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Transcript--Defining and Refining Professionalism: Assessing the Roles and Regulation of Lawyers in the Twenty-First Century

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FLORIDA STATE UNIVERSITY LAW REVIEW



TRANSCRIPT--DEFINING AND REFINING PROFESSIONALISM:
ASSESSING THE ROLES AND REGULATION OF
LAWYERS IN THE TWENTY-FIRST CENTURY

Panel Discussion

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DEFINING AND REFINING PROFESSIONALISM: ASSESSING
THE ROLES AND REGULATION OF LAWYERS IN THE
TWENTY-FIRST CENTURY

TRANSCRIPT: PANEL DISCUSSION AND AUDIENCE COMMENTS*

PROF. JEFFREY STEMPEL:

With considerable pride, I want to begin the discussion by introducing our all-star cast of participants. On my immediate left is Sandy D'Alemberte, president of Florida State University. Sandy is a longtime activist in the public sector. He began a distinguished career in private practice with the firm of Steele, Hector & Davis in Miami. He became Dean of the FSU College of Law in 1984 and served admirably for five years. He subsequently became President of the American Bar Association before returning to FSU, as president. He continues, of course, to be active in many professional and civic activities.

To Sandy's immediate left is Deborah Rhode, Professor of Law at Stanford University and Director of the Keck Center on Legal Ethics.

In the center of our panel, to Deborah's left, is Justice Harry Lee Anstead of the Florida Supreme Court. Justice Anstead served in the intermediate appellate courts before joining the State Supreme Court. He has been, perhaps, the leading activist on the bench promoting legal professionalism initiatives in Florida.

To Justice Anstead's left is Professor Marc Galanter from the University of Wisconsin Law School. Marc is one of the leading lawyer-sociologists/empiricists in our business. He frequently brings together the teachings of other disciplines, particularly sociology and history, in his analysis of major legal issues.

I first became aware of Marc's work, ironically, when I was a student, by reading his famous 1974 law review article in the *Law & Society Review*, *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change*,¹ an article so famous that it was the subject of its own symposium in Wisconsin, just a year ago. And, I think there is almost nary an article I write where I don't cite to him in at least one footnote.

To Marc's right is Martha Barnett, partner in the Holland & Knight law firm, a distinguished practitioner and public activist in the Florida Bar, and the president-elect of the American Bar Association.

We're just thrilled to have this group with us—such varied backgrounds and such great stature. We begin our discussion with Marc Galanter:

* Panelists include: Jeffrey W. Stempel, Professor of Law, William S. Boyd School of Law, Las Vegas, Nevada; Talbot "Sandy" D'Alemberte, President, Florida State University; Deborah L. Rhode, Professor of Law, Stanford University Law School; Honorable Harry Lee Anstead, Florida Supreme Court Justice; Marc S. Galanter, John and Rylla Bosshard Professor of Law, University of Wisconsin Law School; Martha Barnett, Esq., Partner, Holland & Knight; Russell G. Pearce, Professor of Law, Fordham University School of Law; Stephen Gillers, Professor of Law, New York University School of Law; Carrie Menkel-Meadow, Professor of Law, Georgetown University School of Law.

1. Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & Soc'y REV. 94 (1974).

PROF. MARC GALANTER: Thank you, Jeff.

Having listened to the business paradigm versus professional paradigm debate this morning, I'm in the position of the Rabbi in a well-known story who is judging a matrimonial dispute. He listens first to the wife, and after hearing her out says, "yes, yes, you're right, you're absolutely right." Then, the husband gives his side, and the Rabbi listens attentively and says, "you're right, you're absolutely right." After the parties leave, the Rabbi's wife accosts him and says, "what were you doing? You told this one she's right. You told that one he's right. How can they both be right?" He says, "you know something? You're right."² (Audience laughter.)

I find myself somewhat in that position. Because I think what we were presented with this morning is really not an either/or choice. We know that in some sense both paradigms presently coexist. The real question facing us, it seems to me, is how to arrange and coordinate these different systems of controls of lawyer conduct.

