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# An Introduction to the American Legal Profession in the Year 2000

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AMERICAN LAWYERS IN THE YEAR 2000 - AN INTRODUCTION  
By Gerard J. Clark <sup>1</sup>

10-5-00-FINAL

INTRODUCTION

The American legal profession of the year 2000 is so large and so diverse, that it is difficult to describe; like American business, it takes on an almost infinite variety of forms and structures. This piece shall first attempt to describe the profession by looking at a variety of practice settings in the first section. Then it will investigate economics of the profession including fees and salaries. Next it will discuss a number of institutional issues including interstate practice, multi-disciplinary practice and the role of bar associations. Finally it will ask about the future of the profession..

Beginning with some demographics, the number of lawyers in the United States has literally exploded. In 1947 there were 169,000 lawyers in the United States compared with close to 1,000,000 today. <sup>2</sup> Further, women who comprised just 2.5 percent of the bar in 1950, comprise 50 percent of the incoming class in 2000. Minority representation has shown a less dramatic although steady increase as well. ABA Section of Legal Education and Admission to the Bar, Legal Education and Professional Development - An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (Chicago, 1992) popularly referred to, and referred to hereinafter as the MacCrate Report pp. 18- 27. About seventy-two percent are in private practice. About 10% are house counsels, close to 10% work for the government, small percentages are judges, law professors, poverty lawyers and others; some are inactive or semi-active. One-third of the bar are solo practitioners <sup>3</sup>.

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<sup>2</sup> This computes to one lawyer for every 265 Americans. See Trilling, The Strategic Application of Business Methods to the Practice of Law 38 Washburn Law Journal 13, 17 (1998)

<sup>3</sup> MacCrate Report, p. 15 et seq.

## A. THE PRACTICE SETTINGS

The Chicago Lawyers<sup>4</sup> separate the bar into roughly equal populations, along client lines - one group representing individual clients with their personal legal problems; and the other representing institutions or organizations. <sup>5</sup> Individual representation is delivered by private practitioners in a variety of practice settings. Institutions are serviced by in-house counsel, government lawyers, as well as private practitioners. Private practitioners may practice alone, in small to middle-sized firms, or in large firms. <sup>6</sup>

## I. THE SOLO PRACTITIONER

The office of the solo practitioner is a small business and as such, it requires a wide variety of expertise to operate smoothly. <sup>7</sup> The business needs an office in an appropriate and convenient location, a library, office supplies, communications capabilities, computers and other office machinery, secretaries and other support personnel. <sup>8</sup> It needs a steady supply of clients

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<sup>4</sup> Heinz and Laumann, Chicago Lawyers: The Social Structure of the Bar, (1982)

<sup>5</sup> The study presented in the The Chicago Lawyers suggests that lawyers from these two distinctive groups actually have very little in common. They have different class, economic and ethnic backgrounds, they went to different law schools, and live in different kinds of towns. The Chicago study found that the lawyers that represented individualstended toward new wave immigrants, like Irish, Italian, Jewish, who tended to go to law schools like Loyola of Chicago. Lawyers for large organizations tended to be Anglo-American, from families of wealth, who went to schools like University of Chicago. What all lawyers have in common is: that they are persons holding a license to practice, they have attended law school and have taken a bar exam, but not much else. The bifurcation of the bar described therein has probably exacerbated since the study was done - big firms are larger and richer and seem even more distant from their colleagues who do individual representation.

<sup>6</sup> Although these categories are somewhat arbitrary, much of what is said in this article in reference to solo practitioners, applies as well to small firms (up to five lawyers); middle size firms run from six lawyers to fifty; large firms have over fifty lawyers.

<sup>7</sup> See generally Carlin, Lawyers on their Own: A Study of Individual Practitioners in Chicago, (1962) Rutgers University Press

<sup>8</sup> Choice of practice location, whether in a city, a suburb or a rural area, can clearly affect quality of life. City practice offers the highest amount of specialization, the most money, the most sophisticated cases for the most interesting clients. City practice may also be stressful,

seeking service of their legal needs with a willingness and an ability to pay for it.

<sup>9</sup>It is often the

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narrow, and impersonal in areas with greater traffic congestion and commuting time, higher crime rates and high cost of living. In a rural area, the practitioner is a higher profile business person, with appreciative clients; time pressures may be less, and the work more varied. On the other hand, rural practice may involve petty personal disputes, awkward fee collection, subtle conflicts of interest, lack of confidentiality, and a old -bo network and less money. See generally, Williams, P.C., From Metropolis to Mayberry... A Lawyer's Guide to Small Town Law Practice, Chicago. ABA General Practice Section, 1996. See generally, Handler, The Lawyer and His Community: The Practicing Bar in a Middle -sized City University of Wisconsin Press (1967); Movin' to Main Street, ABA Journal April, 2000, p. 90.

<sup>9</sup>The solo or small practitioner must also develop a strategy for client development. Advertising is, of course an option, since Bates v. State Bar of Arizona 433 US 350 (1977) (lawyer

responsibility of one person, whom may have little or no training or expertise to establish and maintain all of the above.<sup>10</sup>

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advertising is commercial speech protected by the First Amendment). This would require the choice of consultant to assist in development of the ad or the ad campaign. The Yellow Pages for the City of Boston, for instance, has six typewritten pages of legal advertisements. The internet is also providing opportunities for lawyers to publicize themselves. (see e.g., sharktank.com, an internet site where clients are invited to describe their problem and then lawyers associated with the web site communicate with the prospective client and offer services.) Lawyers also tend to be joiners. Personal contact generates business. So, that lawyer who runs for office or becomes the officer in the church or civic organization develops a reputation and this may generate business

<sup>10</sup>It's not uncommon at all for lawyers to share space. The lawyers may also share a secretary, a library, a conference room and office equipment, taking advantage of the economies of scale. Such a situation may be attractive to a recent graduate because they often operate like firms. Close proximity to five or six other lawyers may lead to passing of cases around from one to another. Indeed some "firms" have such loose connections among the lawyers that they are really just space-sharing arrangements. A recent change to the comment to the Rules of Professional Conduct in Massachusetts requires lawyers that practice in space-sharing arrangements not to use firm names that might suggest to the public that they are practicing as a partnership absent an "effective disclaimer of joint responsibility." 28 Mass. Lawyers Weekly 1275 (2000). See also Garwin, Partners-In-Rent Only ABAJ, June, 2000, p.74.

One of the mix of considerations involved in accepting any case involving litigation is venue. In Massachusetts and in most of the states, the state courts are still based on county lines. A solo practitioner can have difficulty attempting to cover a large number of courthouses. A five-day trial in a distant city can disrupt the practice, by making the lawyer unavailable to other clients. Consequently, lawyers often set their offices near the courthouse. Cases in distant venues may be refused or referred out.<sup>1</sup>

The solo practitioner may be a specialist or generalist. The specialist, often referred to as a boutique, has a highly distinctive client mix and provides a highly specialized service, such as zoning for commercial developers, patent law for the bio-tech developers, or European Economic Community law consulting for a group of communications companies. Often this specialist moved laterally away from government, in-house corporate, or larger firm, where expertise, contacts and clients were developed.

#### A. The Caseload

The generalist, often in a storefront office, serves individuals and small businesses.<sup>2</sup> Economic considerations may dictate a reluctance to turn away clients.<sup>3</sup> Studies of the legal needs of the public may be used to predict the caseload.<sup>4</sup> The public consults lawyers as follows,

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<sup>1</sup>The Model Rules of Professional Conduct require that any fees split between the referor and referee be based strictly on work performed or responsibility undertaken. M.R. 1.5(e) This rule was not adopted in Massachusetts where a well-honed referral network is in place, and the unwritten rule is that the referring attorney receives one-third of the fee. The large advertisers often are nothing more than an ad campaign with an 800 phone number and a referral list.

