “clients” who can even name the attorneys working their case. It is thus time to bring the wealth of the country’s legal minds back to Main Street, and back to serving the people who most require service. The legal profession has always proudly worn its “service-first” medallion, but over the past few decades that medallion has become warped into the “client-centered service” mantra of Big Law website fame, a hollow caricature of its proud past. Of course, Wall Street will always have its attorneys, but the law was always meant for the public, and the public was there to judge it, and ultimately to keep it in line with its proper purpose.

In terms of their profession, lawyers are now closer to accountants than ever, but this similarity is illogical when taken from the perspective of the work that each performs. The work of accountants exists within rigid lines, but the province of the attorney is within all human action. There is no dearth of support for the idea that legal education’s downfall is inversely related to the rise of corporatism in the American law firm.

---

6 Id.

7 Id. One law professor following the changes noted that language “this strong” has “never been used” by other bodies—either external or internal—to evaluate the ABA’s accreditation system. Kurt Olson, Commentary, Drastic Change Would be Good for Legal Education, The National Jurist, Page 11-12 (Nov. 2013) (emphasis added).


The Solution

President Obama, a former law professor himself,10 recommended publicly in 2013 that law school curriculums take on a more flexible approach, allowing some students to opt-out of a third year in favor of a mini-JD.11 On cue, a flurry of advocates on both sides of the argument wrote furiously to announce or denounce the practicability of the idea.12 This approach, many supporters contend, will reduce law school debt for many, while meeting the demand for on-the-ground, essential legal services. This is not, however, a solution to our problem.

When taking the long view, a fresh supply of mini-JDs will do little for the current market saturation, and could even harm those who are currently in the market for legal employment. In an instant, “old type” JDs will become a relic—an expensive antique that cannot support a firm’s bottom line. The new mini-JDs will be hired en masse, accepting lower salaries while performing basic transactional work for a newfound client base.13 Turning the market on its head in this fashion does little for the current surplus of JD holders, and it certainly does not address the fundamental connection (or lack thereof) between attorney and client. This economic strategy is akin to flailing law

---

towhitehouse.
13 Indeed, if firms hire these “apprentices” at lower salaries, they can bill clients at lower rates, which may increase client satisfaction. That approach might be effective if the market could start today, at point zero. That pipe dream does not, however, solve the problem of the current market surplus of well-trained three-year JD holders. See Samuel Estreicher, The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School, 15 N.Y.U. J. L. & PUBLIC POLICY 599, 605 (2012) (citing The Honorable Jose A. Cabranes, U.S. Court of Appeals for the Second Circuit, Remarks at the Annual Luncheon of the Association of American Law Schools: Legal Education Today and Tomorrow 7-9 (Jan. 6, 2012)).
schools suspending hiring of full-time professors in favor of a new wave of adjunct-taught classes. Given a choice, students will seek their own interest, and make every attempt to avoid what will be seen as second-class education.¹⁴ Law schools with more robust endowments that can afford a full slate of salaried professors will rack up on applications, raise prices to meet the rise in demand, and the law school quality spectrum will become more polarized than ever. These considerations may not even be the worst of the implications, but are rather the first that come to mind. This cannot, regardless of the President’s recommendation, be the way out.

As interest in declining law school efficacy peaked, Daniel Rodriguez, Dean of Northwestern University’s School of Law, and Samuel Estreicher, professor at New York University Law School, wrote an opinion piece for The New York Times promoting the two-year option, dismissing concerns over increased market stratification in merely five words.¹⁵ They assume that the creation of “unequal classes” of lawyers would likely not “glut” an already burdened market, but that the risk could be balanced with the diverse need for legal services.¹⁶ Current needs for legal services are indeed diverse. But it seems that this risk, while far more economically enormous than either Rodriguez or Estreicher admits, does not address such a diverse need. In fact, it would exacerbate the current stratification of legal needs by adding a similar stratification to the organizations of lawyers serving those separate client bases. The result would not be an intermingled, diverse sector of legal professionals efficiently meeting the needs of the public—rather, it would berth two distinct, unequal, and incompatible legal markets. Attorneys would choose their path early, and work only in one sector. Large law firms would need to hybridize their staff, or risk splitting (or losing) the heads of its distinct service departments permanently. I fail to see how creating two unknown legal markets is better than addressing a single troubled one.¹⁷

---

¹⁴ This approach could ultimately end in the very real scenario of law students touting how many full professor-taught courses they had completed in firm interviews. One could easily envision this sort of neo-credentialing.

