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INTRODUCTION TO THE 2005 NORTH CAROLINA LAW REVIEW SYMPOSIUM, EMPIRICAL STUDIES OF THE LEGAL PROFESSION: WHAT DO WE KNOW ABOUT LAWYERS' LIVES?

JOHN M. CONLEY* & SCOTT BAKER**

A hallway conversation sparked the idea for this Symposium. As academics who study the profession, we found ourselves frustrated by the lack of reliable evidence about its state. It is not that law professors, judges, and lawyers don't talk about the profession. They do. One hears and reads the constant refrain that the profession is bad and getting worse. Lawyers are more likely to become alcoholics, suffer from depression, commit suicide, and so on.¹ Large firms are full of people who will gladly set aside ethical rules to make more money.² Partners at large firms kow-tow to clients and facilitate corporate scandals, of which Enron is but one example. Large-firm associates have a miserable life. They have to bill an oppressive number of hours under the never-ending stress of the partnership tournament. Solo practitioners and small firm lawyers don't have it much better. The stress of maintaining a practice and serving clients requires a twenty-four-hour workday, leaving little time for leisure or family. Indeed, the negative refrain has carried over to law students, who are thought to be more likely to suffer from anxiety and depression than other professional students.³

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1. See Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 873-80 (1999). But see Kathleen E. Hull, *Cross-Examining the Myth of Lawyers' Misery*, 52 VAND. L. REV. 971, 983 (stating that there is no "solid evidence" that lawyers are unhappy with their jobs).

2. See Symposium, *Attorney Well-Being in Large Firms: Choices Facing Young Lawyers*, 52 VAND. L. REV. 871 (1999).

3. Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution*, 8 LEGAL WRITING 229, 229-30 (2000).

But rumor and anecdote, not evidence, seem to support many of these claims. As empirically-minded scholars, we were curious about the actual state of the profession. Did it mirror this conventional wisdom? Or was that wisdom legal “urban legend” that had taken on a life of its own? To help resolve this dilemma, we asked several prominent legal scholars, two economists, two practitioners, and a federal judge to consider the state of the profession. The papers in this Symposium reflect their considerable talents and energy.

Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit began the conference with a strong critique of the recent direction of the profession. His Essay, *Renewing Our Commitment to the Highest Ideals of the Legal Profession*, argues that those ideals have been gradually eroding.⁴ According to Judge Edwards, the Model Rules of Professional Conduct merely provide the floor for ethical behavior. The truly great lawyer provides more than the floor in terms of public service, client counseling, and the delivery of public goods. Judge Edwards also turns his perceptive gaze on law schools and the hiring of junior faculty. He is disturbed by the trend away from requiring a significant amount of practice experience before a professor enters the classroom. Without ever having served as an active member of the legal profession, Judge Edwards asks, how can a law professor impart to students its highest ideals?

Marc Galanter’s keynote address, *Tournament of Jokes: Generational Tension in Large Law Firms*,⁵ provides an elegant counterpoint to Judge Edwards’s Essay. Whereas Judge Edwards offers forthright criticism of changes in the profession, Galanter works by indirection, asking what can be inferred about these changes from lawyer jokes. His premise is that joking is a universal form of human interaction, and that the best jokes have an element of truth at their core. Galanter notes, for example, the changing age profile of the profession, with a higher percentage of lawyers over fifty. This demographic shift creates inevitable conflict. Not surprisingly, that conflict has become the subject of jokes, many of which poke fun at the relationship between junior and senior lawyers. One theme is the senior partner as parasite, profiting from the hard work of the junior lawyer. Another is the junior lawyer as incompetent. He provides the senior lawyer endless information, but none of it is relevant to the

4. Judge Harry T. Edwards, *Renewing Our Commitment to the Highest Ideals of the Legal Profession*, 84 N.C. L. REV. 1421 (2006).

5. Marc Galanter, *Tournament of Jokes: Generational Tension in Large Law Firms*, 84 N.C. L. REV. 1437 (2006).

legal issue at hand. For Galanter, these jokes are clues to the frustrations that ensue as the profession ages. The more general point is that those who study the profession would do well to attend to humor as a revealing form of data.

The substantive pieces for the Symposium took various methodological approaches, some quantitative and some qualitative. Each, however, asked important questions and tried to answer them with reliable data. In *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, William Henderson studies the movement among law firms toward the two-tiered partnership.⁶ This model alters the traditional “up-or-out” promotion scheme, in which an associate either becomes a full-fledged owner of the firm or is forced to leave. In the two-tiered partnership, an associate can—or must, at least for a time—move into an intermediate status as a non-equity or service partner, with some of the economic and status advantages of partnership but without the full rights of an owner. In some cases, depending on the lawyer and the firm, non-equity partnership is as far as one gets; in others, the expectation is that the lawyer will graduate to full partnership after a further period of probation. The two-tiered arrangement thus softens the stark up-or-out nature of the traditional promotion model. It also enables the law firms to retain valuable associates who might not have rainmaking capabilities.

The puzzle for Henderson is why some firms switch to two-tiered partnerships, while others maintain the traditional single-tier system. Henderson finds a correlation between law firm prestige and tier structure. He concludes that those firms at the top of the prestige pecking order don’t switch forms because they don’t need to. Less prosperous firms worry that their most productive partners will defect to other firms for more money. At the same time, they need to retain the highly competent mid-level lawyers who do the actual work. But if they offer the latter full partnerships, the per-partner profit share will be diluted, tempting the former to defect even more. The two-tiered system presents itself as a compromise solution, limiting the number of partners sharing profits and thereby keeping the rainmakers happy while simultaneously offering the valuable “grinders” just enough of an incentive to stay around. For the most prestigious firms—the super-elite—this kind of gimmick is simply unnecessary. The firm itself has so much reputational capital that

6. William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691 (2006).

partners are unlikely to be able to make more money anywhere else. The non-equity system thus emerges as a bit of a desperation strategy for firms that see themselves falling behind.