<sup>2</sup>Time studies of lawyers who represent individuals indicate that 16% of his time is spent conferring with clients, 12% factual investigation, 10% legal research, 14% pleading, 16% discovery settlement discussions, etc. MacCrate Report, p. 40.

<sup>3</sup>The solo practitioner who is forced by circumstance to handle matters in all of the fields described above worries about what he or she doesn't know. One practitioner described it as "ducking bullets." After the solo gets more established he or she is able to develop a specialty, which gives the lawyer the ability to approach a situation with more confidence.

<sup>4</sup>Curran, Barbara, The Legal Needs of the Public, Chicago, The American Bar Foundation, 1977, pp. 260-262.

inalistofdecliningfrequency:realestate,trustsandestates,domesticrelations,tort,consumer, governmentalproblems andjuvenileandcriminal.

## 1.RealEstatePractice

Alargepartoftherealestatepracticethatthesolopractitionermaybecalleduponto performinvolvesresidentialpurchaseandsale.Sincemostsuchsalesinvolvebankfinancing,a sourceofthisbusinessisthelendinginstitution.Banksoftenreferrealestateclosingstolocal lawyers.Thusareferralrelationshipwithabankthatdoesahighvolumeofmortgagelendingon commercialorresidentialrealestateisasourceofcontinuousbusinessfromaclientwhichpays itsbillspromptly.Thisworkmightalsoinvolverelationshipswithatitleinsurancecompany andanumberofrealestateofficesandotherinspectorsandconsultants.Thisworkinvolves documentpreparationincludingdeeds,mortgages,promissorynotes,andth compilationoftitle certifications,inspectionsfordamageordefects,certificationsconcerningleadpaintorother hazardousubstances,escrowagreements,andHUDformsforaclosing.<sup>5</sup>Theseservicesare oftenbilledasaclosingcostandrequireanofficewithexcellentsecretarialhelpandanefficient wordprocessingsystem.Aseller'sattorneyishiredonamorerandombasis.Additionalreal estatebusinessmayinvolvezoning,assessmentandtaxation,permitacquisition,environmental, constructionorrepaircontractordisputes,insurance,mortgage,landlord-tenantanddisputes withneighbors.

## 2.ProbatePractice

Estateplanningandprobateworkinvolveconsultationandextensivedocument preparationon behalfofaclientelethat hassufficientassetstoworryaboutsuchmatters.The practiceinvolvesthedraftingofanestateplanwhichmayincludewills,trusts,powersof attorneyandhealthcareproxiesandmaybebilledonafeeforservicesbasis eitherasalump sumorperhour.Thedrafterwouldusuallyanticipatefurtherworkuponthedeathofthetestator. Thatworkmightinvolve takingtheestatethroughprobate,thepreparationofappropriatetax

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<sup>5</sup>SeeWilson, Bought,NotSold,Greenfield,MA,CognaBooks,1998.

returns, counseling executors and trustees or acting in one or both of those capacities. Some of the latter representative work may be billed upon a percentage of the estate or corpus basis. The bulk of the work may be described as transactional<sup>6</sup> with litigation occurring only rarely. Practitioners in this field need increasing levels of expertise with increasing size of estates and trusts that are serviced. Their offices should be well-organized, with good secretarial help and word processing capacity. Lawyers in bank trust departments also do a high volume of this work; they keep most of this work in-house, but may occasionally refer it out.

### 3. Tort Practice

Tort work involves litigation arising out of personal injury and property damage as a result of automobile accidents and slip and falls, professional malpractice, product liability and workers compensation. Tort lawyers tend to choose between plaintiff's work or defense. Defense lawyers tend to have a continuing relationship with an insurance company. The large automobile and home owner policy writers refer their defense work to local lawyers, although some keep it in-house. In-house lawyers may perform oversight with respect to the outside lawyers. Defense work is steady and reliable. The insurance company, upon receiving a claim against one of its insureds makes the referral and then the receiving lawyer contacts the client and defends the interest of the client and the insurance company.<sup>7</sup> The lawyer may be paid on a per hour basis, previously negotiated.<sup>8</sup> The insurance company may have similar arrangements with a large number of lawyers in various locations throughout the state.

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<sup>6</sup> Another distinction among lawyers is litigators vs. transactional lawyers. Torts, criminal law and divorce usually involve litigation. Transactional lawyers engage more in counseling, negotiating and drafting in such fields as corporate, commercial, real estate, and estate planning. The litigator must deal with, and translate to a client, the courts which are slow, inefficient, procedurally complex and stretched thin by minimal resources. See Trilling, 38 Washburn L. Rev. 26.

<sup>7</sup> Some have suggested that this dual representation creates conflict of interest problems. See Richmond, Lost in the Eternal Triangle of Insurance Defense Ethics 9 Geo. J. Legal Ethics 475 (1996)

<sup>8</sup> The current average fee for this kind of work is \$100 per hour

The plaintiff's bar, on the other hand, lives on the contingent fee. A characteristic of a contingent fee case is the uncertainty of cash flow. Civil cases can easily last for three and four years, during which time the lawyer not only works without compensation, but may be investing his own funds into his case to fund discovery and expert assistance.<sup>9</sup> A eventual verdict for the defendant can be devastating and a big score can be the cause for celebration.

In the last fifteen years, a new breed of tort lawyer has emerged. Often practicing in middle-size firms they bring large product liability class actions against such defendants as tobacco companies, gun manufacturers and drug companies.<sup>10</sup> These actions are beyond the capacities of the solo practitioner because of the sheer volume of the work, not to mention the investment of time and effort in case preparation.<sup>11</sup>

Workers' compensation is a subset of personal injury or tort. On the defense side it is similar to personal injury; on the plaintiff's side the fees are usually established by a statutory fee schedule.<sup>12</sup> The everyday tasks of the personal injury practitioner involves working one's cases - discovery, motions, gathering facts and reports, hiring and preparing experts - medical and other. Most cases settle before trial and this involves extensive negotiation, communication and sharing of information.

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<sup>9</sup>The Model Code of Professional Responsibility required that the client remain responsible for all costs advanced (D.R. 5-103(b)). The Model Rules of Professional Conduct allow the reimbursement to the lawyer from the client to be contingent upon the result. (M.R. 1.8(e)). This legalized along-standing practice which plaintiff lawyers claimed to need to secure clients.

<sup>10</sup>These cases have led to a vehement anti-lawyer political reaction which has called for the reining-in of punitive damages and class actions and other forms of "tort reform." See the web site of the American Trial Lawyers Association [www.atlanet.org/](http://www.atlanet.org/)

<sup>11</sup>See, e.g., Haar, *A Civil Action*, New York, Vintage Books, 1995 (describing toxic tort case on behalf of leukemia victims in Woburn, Mass.); Zegart, *Civil Warriors*, New York, Delacort Press, 2000 (tobacco cases)

<sup>12</sup>The fee for a victorious plaintiff's attorney after trial before an administrative judge is \$1,000 under the Massachusetts Workers' Compensation statute. M.G.L. ch. 152A sec. 13A. This statutory fee is a reduction enacted by the legislature after Governor Weld promised to make Massachusetts more friendly to business.

#### 4. Family Law Practice

The family law practice obviously requires an ability to deal with people who are in high stress situations. The work frequently involves litigation, usually in specialized courts which tend to be very busy and reluctant to try cases. Settlements are highly encouraged and thus the practice involves much negotiation and mediation. The lawyer might work with a large network of specialists including guardians ad litem, family services specialists, psychologists and mediators. The issues, in this very rapidly developing field, <sup>13</sup> most often concern property distribution, custody, and alimony. Court proceedings are common but quite informal. Trials are rare. The orders involving such matters as custody and visitation may be frequently modified under the supervision of the court. <sup>14</sup>

#### 5. Governmental Practice

The problems that the general population have with government are broad indeed. At the federal level the agency involved might be the Internal Revenue Service, the Social Security Administration, the Veteran's Administration, or the military. At the state level, the more common public problems involve motor vehicles, welfare, unemployment compensation, insurance and the various boards of registry for occupational licenses. At the local level, disputes might arise with a zoning board, a tax assessor, a board of education, a building inspector or a health or social service official.