I would like to put forth an immodest proposal, which reconciles these at the cost, of course, of creating many more problems. But let me put it forward and then, if other people want to jump on it, I would be very pleased to respond.

One observation that surfaced in a number of remarks today is that the legal profession is a bifurcated structure. There are what Heinz and Laumann describe as "two hemispheres."³ There is an individual hemisphere or personal service sector consisting of the very large number of lawyers organized in small practices who mostly serve individuals and sometimes their small businesses.

On the other hand, there is a corporate hemisphere consisting of a large number of lawyers organized in large law firms who serve the legal needs of corporations, governments, and other organizations. So, we have large law firms serving a corporate sector or corporate hemisphere and smaller practices serving personal services hemisphere. Of course, these are crude generalizations, but, by and large, they provide an accurate picture of the American legal profession.

Note that what we have is not only two different kinds of law practice but also two different kinds of legal actors. The actors represented by the lawyers in personal services sector are natural flesh and blood people. The actors represented by lawyers in the corporate hemisphere are the "artificial persons," as Blackstone called them.⁴ Artificial persons, be they corporations, government units, associations, or organizations of various kinds are the creations of the law. There is some very interesting evidence that more and more of the world of lawyering and the world of

2. This joke, told interchangeably about rabbis and judges, has been around since at least the 1850s. A wonderful analysis and ample documentation can be found at RICHARD RASKIN, *LIFE IS A GLASS OF TEA: STUDIES OF CLASSIC JEWISH JOKES* 13-32 (1992).

3. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 319-85 (1982) (hereinafter *CHICAGO LAWYERS*); see also John P. Heinz et al., *The Changing Character of the Lawyers' Work: Chicago in 1975 and 1995*, 32 L. & SOC'Y REV. 751 (1998).

4. See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* I(i)(23) (1965).

law are being occupied by these artificial persons—or for short, let me call them AP's.

For example, every five years, the U.S. Census calculates where the income of the legal services industry—as they call us—comes from. Does it come from individuals or businesses or government bodies? The Census has been counting this since 1967 at five-year intervals, and every five years, the portion of the total legal services pie that is consumed by individuals goes down. Although the absolute amount consumed by individuals continues to rise, the percentage falls.⁵ The portion of the pie consumed by businesses and government rises—that is, services purchased from the private bar. If we added the consumption of in-house legal services by government and business, we would see an even greater disparity.

Another reading of the same phenomenon is provided in the follow up to the very best study we have of the structure of the bar in the United States, *Chicago Lawyers*, by John Heinz and Edward Laumann. Their original study describes the whole legal profession in Chicago in 1975.⁶

Then, twenty years later, Heinz and Laumann went back to the Chicago bar and collected a new round of data, so they were able to compare the shape of the Chicago bar in 1995 with that in 1975.⁷ They found that in that twenty-year period the growth of the corporate hemisphere enormously outstripped the growth in the personal services hemisphere. Back in 1975, about fifty-three percent of the total effort of lawyers was expended in the corporate hemisphere—In the corporate hemisphere, about forty percent in the individual hemisphere; and the rest in other categories that didn't quite fit.

By 1995 the corporate hemisphere absorbed about sixty-one percent of the entire effort of the profession, and the personal services hemisphere absorbed about twenty-nine percent. The disparity grew from a four-to-three to a two-to-one ratio.

We have a bifurcated profession, and we have the several models of regulation discussed earlier today. I would like to float the suggestion that we retain the professional model of regulation for the personal services sector but we abandon it for the corporate sector, that is for the lawyers who are representing artificial persons.

