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COPING WITH CHANGE: THE LAWYER'S ROLE**

WILTON S. SOGG*

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I. THE CONCEPT

The following articles are the result of an experimental course entitled "Current Problems of Small Business" offered at Cleveland-Marshall College of Law. Primarily for third-year students, the course was designed to provide a practical learning experience in seminar format. The course focused on business issues, but also taught lawyering skills such as interviewing, counseling, negotiating and drafting. Thus, the students were provided a pragmatic learning experience that can be applied to legal practice.¹

The course was an ambitious undertaking. It focused on current problems facing small and growing businesses. However, the central feature which made the course unique was its attention to how a lawyer copes with changes in the law, as well as the lawyer's role in helping the small business client to cope with these changes.

Those of us who combine private practice with academia have long been fascinated by business literature filled with articles entitled: "Coping with Change in" Business best-sellers particularly have addressed this issue. *Future Shock*² focused upon the stress of coping with the restructuring of our nation, our institutions, and the way the work

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¹ Academicians have occasionally expressed the need to link the pragmatic aspects of practicing law with the teaching of law. "We need a new generation of research and ideas about the delivery of legal services . . ." Vorenberg, *Challenges to Legal Education*, *Harv. U. Gazette* (Harv. L. Sch. Supp.), April 24, 1987 at 1.

² A. TOFFLER, *FUTURE SHOCK* (1971).

place functions. Similarly, *Reinventing the Corporation*³ explored changing cultural norms in the business world and the executive suite.

However, there appear to be no significant books or articles on the subject of coping with changes in the law. To confirm my perception of a literary void, I contacted Dean Dauer of the Center for Preventive Law at the University of Denver⁴ to ask what materials, either published or unpublished, the Center's library might hold on the subject. Dean Dauer was particularly receptive and cooperative. His initial response was that he was unaware of anything in the archives. Additional research revealed nothing at all in their collection.⁵ Not surprisingly, this heightened both of our interests in the topic,⁶ since this is an area of emerging and critical importance to legal education and practice.

II. THE FRAMEWORK

The course curriculum was developed to survey a variety of critical problems which currently confront privately-owned businesses and their legal counsel. Income taxation, employment relations law, liability reform, and the acquisition of working capital for growing businesses were selected as areas of general concern to both lawyers and businessmen. Classroom discussion and study progressed on two levels. First, the general concerns and problems each area presents for lawyers and businessmen were addressed. Second, the additional problems presented by transitions in the law in these areas were examined.

Classic pedagogy yielded little assistance in the effort to structure the course since the subject of the lawyer's role in dealing with changes in the law had been heretofore relatively untouched. Analysis of the selected areas revealed certain key topics which merited thorough examination throughout the course. The topics included can be broken down into four key areas.

First, the role of the lawyer in dealing with changes in the law was examined. Further analysis of this topic led to the development of more specific and well-defined subtopics. These included:

³ P. ABURDENE & J. NAISBITT, *RE-INVENTING THE CORPORATION: TRANSFORMING YOUR JOB AND YOUR COMPANY FOR THE NEW INFORMATION SOCIETY* (1985).

⁴ Dauer co-authored a text used in the course. L. BROWN & E. DAUER, *PLANNING BY LAWYERS* (1978).

⁵ In the interim between the original search and the publication of this symposium, two articles dealing with the subject of coping with change in the law were called to my attention. See Milbrath, *Non-Price Vertical Restraints and Antitrust Law: Dealing with the Uncertainty in a Changing Legal Climate*, THE FLA. B. BUS. REP., THE Q. REP., Spring, 1988, at 11. See also, *The Role of the Probate Lawyer in a Changing Legal Environment*, 22 REAL PROP., PROB. AND TR. J. 753 (1987).

⁶ See Brown and Dauer, *The Dauer-Brown Letters: Towards a Comprehensive Legal Education*, 36 CLEV. ST. L. REV. _____ (1988).

- (1) The lawyer's ability to understand the nature and character of the change, and to find ways to describe, analyze, characterize and deal with it.
- (2) The lawyer's ability to enhance his own professional skills in coping with change.
- (3) The lawyer's ability to devise strategies for assisting and counseling a client whose business has been affected by the change.
- (4) The use of the lawyer's skills to deal with other professionals who are part of the business client's team and thus also affected by the change.

Second, the course looked at the lawyer's ability to recognize and understand the special circumstances of the client caught in the midst of a change.

Third, the course addressed the discrete strategies for coping with change at different stages. The following sub-topics were also considered:

- (1) Anticipating change: e.g., the call for tax reform, introduction of legislation, or a judicial decision foreshadowing change.
- (2) Change in progress: e.g., pending legislation or case law developing in new directions.
- (3) Adjusting to the accomplished change: e.g., with change having taken place, adjusting to and coping with the impact which follows.