#### 6. Consumer Practice

Consumer problems are those that occur in the market place. They include difficulties with the seller of a major purchase, with a creditor seeking repossession or garnishment or with

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<sup>13</sup>See, e.g. Troxel v. Granville, 120 S.Ct 2054 (2000) (affirming the right of parents to deny visitation rights to grandparents); Baker v. Vermont, Dec. 20, 1999 (affirming a right of single sex partners to some sort of domestic partnership relationship under the state constitution); Bornemann v. Bornemann, 245 Conn. 508 (1998) (treatment of unvested stock options in determining the distribution of marital assets)

<sup>14</sup>See Sarat and Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *Law and Society Rev.* 93 (1986)

alandlordsuchasevictionorcodeviolations.Theincomesofthisclientmixmaytendto be lower.<sup>15</sup>Thusthefeeforservices,whichwillofteninvolvenegotiation,willbemodest,unless stateconsumerprotectionlawsprovideforfee-shifting.<sup>16</sup>Thesellers,lendersandlandlordswill tendtobeinstitutional,andthereforelesslikelytoberepresentedbythesolopractitioner.

## 7.CriminalandJuvenilePractice

Whilethenumberofcriminalcasesfiledinthecourtseachyearfaroutstripsthenumber ofcivilcases,theprivatepractitionerseesonlyasmallfractionofthesecases.<sup>17</sup>Alawyer, especiallythesolopractitioner,mayplayanalmostinfinitevarietyofotherrolesaswell including:officerofthecourt,facilitator,friend,scivener,investigator,manager,business person,politicaloperative,spindoctor,moralevaluator,publiccitizen,fiduciary,educator,judge andpolicymaker.Theprosecutionsideisalmostalwaysrepresentedbyalawyeremployedby thegovernment.Alsomorethaneightypercentofthedefendantsareindigentandthusqualify forastatesubsidizedlawyerpaidforbythegovernment.<sup>18</sup>Thesolopractitionerwillseesome “pettycrime”likedrivingundertheinfluence,drugpossession,assaultandbatteries,smaller larceniesandavarietyofjuvenileoffenses.

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<sup>15</sup>Familieswithincomesoflessthan\$100,000peryearwillhavedifficultyaffordingtheservices ofthelegalprofession.Personsmeetingfederalpovertylevelsmayqualifyforprofessionalhelp atasubsidizedlegalservicesoffice.See infra,fn70.

<sup>16</sup>See,e.g.MGLch93A.(consumeractionsagainstdeceptivetradepractices)

<sup>17</sup>Yetanotherwaytodescribelawyersisbyrolesundertakeninpractice.Thepublicthinks ofthelawyermostoftenasanadvocate,mostlyinthecourtroom.Concernsthatthisroleoftenleads lawyerstoharmsocietyledforcallsforreformoftheprofessionandtheappointmentofthe KutakCommission,whichultimatelyproducedtheModelRules..SeeClark, FearandLoathing inNewOrleans:TheSorryFateoftheKutakCommission’sRules. 17Suff.L.Rev79(1983) TheCommissionaftermuchdebatedecidedtoreplacetheterm“zealousadvocacy”inthemodel CodeofProfessionalResponsibility,D.R.7-101,withtheterm“reasonablediligence”inthemodel RulesofProfessionalConduct,Rule1.3.Otherroles sanctionedbythemodelRules includeadvisor(Rule2.1),intermediary(Rule2.2)andevaluator(Rule2.3)Excludedfromthe Rules,forpoliticalreasons, wastheroleofnegotiator.Eachrolevariestheamountof responsibilitythatalawyer musttakeforherownactions.

<sup>18</sup>GideonvWainwright 372US335(1963)heldthattheSixthAmendmentrighttocounsel requires thestatetopaythecostsofrepresentationofmostcriminaldefendants.

## II. THE GOVERNMENT LAWYER

Government lawyers are typically full-time employees of governmental entity, <sup>19</sup> federal, state and municipal. <sup>20</sup>

### 1. The Federal Government

The federal government employs 25,000 lawyers <sup>21</sup>, most of whom work in the myriad commissions and agencies of the executive branch. Many of these agencies like the U.S. Patent Office exist only in Washington, D.C. Many others, like the U.S. Department of Housing and Urban Development, have regional offices in some ten or twelve major cities and area offices in smaller cities of the region. Typically, the agency's general counsel sits in Washington with a staff of assistants and relates directly to the head of the agency whom may be a political appointee, whom may also have appointed the general counsel. The general counsel and a cadre of deputies or assistants may make agency policy, interacting with the Congress and acting as the custodian of the agency's regulations, codified in the Code of Federal Regulations. Non-political staff lawyers will do the day-to-day legal work of the agency.

The largest federal employer of lawyers is the Department of Justice. <sup>22</sup> It has a large staff in Washington which is broken down into eight divisions. <sup>23</sup> At the local level there is a U.S. Attorney's Office in every federal district. <sup>24</sup> The U.S. Attorney is a presidential appointee

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<sup>19</sup> Most of these agencies have rules that prohibit their lawyer-employees from practicing law outside of their agency.

<sup>20</sup> Surely there are other governmental entities such as counties, and other autonomous agencies like water districts. These entities are not independently treated in this piece.

<sup>21</sup> 17.9% work in the Department of Justice; 9.4% for IRS; 8.4% for Defense; 6.5% for HHS. See MacCrate Report, p. 100 for a complete breakdown.

<sup>22</sup> See Stewart, The Prosecutors, (an insider account of prosecution at the Justice Department in the Reagan administration)

<sup>23</sup> <[www.usdoj.gov](http://www.usdoj.gov)>

<sup>24</sup> Boston, for instance, has the U.S. Attorney's Office, employing about 150 lawyers, 100 of whom do criminal work and 50 do civil. The Criminal division is broken down into eight units: major crimes, drug task force, economic crimes, asset forfeitures, healthcare fraud, public

As the agencies become smaller, the work of the lawyers can become extremely specialized. For instance the lawyers at the Federal Aviation Administration regulate airports, airlines, safety measures, etc; at HHS a staff lawyer may be an expert on Medicaid regulations, at Department of Agriculture a staff attorney may be an expert on wheat subsidies, at the ICC the lawyer may work with the trucking industry on weight regulations. An officer may be charged with the enforcement of only one statute.<sup>25</sup>

Concomitantly, there is almost always a private sector job which is a kind of mirror image of the public sector job. For instance just as the Department of Agriculture has an expert on farm subsidies, a private sector lawyer, perhaps working for one of the big flour companies, will likewise be an expert on farm subsidies. Most likely the two will interact a great deal as well.

Lawyers, working for the federal government other than those in the Justice Department often tend to spend their whole careers with one agency. Fringe benefits including health and retirement tend to be good. The working conditions are good. The lawyer tends to work normal work weeks and have weekends and evenings to themselves. Flex time is frequently available making this work an attractive work for working mothers.

## 2. State Government

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corruption and special prosecutions strike force, and appeals.

<sup>25</sup>For instance, the Office of Foreign Assets Control in the Treasury Department enforces the Trading with the Enemy Act 50 App. USC 1 (1917)

State government work tends to be somewhat similar. An Attorney General is an analog to the U.S. Attorney. He or she, as well as other state officers, may run for office and may seek help for re-election from lawyer assistants. The Massachusetts Attorney General's Office is broken down into bureaus<sup>1</sup>, and like its U.S. Attorney analogue, does most of the trial work for the government.<sup>2</sup> Much like the Federal Government, the alphabet agencies of state government, such as, the Department of Insurance, the Department of Public Utilities, and the Highway Department, have offices of general counsel, many with narrow sub-specialties. State government lawyers tend to spend full careers at a job, at rates slightly less than the federal government. They may move to the industry that they regulated as a government attorney.