Addressing an entirely different issue, in *The Racial Paradox of the Corporate Law Firm*, Richard Sander considers minority hiring and retention in large law firms.⁷ Sander begins by showing that minority law students express as strong a preference for law firm employment as white students, in contrast to the conventional wisdom that minority students prefer public interest jobs over the private sector. Sander then demonstrates that large law firms engage in affirmative action hiring, in the sense of deviating from their usual reliance on law school grades in order to extend opportunities to more minority applicants. While most firms advertise that they are practicing affirmative action, Sander provides empirical support that they actually do. That leads Sander to the ultimate and most difficult question: Why do so few minority lawyers become large-firm partners? He suggests links among affirmative action hiring, lack of mentoring, and the number of minority partners. If, for example, affirmative action hiring means that nonwhite entry-level hires have, on average, lower grades than their white counterparts, then firm partners may develop negative stereotypes about minority associates. This in turn could influence the partners' behavior as they assign significant versus rote work and provide or withhold mentoring, with adverse consequences for the minority associates' partnership prospects. Sander's current data do not provide a definitive resolution to the paradox he identifies.

In *Practicing Immigration Law in Filene's Basement*, Richard Abel tells the gripping and disheartening tale of Joseph Muto, an immigration lawyer in New York City.⁸ His clients were Chinese immigrants facing deportation. Muto claimed to provide good legal services at rock-bottom prices. As Abel's archival research demonstrates, Muto was an unbelievably incompetent lawyer. He missed hearings. He couldn't engage in the most mundane motion practice. He rarely, if ever, met with his clients before their hearings. The immigration judges repeatedly scolded him. He responded by groveling, making excuses, and throwing himself at the mercy of the court. Eventually, Muto was disbarred.

7. Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006).

8. Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449 (2006).

Abel shows that Muto's mishaps had tragic consequences, leading on occasion to the deportation of his clients. With Muto as the example, Abel asks what the profession can do about lawyer incompetence. He offers some tentative suggestions, such as requiring an apprenticeship period before a lawyer can engage in solo practice. To Abel, none of the obvious solutions is perfect. His Article represents a call for scholars to pay closer attention to the problem of professional incompetence.

In contrast to Abel's archival research on the plight of a single lawyer, in *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, George Baker and Rachel Parkin provide a broad overview of the profession.⁹ They have assembled an extraordinarily large and comprehensive database of lawyers and law firms in the United States from 1998–2005 by collecting and formatting the information from the Martindale-Hubbell legal directories. This was no small task—on the contrary, it was Herculean, and sometimes Sisyphean. Cleaning the data, which they did with care, presented many challenges. In the end, their data facilitates a new level of evaluation of alleged “trends” in the profession. Baker and Parkin confirm that large law firms have grown over time, with more lawyers and more branch offices, but find mixed evidence about the often-reported decline of the mid-sized firm. They also find that larger firms tend to be more highly leveraged, but their data also suggest that leveraging may be considerably overrated in the anecdotal literature. Finally, they uncover an increase in the time to promotion for associates, but, once again, the details are surprising. The Baker/Parkin dataset is enormous. For years to come, we anticipate that scholars will use it to uncover trends and test theoretical claims about the profession.

Laura Beth Nielsen and Catherine Albiston complement the work of Baker and Parkin with their study of changes in the structure of public interest law firms in *The Organization of Public Interest Practice: 1975–2000*.¹⁰ They detail a stunning transformation since the mid 1970s. Today, public interest law firms are larger; they employ more support staff; they spend more time on research, education and outreach (as opposed to purely litigation); and they are more often devoted to multiple legal causes, as opposed to a single one. Most interesting, Nielsen and Albiston find that funding

9. George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635 (2006).

10. Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2000*, 84 N.C. L. REV. 1591 (2006).

influences firm activities. Firms supported primarily by government dollars spend the bulk of their time operating as poverty lawyers representing individual clients. By contrast, privately supported firms engage in advocacy lawyering, on both the left and right of the political spectrum.

Finally, Elizabeth Chambliss, in *The Professionalization of Law Firm In-House Counsel*, documents the recent move by law firms toward having an in-house counsel.¹¹ The purpose of this position is to advise the firm's lawyers on compliance with ethical rules (principally conflicts) and to help the firm engage in malpractice risk management. Though they were unheard of twenty years ago, Chambliss's study shows that in-house counsel are firmly rooted in law firms today. But the actual "job" of the in-house counsel remains unsettled. Through focus groups and interviews, Chambliss demonstrates how a new business practice has become part of the profession. She documents the struggles that firms have had in defining the role of in-house counsel, including the important initial question of who is the in-house counsel's "client." Other vexing questions include whether in-house counsel should be a full-time position, and whether the counsel should come from inside the firm or be hired laterally. Although the answers are elusive because the business practice is evolving, Chambliss provides a revealing first look at an important recent development in law firm management.

In sum, the papers in this Symposium aptly capture different aspects of the title, "Lawyers' Lives." Our hope is that this Symposium stimulates other scholars to continue the empirical investigation of how the profession actually operates. As difficult as they may be to discover, the realities of the profession must be the starting point for any meaningful conversation about its problems as well as its promise.

11. Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515 (2006).