¹⁵ “Some will argue that the two-year option would only create unequal classes of lawyers and glut the marketplace with attorneys who don’t have the skills and training that generations of law school graduates before them have had. […] We doubt this will occur.” See Daniel B. Rodriguez & Samuel Estreicher, Make Law Schools Earn a Third Year, N. Y. TIMES (Jan. 17, 2013).

¹⁶ Id.

¹⁷ It certainly remains to be seen how the highly progressive Washington State Bar Association’s adoption of a Limited License Legal Technician (LLLT) professional licensure will affect the legal market. The LLLT certification requires legal study or experience similar to traditional paralegal studies, but with a 45 credit hour requirement similar to 1L curriculum, including requiring credits in contracts, civil procedure, and legal research. While
Healthcare Systems: A Better Approach

A more satisfying approach for those already involved in the legal economy would be to create coalitions of practitioners and academics, organize symposiums, or to encourage national and local bar associations to work together to restructure the way in which clients are processed in the legal system. Like healthcare, the law necessitates a diverse practice to meet a hugely diverse series of legal ailments. But unlike healthcare, many clients attempt to seek out particular attorneys who can take their case, or worse yet, some attorneys seek out particular clients. Mirroring the common healthcare approach, the matching of “on the ground” legal needs and legal services needs to be systematized for a vast majority of clients; practice areas such as basic transactional work, wills, family law, estate planning, and others can be performed quickly at well-regulated rates. Litigation teams and large commercial transactions or complex commercial litigation would be serviced by more traditional ground rules. The ABA’s emphasis on client’s freedom of choosing counsel would be preserved in this two-tier process by setting up an intricate, online database to match geography with jurisdiction, skill with needs, all while promoting transparency. Perhaps online reviews and Martindale-Hubbell-sponsored ratings can feed the attorney-client matching system. These ideas would bring the field of law into the twenty-first century as well as providing a better means of regulating the market.

But who will make these necessary changes? Writing for The Atlantic, Matt Barnum laughed off President Obama’s approach as impracticable due to the very audience needed to make such a drastic change. Barnum argued that neither current JD-holders nor current law students would have an interest in rallying for change, mainly because of the knee-jerk desire to “pull the ladder up with you” as you enter the legal market. No current or past law student wants to make law school easier, economically or academically, and they surely do not want to make it easier for others to find the jobs many of us spent years acquiring. Thus, Barnum argues, only those young students aspiring towards

---

the LLLT examination does not yet exist, it has only currently been approved to license its holders in the field of family law. It will be interesting to see how LLLTs interact with other legal professionals, and whether clients and attorneys alike will integrate their services. For more information on the LLLT program, please visit the Washington State Bar Association’s website, available at http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/LLLT-Education-and-Application-Process.


19 Id.
law school might effect the sort of change necessary in the legal market bubble—and those students cannot be expected to bother with it." Thus it seems that an independent coalition of ABA Task Force-like professionals must enact and enforce strict new cultural regulations, so that law schools can regain their status as citizen-making, professional service educators rather than profiteering middle men.

Conclusion

As the ABA Task Force aptly points out, the demise of the legal profession is “not susceptible to any quick fix.” The failures are rooted in the finances and the very culture of the so-called legal education currently offered at law schools. The popular notion that law schools should focus alternatively on producing non-JDs misses the point entirely: the stark reality of the legal market is not that JDs are poorly educated or even over-prepared, but that the hand they have been dealt through poor financial schemes and race-to-the-bottom competition has merely pigeonholed the market. This in turn forces most lawyers to turn their back on the only sustainable client base the profession ever served: the people. It is time to work to take back the nobility in our profession, re-forming it into one that puts service, civic responsibility, and passion for equal justice above all. It will begin like this: as lawyers, we must first face the cruel truth that the aspect of the legal market we have most failed to serve is ourselves.

---

20 Id.