### 3. Municipal Practice

A municipal practice is hard to describe. It tends to be richly varied, interesting and often political. The chief legal officer of a municipality is often appointed by the mayor.<sup>3</sup> The issues may include tort, contract, labor and employment, regulation of real estate, cable television easements, permits, takings, environmental regulations, administrative law, welfare services, schools, hospitals, home rule. A downside of this work is its instability. Political change may dictate personnel changes in a municipality's law office. Many lawyers in the private sector practice municipal law, like zoning, code enforcement and property taxation.

### 4. Criminal Law

A final public sector lawyer practice is exclusively criminal law. The criminal law is often enforced by a District Attorney, which is most often an elective position.<sup>4</sup> The DA's office has a

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<sup>1</sup>The Massachusetts Attorney General's Office has bureaus (the name seems like a misnomer): Criminal, family and community crimes, government, public protection, business and labor protection and executive. The bureaus are further broken down into some thirty divisions, including, for instance, environmental protection, regulated industries, public charities and Medicaid fraud.

<sup>2</sup>

<sup>3</sup>Larger municipalities, with populations of 100,000, may have a staff of lawyers, numbering three to five. The City of Boston's law department has 50 lawyers. Smaller towns refer their legal work to law firms. Thus a local practitioner may do all of the routine work for a town.

<sup>4</sup>The District Attorney of Suffolk County is Ralph Martin, who is an elected official. His office is

presence at every court in the county. In processing the criminal docket, the D.A. works closely with police stations, probation officers, court officers, clerks, and the like and can make many contacts. DA's tend to have a high turn-over rate.

Criminal defense<sup>5</sup> for persons who cannot afford to hire a lawyer, a large majority of those charged, is done by a public defender.<sup>6</sup> Much of what was said about the position of D.A., applies as well to public defenders. They have large, exclusively criminal case loads. They spend a majority of their time in court. They interact with personnel in the clerk's office, the probation office, the prisons and jails. They gain experience and expertise in criminal procedure and the constitutional rights of those charged with crime. Just as the D.A.'s office must have a presence in every court in the Commonwealth, so too must the public defender to receive court appointments. One downside of the DA position and CPCS is that one starts one's career in the district courts where the level of practice is often low because of the size of the case-load. At the Superior Court level, the both offices tend to assign their more experienced lawyers who oftentimes do high quality work, preparing important cases for jury trials.

Daily presence at the courthouses provides excellent opportunities for the young lawyer. Courthouses frequently house other offices, such as Clerk of Courts, Registrar of Probate, Registrar of Deeds<sup>7</sup>.

### III. LARGE LAW FIRMS

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responsible for all prosecutions in all of the state courts sitting in Suffolk County, which is Boston, Chelsea, Revere, Winthrop. Each county has its own DA, who then must hire a staff of assistant district attorneys to prosecute criminals. The Suffolk County D.A.'s office has 150 lawyers

<sup>5</sup>See generally, Kunen, How Can You Defend These People , Garlins Ready for the Defense , Wishman, Confessions of a Criminal Lawyer .

<sup>6</sup>The Committee for Public Counsel Services provides these lawyers in Massachusetts.

<sup>7</sup>Location of courthouses in Massachusetts is somewhat random. District Courts sit in a large number of the larger towns of the Commonwealth. The presence of a superior court and a probate and family court is reserved for a few number of the larger cities.

Large law firms<sup>8</sup> are getting larger<sup>9</sup>, more numerous and employ an ever increasing percentage of the bar.<sup>10</sup> The largest firm in the United States is Baker and McKenzie of Chicago (with branch offices in thirty-six countries) with 2,230 lawyers, of whom 535 are equity partners;<sup>11</sup>

Traditionally, these firms serviced the general corporate law needs of America's largest companies.<sup>12</sup> These services included advice, negotiation, litigation and evaluation in the substantive fields of corporate and corporate financial, tax, commercial and regulatory law.<sup>13</sup> Tension may have existed between the firms or retained and the in-house corporate law department, but generally the retained firm did the bulk of the important complex work. These firms eschewed work for

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<sup>8</sup>The term "large law firm" shall apply to firms of more than 100 lawyers.

<sup>9</sup>Much of the growth of these firms is by way of mergers. Indeed, a merger mania seem to have taken hold among the nation's very large firms as they expand "to build a critical mass in order to afford the kind of investment that they're going to need in order to compete." American Lawyer, July 1999, p. 76.

<sup>10</sup>That MacCrate Report on personal legal services grew at an annual rate of 4.7% percent between 1968 and 1982, while business legal services by 8% R. H. Sanders and E. D. Williams, Why Are Their So Many Lawyers: Perspectives on a Turbulent Market 14 Law and Society Inquiry 478 (1989). Between 1984 and 1990 the percentage of law school graduates going into firms of more than 100 lawyers jumped from 16.6% to 28.8%, citing NALP National Summary Reports, as a source.

<sup>11</sup>Skadden Arps of New York is next with 1,187 lawyers and 285 equity partners; next Jones Day of Cleveland with 1,164 lawyers and 264 equity partners. The smallest firm on the American Lawyer list of one hundred of the highest grossing law firms for 1998 was Robins Kaplan of Minneapolis with 225 lawyers and 55 equity partners. Skadden Arps led the nation in gross receipts with 890 million dollars with an annual average partner compensation of \$1,380,000; the last on the top 100 list was Steptoe and Johnson of Washington D.C. with 109 million in receipts with average partner compensation of \$410,000 The American Lawyer, July 1999, The Am Law List pp 95- 143.

<sup>12</sup>See Smigel Wall Street Lawyers, Goulden, The Superlawyers and The Million Dollar Lawyers, Stewart, The Partners

<sup>13</sup>In 1933 A. A. Berle described the corporate lawyer as an "intellectual jobber and contractor in business matters." He described the great industrial movement of the late nineteenth century and early twentieth century as a "period of rapid exploitation of resources." "The principal function" of the large law firm was "defending, legalizing and maintaining this exploitative development." The law firm thus became "virtually an annex to some group of financial promoters, manipulators or industrialists." (9 Encyclopaedia of the Social Sciences, pp. 340-45 "Legal Profession and Legal Education".

individuals and stayed inside their fields of specialization. Other work was either sent to the client's in-house department, referred to another law firm or simply turned down.

However, in the latter quarter of the twentieth century, large firms turned down less work. Firms wish to see themselves as full-service entities, who can engineer the merger of two giant corporations from Fortune's 500, but can also have the capacity to handle the fields more traditionally associated with individual representations such as domestic relations, wills and trusts, real estate, personal injury and even criminal. In addition, in keeping with the expansion of the legal needs of corporate America (or more correctly, the corporate world) the full-service firm is likely to have added the capacity to handle problems in intellectual property, employment, international trade, environmental and toxic torts. Further institutional clients have tended more recently to keep a larger volume of their legal work in-house.<sup>14</sup>

A pre-dominant characteristic of the large law firm is its hierarchy.<sup>15</sup> Traditionally, there have been partners or owners and associates or workers.<sup>16</sup>

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<sup>14</sup>See Kronman, The Lost Lawyer

<sup>15</sup>Galanter and Palay, Tournament of Lawyers, Chicago: University of Chicago Press, 1991

<sup>16</sup>An oft-repeated description of structure is that there are "finders, minders and grinders," referring respectively to those that have the connection to bring clients into the firm (usually senior partners), those who manage the actual work being done and having day-to-day contact with persons having lines of responsibility at the client institution, and those that actually produce the pleadings, documents and tax returns that the client is paying for. See Nelson, Practice and Privilege: Social Change and the Structure of Large Law Firms, 1981 Am Bar F. Res. J. 97-98, 110-11, 117, 118.