Fourth, the definition and characterization of different kinds of change were addressed. The following sub-topics were considered:

- (1) Federal legislation: This is nationwide change preceded by notice with a specific effective date and possibly containing "phase-in" mechanisms. Additionally, such legislation may make assistance available, both within the law itself and through the agency administering the law, for adaptation to and implementation of the change.
- (2) State-by-state changes in common law doctrine: Employment-at-will was our model for analysis and the discussion expanded to the entire subject of employment relations. The analysis included the various types of change at the state level in both case law and statutory law.
- (3) Changes in state statutory law: We particularly focused on "tort reform" because of the changes being made in various states.
- (4) Changes in business practices: We studied change in the context of the day-to-day character of a business, within the larger framework of the financial marketplace. This was a mixed issue of law and business, and was typical of the framework within which businessmen and lawyers address issues in the "real world."

III. THE PROCESS

Prior course experience in teaching lawyering skills⁷ indicated that guest speakers were an invaluable resource. Thus, guest speakers were made an integral part of most class sessions. There is considerable difference of opinion in the academic community as to the use of guests in the classroom. The nature and purpose of the material, however, suggested that the practical benefits of having selected guests far outweighed any concerns regarding a more esoteric and controlled approach to teaching law.

Each of the guest speakers had specific expertise relating to one of the areas being studied in the course. For example, in the tax section, our guest was a CPA whose practice focuses on advising growing businesses. Our discussion of the "liability crisis" and "tort reform" featured an Ohio state senator, also an attorney, who was then currently involved in the legislative debate on the subject. Our guest for the banking segment was an experienced lender and administrator with an extensive teaching background.

Prior to speaking, each guest was prepared so that he understood the concept of the course and the purpose of that particular class. Each guest understood that the principal focus of their presentation was not to be so much the substantive content, but rather the manner in which they, as professionals, coped with change individually, for their clients, or with other professionals in what were often precarious situations. The guests had the opportunity to articulate their own views on the core themes of the course and to present their own unique approaches to coping with change in the context of a specific substantive area.

The other significant contribution to learning made by each guest arose from my own interaction with them during the classroom discussions which followed the formal presentations. This allowed me to ask similar questions of each guest and explore themes which had emerged in earlier sessions. As a result, the students not only had the opportunity to hear the speakers' prepared views, but also had the chance to hear them interact with me in heated discussions about the issues which confront the lawyer who is dealing with a change in the law. Additionally, we were able to explore the variety of skills and strategies available for assisting the client who has been impacted by change.

From the recurring themes which appeared with each additional speaker, the class was able to generate a synthesis of the collective views and experiences of our guests. This experience led to student development of concepts and guidelines for dealing with change and an approach to

⁷ See Herwitz, *Teaching Skills in a Business Law Setting: A Course in Business Lawyering*, 37 J. LEGAL EDUC. 261 (1987).

practice with a foundation in substantive law, a familiarity with process and change, and an appreciation of the realities of practice.

The student paper assignment was the critical culmination of the course. The paper was designed to allow the students to choose their own special area of interest and, in the context of that subject, apply the themes developed in the course. Throughout the course, students were required to submit their topics, bibliographies, outlines and one or more drafts of the paper itself. Following the conclusion of the course work, there was time for the completion of the papers so that the full classroom experience could be brought to bear on the finished product. The resulting papers represented the individual student's own thinking and research, enhanced by their classroom experience.

An additional reason for assigning the papers was to help fill the void in legal literature on the subject of coping with change in the law. The following articles serve as an initial step in filling the void. Their collective contribution is therefore considerable. The bibliographies and footnotes represent the beginning of a body of literature on the issue of coping with changes in the law.

As this symposium demonstrates, the students' efforts far exceeded even my less than modest expectations. The student articles in this symposium represent the best papers produced by the class. The excellence of these articles has been attested to by eight individual awards received from the Center for Preventive Law.⁸

Ideally, these articles should serve a dual function. They should encourage readers to think through these issues for themselves. They should also provide a basis for experienced practitioners to work through their own experiences in similar situations and to articulate and sharpen their own skills in dealing with change.

When I was an instructor in a similar course twenty years ago, I sensed that opinion letters of counsel were an important issue of practice which had been neglected in legal literature. When our student papers were published in the *Cleveland State Law Review*⁹ they were the first significant literature in the area. The intervening years have demonstrated the importance of the subject. A significant amount of literature has developed since that time. It is therefore my reasonable hope that the landmark articles in this symposium will serve as the foundation for a similar body of thought and commentary on coping with change in the law.

⁸ Each student contributor received \$100 as a share of the first prize in a writing contest sponsored by The Center for Preventive Law at the University of Denver. Two of the students declined publication in this symposium issue choosing instead to consolidate their papers and submit the finished product to other publications.

⁹ See, e.g., Raney, *Drafting and Use of Opinion Letters of Counsel*, 17 CLEV. ST. L. REV. 360 (1968).