More recently, the partnership track has been further divided into senior or equity partners and junior or non-equity partners. The equity partner as an owner must buy into the firm for an amount that represents the past investment into the firm and thereby takes on the legal responsibility for the actions of the firm. Another recent development is the creation of the position of staff attorney, which is a non-partnership track. The amorphous classification “of counsel” often refers to an attorney who is on call or serves in a consulting capacity. The associate position is a track that leads to partnership, usually after seven or eight years<sup>1</sup>. The decision is made by the equity partners based on the associate’s past performance and perceived value to the firm in the future. Associates often feel pressure to bill the expected 2000 hours per year<sup>2</sup>, which breaks down to 40 hours a week.<sup>3</sup>

Firms have varying associate-to-partner ratios, as well as percentages of associates that are actually invited to partnership, the golden ring in the large law firms.<sup>4</sup> A recent NALP Foundation study had some dire predictions about life in law firms<sup>5</sup>. A downside of partnership is responsibility

<sup>1</sup>See Stracher, Double Billing (self-described as ‘a young lawyer’ stale of greed, sex, lies and the pursuit of a swivel chair.) New York, William Morrow and Co., Inc, 1998.

<sup>2</sup>See Schiltz, On Being Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession, 52 Vanderbilt L. Rev. 871 (1999) for a very negative appraisal of the life of the associate in a large firm. But see the rest of the volume, Attorney Well-Being in Large Firms: Choices Facing Young Lawyers.

<sup>3</sup>Assuming that one can legitimately bill for only two-thirds of actual time at the office, forty hours of billing requires sixty hours spent. The normal workday includes such non-billable activities as coffee, mail, e-mail, voicemail, interaction with associates and support personnel, firm meetings, client development work and the like.

<sup>4</sup>NALP study p. 27-9.

<sup>5</sup>NALP Foundation for Research and Education, Perceptions of Partnership: The Allure and Accessibility of the Brass Ring, 1999 p. 13.

<sup>6</sup>In the introduction to Perceptions of Partnership, the NALP study stated: “Law firms are engaged in a human resources war unparalleled in the history of the legal community. Legal work is burgeoning while the availability of talented new attorneys is declining. Lateral hiring is outpacing entry-level hiring, and compensation has escalated to unprecedented high levels. Competition for attorney talent and legal work from multi-disciplinary professional service firms has generated concern throughout the practicing bar. Skyrocketing attrition rates for junior and mid-level associates have put pressure on law firm leveraging and profitability. High attrition rates have so ravaged associate ranks in some firms that the future of the partnership may be in peril”. The report

for the firms' liabilities arising out of mistakes and malpractice.<sup>7</sup>

#### IV. MIDDLE-SIZED FIRMS

Middle-size firms<sup>8</sup> may be the most difficult to describe.<sup>9</sup> They often do labor and employment, larger personal injury like medical malpractice, municipal law. They may rely upon one client for a large percentage of their billing. They often start out small and grow. The growth is often a result of one or two lawyers who are extraordinary for their ability to attract clients or for their reputations for excellence. Compensation within the firm might vary wildly, depending upon which of the partners brought the client to the firm. Partnership agreements may be unwritten and quite informal. There is often a year-end meeting where each partner's share in the profits is determined. The mix of cases may depend a great deal about the capacities of the individual lawyers and lateral hires may be made in order to improve the mix of cases that the firm is capable of handling.<sup>10</sup> With the merger mania that has gripped the legal world, the mid-sized firms often question their ability to survive.

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went on to detail a widespread of dissatisfaction among large law firm associates. That dissatisfaction was exacerbated for women and minorities.

<sup>7</sup>Firms that assume the form of professional corporation do not insulate the lawyer-owners from liability. Malpractice insurance does not cover every possible claim against a law firm, and try to protect themselves from individual liability, judgments and sanctions against law firms are becoming more common and of great concern to partners. See In the Matter of Kaye, Scholer, Fierman, Hays and Handler: A Symposium on Government Regulation, Lawyer's Ethics, and the Rule of Law: Introduction 66 So Cal. L. Rev. 977 (1993). Another major difficulty accompanying increased size and multiple location is conflict of interest and the motion to disqualify adversary counsel that may be launched against a law firm that fails to recognize a conflict.

<sup>8</sup>Middle-sized firms generally have between 12 to 50 lawyers.

<sup>9</sup>It has been suggested that with the onslaught of the mega-firms and merger mania that the mid-sized firm is "disappearing at a breathtaking rate." American Lawyer, June 1999, p. 76.

<sup>10</sup>One possible niche for the mid-sized firm is to provide services to a group or pre-paid legal services plan. Such plans may be negotiated as a fringe benefit in a collective bargaining agreement. A fixed amount may be contributed by the employer and employee into a fund that contracts for routine legal services for the membership. See MacCrate Report, p. 64; also Billings, Prepaid Legal Services, San Francisco, Lawyer's Cooperative Publishing Service, 1981.

## V. HOUSE COUNSEL

The Directory of Corporate Counsel lists 7,000 corporations and non-profit organizations, employing some 30,000 lawyers in the United States. <sup>11</sup> Martindale -Hubbell provides biographical data on some 60,000 corporate counsel working for the 15,000 leading corporate law departments. <sup>12</sup> There are some 4,000 corporations with law departments consisting of just one attorney. There are twelve corporations with law departments consisting of more than 125 attorneys. In declining order the specialties of lawyers working in these departments are corporate, contract, litigation, environmental/energy, anti-trust, intellectual property, secured transactions, insurance, banking, real estate, product liability, international trade, consumer law, governmental relations, employee relations and tax. <sup>13</sup> Banks, trust companies and insurance companies tend to employ many lawyers. Prudential Insurance and Merrill Lynch employ over 300 lawyers in their law department. Citigroup Inc., the parent of Citibank employ over 500 lawyers. Microsoft employs about 140 lawyers. House counsel may also be employed by non-profits; for instance, Harvard University employs ten lawyers; The Ford Foundation employs five; the Mayo Foundation employs nine; the National Rifle Association employs five and the Grocery Manufacturers of America employ one. <sup>14</sup>

A characteristic of house counsel work is close client contact, assuming the role of advisor <sup>15</sup> to various individuals of the corporate hierarchy. <sup>16</sup> Like the government lawyer they are, in a sense, captives of their sole client and thus sacrifice some of the “independence” <sup>17</sup> of the private

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<sup>11</sup> Directory of Corporate Counsel, 1999-2000, New York, Aspen Law and Business, 1999. P. ix.

<sup>12</sup> Martindale-Hubbell Corporate Law Directory, New Providence, NJ, Reed Elsevier plc Group, p. v. Further information is available from the American Corporate Counsel Association

<sup>13</sup> Morrison, Rees W., for Altman Weil, Inc. Directory of Corporate Counsel, Special Supplement, Aspen Law and Business, 2000, p. 22.

<sup>14</sup> Directory of Corporate Counsel, 1999-2000.

<sup>15</sup> See Model Rule of Professional Conduct Rule 2.1.

<sup>16</sup> See generally, Symposium, The Role of General Counsel, 46 Emory L.J. 1005 (1997)

<sup>17</sup> Brandeis rue the lawyer's loss of independence to corporate clients as early as 1913, but insists

practitioner. On the positive side, they often have more time to do a job well without having to worry about whether the expenditure of the additional effort is justified based upon a client's ability to pay. They also share many of the benefits of the corporate world including stock options, good fringe benefits, short and more regular hours and flex time.

## VI. MISCELLANEOUS OTHERS

Other opportunities in the law are smaller in number. Law professors require only the JD degree, although many go on for the LL.M. and few obtain the LL.D. These highly sought after positions most often require excellent academic records from prestigious law schools, followed by judicial clerkships and a number of years of excellent experience at a large law firm or in government.<sup>18</sup>

Judges are often lawyers with twenty or more years of well-regarded practice<sup>19</sup> leading to appointment by the President for the federal bench<sup>20</sup> and by governors for the state courts.<sup>21</sup> Courts also use extensive support personnel, including clerks, probation officers and others whom a lawyer may not be.

A large percentage of the nation's legislators and politicians at every level are lawyers. Likewise legislatures employ lawyers as staff and other support personnel. Many of the lobbyists, whose influence in legislatures are also lawyers.

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that to practice in the "grand manner", himself quoting Matthew Arnold, a lawyer must exercise a judicial attitude and extreme tolerance in intermediating between a client and the law. Brandeis, The Opportunity in the Law, quoted in Hazard and Rhode, The Legal Profession: Responsibility and Regulation, 3<sup>rd</sup> Ed., Foundation Press, 1994.

<sup>18</sup>See generally, Stevens, Law Schools, Legal Education in America from the 1850's to the 1980's (1983)

<sup>19</sup>This should be distinguished from the civil law countries where the judiciary is a separate career track from the legal profession, See Clark, An Introduction to the Legal Profession in Spain 1988 Arizona J. of Int. and Comp. Law 1 (1988)

<sup>20</sup>The President often accepts recommendations for appointment by the senior member of Congress. These appointments are subject to the advice and consent of the Senate.

<sup>21</sup>Various states have judicial nominating commissions or executive councils that may also play a role. Other states elect judges.

Poverty lawyers work for legal service offices, funded by the federal government. They typically handle large case loads for persons whose incomes fall below federal poverty standards. Finally, legal advocacy organizations committed to advancing one or more political issues hire lawyers to present their causes to executive agencies, the courts or the legislature.<sup>23</sup>

## B. THE ECONOMICS OF THE PROFESSION

The American legal profession generates over \$100 billion in revenue per annum.<sup>24</sup> These revenues are generated through legal fees

### I. FEES

Lawyers in private practice obviously earn their salaries by charging their clients fees. Fees may be charged in a variety of ways: on an hourly basis<sup>25</sup>, as a lump sum for job performed, on a continuous monthly or periodic retainer basis and on a contingency where a lawyer's fee depends upon the result achieved. These methods may also be combined in a wide variety of ways. At the high end a large firm senior partner (or a small boutique firm) may charge as much as 500 dollars per hour.<sup>26</sup> At the low end, a lawyer would need to charge at least 100 dollars per hour to make a

<sup>22</sup>Federal funding for these offices comes from the Legal Services Corporation, funded by the Office of Economic Opportunity. 42 USC sec 2996. The existence of this program as well as its annual funding excites much political debate. Legal services lawyers are prohibited from bringing most class action, school desegregation cases, most abortion cases and others. See generally Wolfram, *Modern Legal Ethics* (1986), p. 939. Client demand far outstrips available resources

<sup>23</sup>Examples include the American Civil Liberties Union, the Conservation Law Foundation and the Disability Law Center.

<sup>24</sup>Trilling, *The Accountants are Coming*, p. 6. I believe the number is double Trilling's number. A million lawyers, each earning \$100,000 per annum is a hundred billion in salaries alone; surely the number needs to be at least doubled to account for overhead.

<sup>25</sup>See Lerman, *Gross Profits? Questions About Lawyer Billing Practices* 22 Hofstra L. Rev. 645 (1994) (suggesting that fraudulent billing for per hour work is widespread) see also Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* Durham, N.C., Carolina Academic Press, 1996

<sup>26</sup>For instance, at Covington and Burling in the District of Columbia, the high partner billing rate was 440 dollars per hour, the low partner rate was 250 dollars per hour; the high associate rate was 245 and the low associate rate was 110. In Buffalo, New York the comparative numbers at Damon and Morey were 225, 80, 150 and 70 respectively. *The Lawyers Almanac* 1999, pp. B-23 et seq.

decent living. The small firm lawyer usually assumes that at least 50 percent of his or her fee will be spent for overhead. Further, because the small firm lawyer or solo practitioner must perform so many non-billable tasks each day, he or she may be able to bill only twenty hours per week. This computes to only 50,000 dollars per year before the lawyer's own fringe benefit package has been paid for.

Certain statutes, including those protecting civil rights and the rights of consumers may provide for attorney's fees as part of the award for successful claimants. Contracts and leases may also provide for fee shifting. Lawyers who do defense work for insurance companies, who do real estate work for banks, who represent governmental entities, and others may have to negotiate their rate in competition with others whom they seek similar work.

An alternative method is lump-sum billing. Many of the lawyers who advertise might attempt to charge a lump sum for an engagement such as drafting a will or securing a divorce. With advertised rates as low as 500 dollars per engagement, these lawyers must rely upon a high volume practice in order to earn a satisfactory return. Institutional entities that must operate within budget constraints may also seek lump sum fees for securing a patent, or zoning variance or for appealing a judgment. Lump sum fees may be established by statute or regulation. In Massachusetts, for instance, fees for lawyers who represent plaintiffs in worker compensation cases are limited to \$1,000 dollars per case.

Lawyers especially those representing entities like smaller municipalities and small corporations that do not generate enough legal work to justify a full time lawyer may negotiate a retainer amount to handle the routine work of the entity. Non-routine work may be paid for by using an alternative billing method.

The most common payment method for plaintiff's personal injury work is the contingent fee. In these arrangements, the lawyer takes a percentage, often one-third, of the client's recovery. Often the lawyer will advance the costs of trial preparation including depositions and expert fees, which may or may not be reimbursed if the case is lost. Since most negligence lawyers demand jury trials, these cases are put on the longest and slowest moving calendar at the courthouse. Thus a lawyer

may be advancing costs for three or four years in the hope of payment and reimbursement at some time in the distant future. Thus verdicts in favor of a defendant can be disastrous and big verdicts can be the cause of great celebration.

## II. SALARIES

Discovering accurate fee and salary information can be difficult. The salaries of lawyers that work for the federal government are based upon the GS or government salary system. This is a schedule of salaries with fifteen levels and ten annual steps within levels awarded for years of service, established by the government with some variation for regional differences.<sup>27</sup>

Salaries in state government tend to be lower. Salaries at the Illinois Attorney General's office start at \$35,000 and are limited by the attorney general whose salary is \$128,715.<sup>28</sup> These salaries will be limited by the salary of the attorney general and state judges which are established by the state legislature.<sup>29</sup>

The salaries in district attorney's offices and public defender offices tend to be similar.<sup>30</sup> Salaries for non-profit advocacy groups and legal services lawyers tend also to be lower.<sup>31</sup>

The financial rewards at the large firm tend to be much greater.<sup>32</sup> The 1997-1998 median

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<sup>27</sup>In New England the year 2000 base levels run from 15,357 dollars per year for a GS level 1 ranking to 111,713 for a GS level 15 at level 10. Generally, the U.S. Attorney's Office requires three years of experience and such a hire in the Boston area may beat grade 13 at 61,823 dollars. The same system is used throughout the federal government for all lawyer and non-lawyer hires. The fringe benefit package for federal employees tends to be quite generous with comprehensive health coverage, good pensions, paid holidays and some tuition reimbursement.

<sup>28</sup>National Law Journal, October 2, 2000, p. A30.

<sup>29</sup>The salaries of state judges in Indiana run between \$90,000 and \$110,000; in New York \$136,700 and 144,000. Federal district court judges receive \$141,300; Supreme Court Justices receive \$173,600. *Ibid.*, p. A30 -A31.

<sup>30</sup>Baltimore County, MD: \$38,872 - \$138,068. *Ibid.*, p. A29

<sup>31</sup>Greater Boston Legal Services: \$31,100 to \$70,350; Native American Rights Fund in Colorado \$49,082 to \$130,200. *ibid.*, p. A28.

<sup>32</sup>The American Lawyer reports that in 1998 the highest per partner average of the year's highest grossing firms was slightly over three million dollars per year at Wachtell, Lipton in New York City. The lowest per partner take on this American Lawyers list was 230,000 dollars at Maguire, Woods in

base annual salary for all lawyers in in-house law offices was 104,000 dollars; when bonuses and cash profit-sharing was added in the number rose to 112,000 dollars. The median for lawyers with one year experience or less was 49,494 dollars. The median for lawyers working for non-profit organizations was 67,680 dollars. The median for chief legal officers was 271,891 in 1998, representing a decline of over ten percent from the 1996 median.<sup>33</sup>

The Massachusetts Lawyers Weekly reported in its July 12, 1999 issue that its survey of Small-Firm Lawyers in Massachusetts an annual survey for men of 123,418 dollars per year as compared to 74,610 dollars per year for women. Some of the discrepancy was due to a higher percentage of women reporting that they practice law "part-time." The gender gap was further reducing for lawyers who have been in practice for nineteen years or less: 89,021 dollars per year for men and 80,379 dollars per year for women.<sup>34</sup>

### C. STRUCTURAL ISSUES

The organized bar, both at the state and the national level is quite skilled at defending the prerogatives of lawyers. At the national level, the American Bar Association imposes strict accreditation standards on the nation's law schools and defends the profession against incursions into areas controlled by lawyers and defends the profession against claims that lawyers and lawsuits undermine efficiency or America's position in world markets. At the state level, the bar writes its own ethical rules which often defend the local bar against competition from out-of-staters.

### I. INTERSTATE PRACTICE

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Richmond, a firm with 438 lawyers. The trend setting New York firms shocked the legal world in January, 2000 by raising their starting salaries to 140,000 dollars per year. Firms in other cities watch the rates in New York and often set their rates at some percentage of the New York rate. Of course, there are thousands of other large firms in the country who did not make the American Lawyer's coveted list, which would tend to have lower compensation levels.

<sup>33</sup>The chief legal officer for Time Warner had a salary of 825,000 and received bonuses of 1,200,000; the lead attorney at Polaroid had a salary of 287,502 dollars with bonuses of 75,000 dollars. The Lawyer's Almanac, 1999 Aspen Law and Business, pp. B-42 et seq.

<sup>34</sup>Massachusetts Lawyer's Weekly, July 12, 1999

In a national and global economy, limitations on the practice of law to states where an attorney is admitted seem less and less defensible. A large New York -based law firm may have a Fortune 500 corporation, incorporated in Delaware, with a principal place of business in Detroit, whose seeks advice on a merger with a west coast corporation. Most of the relevant legal issues may be federal, including, for instance, federal tax treatment of the transaction or the application of federal securities law. However, the state -by-state admissions system has stubbornly held on. The Supreme Court has ruled that the imposition of residency requirements as a condition of admission violates the privileges and immunities clause of the constitution<sup>35</sup>, however, it has left state by state licensing in place in spite of its obvious burden upon interstate commerce. These prohibitions on interstate practice may be honored more in the breach by large firms, but they act at their own peril because there are occasional charges of unauthorized practice. Clearly when litigation in any of the state courts is involved, the retention of local counsel to sign and file papers is often indicated. Motion to appear pro hac vice are routinely granted by state courts; however, they are anything but a sure thing. Many states do grant admission to attorneys with a designated number of years of experience upon motion and without submission to a local bar exam<sup>36</sup>. However, recent law school graduates are frequently well-advised to take more than one bar exam, while the breadth of the subject matter, taught in law school and tested on the bar exam is fresh in mind.

## .II. MULTI -DISCIPLINARY PRACTICE

Perhaps no subject concerning the practice of law is so unsettled as the subject of multi -disciplinary practice, formerly called ancillary services. Formerly many states restricted a lawyer's ability to offer a client anything but legal services<sup>37</sup>. The rule was often honored in the breach by solo storefront practitioners who might have combined his or her legal practice with real estate

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<sup>35</sup>Supreme Court of New Hampshire v. Piper 470 U.S. 274 (1985); Supreme Court of Virginia v. Friedman 487 U.S. 59 (1988)

<sup>36</sup>See, e.g. Mass. S.J.C. Rules, Rule 3:01, sec. 6 (five years of practice in another state)

<sup>37</sup>See Wolfram, Modern Legal Ethics, p. 479

brokerage services or the sale of insurance. Today the Rules of Professional Conduct have omitted these prohibitions and many firms offer a wide variety of non-legal services including, for instance, investment counseling, public relations and financial management. But the Rules continue to prohibit a lawyer from sharing a fee with a non-lawyer and prohibit practice where a non-lawyer has an ownership interest in the entity that is practicing law.<sup>38</sup> The unauthorized practice rules prohibit anyone but a licensee of the state's highest court from practicing law. However, there is much recent discussion about the merger of law firms and accounting firms.<sup>39</sup> Most recently the Bar of the District of Columbia has adopted new rules that drop most of the prohibitions against splitting fees with non-lawyers and lay ownership of entities that practice law. The ABA rejected the recommendations of its own Commission to do likewise, in a debate that is far from over<sup>40</sup>. Loosening restrictions will be an expansion of services provided by law firms. Today many large firms offer investment and other services to clients.

A full service firm might offer bankruptcy clients, accounting and factoring services, receivership services that take title to the business and manage it. An environmental firm may combine to offer detection and engineering services, supervision of clean-up, evaluation and certification of results to the relevant governmental agency. Difficulties arising out of conflict of interest rules are likely to multiply.

### III UNAUTHORIZED PRACTICE AND ADMISSION TO PRACTICE

Unauthorized practice statutes prohibit anyone not admitted to the bar from practicing law. Admission is controlled by the highest court of each state and usually requires a bar examination, which often has a multiple choice multi-state section on general national law, and an essay section, mostly on state law and also a Multi-State Professional Responsibility Examination.

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<sup>38</sup>MRPC Rule 5.4.

<sup>39</sup>Trilling, The Big Five and Coning! The Big Five are Coming! Multidisciplinary Practice and the U.S. Legal Profession.

<sup>40</sup>Gibeaut, MDP on Deck ABAJ, June, 2000, p. 22.

Applicants for the bar exam must have a bachelor's degree and a J.D. or LL.B. degree from a recognized law school.<sup>41</sup> Applicants must be recommended by a member of the bar and possess "good moral character,"<sup>42</sup> as determined by an investigatory board, before being sworn in.

Many states require that members of the bar pay an annual fee to a client's security fund that is established to make restitution to client-victims of lawyer wrongdoing.<sup>43</sup> While the Model Rules state that a lawyer "should aspire to render at least 50 hours of pro bono publico services per year,"<sup>44</sup> very few states have actually imposed the obligation.<sup>45</sup> In addition, many states require continuing legal education.<sup>46</sup> States may have further programs to allow attorneys to designate themselves as specialists.<sup>47</sup> Attorneys are regulated by rules of professional responsibility<sup>47</sup> administered by

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<sup>41</sup>There are 175 ABA accredited law schools, as well as a growing number of unaccredited schools where graduates may practice only in the state in which the school is located and licensed. The law schools of the nation have similar course offerings, teaching methodologies, and casebooks. See Clark, The Harvardization of Suffolk, The Advocate, 75<sup>th</sup> Anniversary Ed. 35 (1981). One reason for the similarity is the extremely detailed accreditation requirements imposed by the ABA section on Legal Education and Admission to the Bar, which also contribute to its high cost. (\$23,270 per year tuition for Suffolk in the year 2000-2001). See Clark, A Challenge to Law School Accreditation: Massachusetts School of Law v. the ABA, 24 The Advocate 62 (1994). Legal education has recently been criticized for its narrowness and failure to teach skills and values. MacCrate Report. See also, Clark, Narrowing the Gap Between Law School and the Profession, Suff. L. Rev. See Stevens, Law School, Legal Education in America from the 1850's to the 1980's (1983) for an excellent history of legal education.

<sup>42</sup>Mass Supreme Judicial Court Rules, Rule 3:01. See Schwartz v. Board of Bar Examiners, 353 U.S. 232 (1957). See also Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491 (1985) (suggesting that this standard is applied in a haphazard and discriminatory manner.)

<sup>43</sup>See, e.g., Mass. S.J.C. Rules, Rule 4:04.

<sup>44</sup>Summarize NM Plan. See also Madden v. Delran, 126 N.J. 591 (1992). See also Cramton, Mandatory Pro Bono, 19 Hofstra L. Rev. 1113 (1991).

<sup>45</sup>Currently forty-two states require continuing legal education see Comparison of the Features of Mandatory Continuing Legal Education Rules in Effect as of July 1999, Albany, N.Y., New York State Bar Association, 1999.

<sup>46</sup>New Jersey allows certification in the areas of civil trial, criminal trial, matrimonial and workers compensation. Ibid., p. 2. See also Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990) (in the absence of a state program, self-designation of bonafide specialization is protected by the First Amendment.)

agencies appointed by the state's highest court. <sup>48</sup>

#### IV. BAR ASSOCIATIONS

Lawyers who are admitted to practice by a state's highest court are referred to as members of the bar. Some states, by rule, have an integrated bar which requires those admitted to be members of a state-wide bar association as well. <sup>49</sup> In the rest of the states, joining a bar association is elective. There are often a wide variety of bar associations that a lawyer may choose to join. The American Bar Association is the largest national-wide association which boasts the membership of one-half of the lawyers in the country <sup>50</sup>. It has gained influence by promulgating the Model Rules of Professional Conduct <sup>51</sup> and by being designated as the accreditation authority of American law schools by most states and by the U.S. Department of Education..

Each state also has a state-wide bar association, which also has sections, meetings and publications. Many counties and larger cities have bar associations as well. Most bar associations are have no official status. There are in addition innumerable other associations that lawyers join - like the American Trial Lawyers Association, the American College of Trial Advocacy, the Patent Law Association etc. Many engage in lobbying and publicity to defend lawyers' prerogatives. Lawyers

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<sup>47</sup>The ABA has written three codes during the twentieth century: the Canon of Professional Ethics in 1908, the Model Code of Professional Responsibility in 1969, and the Model Rules of Professional Conduct in 1983. See Morgan and Rotunda, 1999 Selected Standards on Professional Responsibility. New York, Foundation Press. These suggested codes may be adopted by state high courts in whole or in part.

<sup>48</sup>See, e.g., Rules of the Board of Bar Overseers, Mass. Rules of Court, West Group, 1999, p. 1039

<sup>49</sup>See Kellerv. State Bar 496 U.S. 1 (1990) (Compulsory bar dues may be used to discipline lawyers and to study and advise the court on matters involving the administration of justice, but not for "activities having political or ideological coloration.")

<sup>50</sup>The ABA is the largest bar association in the United States. It has 22 sections, including, for instance, the Section on General Practice, Solo and Small Firm, the Section on Intellectual Property, and the Section on State and Local Government. It holds annual meetings in early August and semi-annual meetings in early February. It also has a strong lobbying presence in Washington, D.C. See the ABA website at [www.abanet.org](http://www.abanet.org)

<sup>51</sup>Clark, New Rules of Professional Conduct for Massachusetts: A Dissent 27 the Advocate p. 38 (1997)

may join these associations to get to know local lawyers who practice in the same field and to gain referrals.

#### D. THOUGHTS ON THE FUTURE OF THE PROFESSION

The legal professions solidified its position as the sole expounder of the law regardless of the identity of the client during the twentieth century. Its monopoly position was enhanced by the advocacy by the ABA of requirements of a college degree prior to law school, ABA accreditation of law schools and bar examinations. Further through ABA sponsored ethical codes, the structures for the delivery of legal services were strictly circumscribed and competition was eliminated as unauthorized practice. The duty of zealous advocacy has also served to drive up the cost of legal services.<sup>52</sup>

At the dawn of the twenty-first century, some of the pillars of the professional monopoly are shaking a bit. Multi-disciplinary practice and lay ownership of law firms seem to have arrived.<sup>53</sup> This could theoretically lead to big five ownership of the provision of legal services to America's largest corporations. Even if this effort is blocked by the lawyers, it seems clear that the merger mania that characterized the last five years will continue unabated. Assuming the American economy continues to grow, the spiraling upward of associate compensation is likely to continue, which will exacerbate the pressure on associates to produce billable hours, which in turn will cause the exodus of associates from these firms to increase.<sup>54</sup> The pressure to bill may also provide less time for training and mentoring new associates. The monopoly of expensive ABA accredited legal education is being challenged by "distance education."<sup>55</sup>

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<sup>52</sup> A serious challenge to the universal standard of zealous advocacy was launched in 1977 with the appointment of the Kutak Commission by the ABA. However, after much consternation, there was little change. See Clark, Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules, 17 Suff. L. Rev. 79 (1983)

<sup>53</sup> All Aboard for MDP Train, ABAJ., Jan, 2000 (describing the merger of Earnst and Young, the big-five accounting firm and a Washington, D.C. law firm)

<sup>54</sup> Cameron Stracher, Show Me the Misery, Wall Street Journal, March 6, 2000.

<sup>55</sup> Concord University Law School now offers a J.D. degree which is completely online for a total three year cost of \$19,200. See [www.concord.kaplan.edu](http://www.concord.kaplan.edu)

There is no reason to believe that the six-fold increase in the size of the profession over the last half-century will abate. Legislatures and the public continue to believe that all social problems can be solved by enacting new laws; business and trade and the forms of those relationships continue to grow.

The practice of these segments of the bar that service the individual will change as well, but perhaps less radically. Computer literacy is all but a necessity in the practice today. Standards of competency demand that the lawyer be aware of the wealth of information on the internet in serving the client. Computerized calendars systems and billings systems, as well as e-mail and fax machines are now fixtures in the practice. Lawyers are also finding new ways to advertise on the web.<sup>56</sup>

Opportunities in law will continue to mirror the American economy. Technology and pharmaceutical companies are growing and this growth produces legal work in fields like intellectual property, business and investment planning. Other growth fields include international trade, environmental law, and employment law. One would expect less growth in the fields of individual representation.

Finally one might ask about the future of professionalism itself, about which there have been many recent lamentations.<sup>58</sup> But many of these lamentations focus upon these segments of the bar serving

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<sup>56</sup> See, e.g., [www.sharktank.com](http://www.sharktank.com) and [www.americacounsel.com](http://www.americacounsel.com). See Carter, Checkbook Credibility, ABA J June, 2000, p. 50. For a discussion of the ethical problems presented by these web sites.

<sup>57</sup> Dean Pound defined this term as the pursuit of a learned art as a common calling in the spirit of public service. Pound defined the term, profession, as “a learned art as a common calling in the spirit of public service.” Pound, The Lawyer from Antiquity to Modern Times, (1953) The very concept of a profession has been criticized as elitist and as a “nostalgic crusade in the name of an ideology almost no one believes in fully and which has little to do with the everyday working vision of American lawyers.” Nelson and Trubek, “New Problems and New Paradigms in the Studies of the Legal Profession,” in Lawyers Ideals/Lawyers Practices: Transformation in the American Legal Profession, (Nelson, Trubek and Solomon eds., 1992). See also Clark, Review, The Lost Lawyer: the Oligopoly of the Elite Lawyer, 26 The Advocate, Spring, 1996; Auerbach, Unequal Justice Oxford U. Press, (1976)

<sup>58</sup> Linowitz, The Betrayed Profession (1994), Kronman, The Lost Lawyer (1993), Glendon, Nation under Lawyers (1994), see also Clark, Book Review: Lost Lawyer and the Oligopoly of the Elite Lawyer, the Advocate, Spring, 1996

large institutions and their lament seems well-founded when the subject of the inquiry is the associate at the large firm who does 2000 hours of discovery in the firm's litigation department without meeting a client or seeing the inside of a courtroom. However, the notion of reverence for the law, fiduciary duty and client service seem quite alive and well among most of the lawyers in most segments of the bar.