This is not the first time that a proposal for dividing the profession has been put forward. Inspired by the success of the *Flexner Report* in

5. In 1967, individuals bought 55% of the product of the legal services industry and businesses bought 39%. See Richard H. Sander & Douglas Williams, *Why Are There so Many Lawyers?: Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431, 441 (1989). With each subsequent five-year period, the business portion has increased and the share consumed by individuals has declined. See *id.*; see also BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1897 CENSUS OF SERVICE INDUSTRIES, MISCELLANEOUS SUBJECTS, at tbl.42 (1991); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1992 CENSUS OF SERVICE INDUSTRIES, SOURCES OR RECEIPTS OF REVENUE tbl.49 (1996). By 1992 the share bought by business rose to 51% and the share bought by individuals fell to 40%. See *id.* In constant 1987 dollars, individual expenditures on legal services increased 261% from 1967 to 1992, while law firms' incomes from business increased by 555% during that period. See *id.* The "legal services" category includes all law practices that have a payroll, which means virtually all lawyers in private practice.

6. See HEINZ & LAUMANN, *supra* note 3.

7. See Heinz et al., *supra* note 3.

Reforming Medical Education, the Carnegie Corporation commissioned Alfred Z. Reed to prepare a report proposing reforms of legal education. Reed concluded that there really were two professions, differentiated by “the economic status of the client.”⁸ He proposed that the division be recognized and formalized and that an inclusive general bar should be accompanied by an “inner bar” consisting of “lawyers of superior attainments of broader vision, and greater ability to identify themselves with the larger whole”⁹

I’m not buying into the whole “Reed program,” by any means. But, like Reed, we should be willing to contemplate the possibility of recognizing separate occupations or at least reasons for having distinct regulatory regimes. Imagine having a heavily regulated profession of caring, loyal legal professionals serving natural persons, and a “bus-fession” of people who provide legal services for corporations and other artificial persons.

This isn’t a barrister/solicitor distinction. Nor is it Reed’s version of highly trained lawyers for complex business affairs and narrower specialized lawyers to provide personal services. It is more like the difference between the prescription drug industry and the over-the-counter drug industry. We permit people to buy over-the-counter drugs on the assumption that people are reasonably good judges of these things, and they can decide what to do with them. On the other hand, there are certain things where people really need protection, and some paternalism is justified.

What I am suggesting is that the provision of legal services to organization market controls are sufficient. In fact, the existing disciplinary process has very little bite in the corporate hemisphere. With the rarest of exceptions, disciplinary proceedings concern small practices that serve individuals. The problems of the CORPORATE sector are very, very different. Unlike the personal service sector where the typical problem is underserving clients, in the corporate sector the problem tends to be overserving clients, often colluding with them to screw third parties. That is a very, very different set of problems and calls for a very different set of regulatory mechanisms.¹⁰

You may wonder about the situation where individual persons are fighting with a corporation or government body. Wouldn’t the latter enjoy an advantage if their unregulated “bus-fession” could provide services cheaper, while the natural person would have to purchase services from a regulated monopoly? It would require some measures to balance that; for example, provisions for fee shifting and other measures to address the problem of the undercapitalization of personal sector lawyering.¹¹ This is a pervasive problem that is dramatized in the book and film,

8. ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 419 (1921).

9. *Id.* at 238.

10. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (indicating a need for overlapping systems of controls with different strengths to deal with problems that arise in various sectors of law practice).

11. On the chronic undercapitalization of the plaintiff’s bar, see Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 474-77 (1998).

A Civil Action.¹² It is basically about what happens to a dedicated and capable lawyer who is undercapitalized and engaged in a battle against a very well resourced opponent. Another consequence of confining the professional model to the personal services sector would be that a lawyer/client confidentiality protection and a work product protection would need not extend to the “bus-fession” that served corporate entities.

My point, if I can put it in a sentence, is that we should use the current concern about the identity of the profession, to address the larger crisis of the increased ascendancy of artificial persons over natural persons—that is, of corporate bodies over flesh and blood individuals. We should begin to think about the ways that the legal profession can help to equip natural persons with tools for coping with an ever more organized organizational world. Let me just throw this out for your consideration.

PROF. STEMPEL: Well, it’s certainly provocative, Marc. Let me ask for the first response from Justice Anstead, because I don’t think you have anything pending on this issue. As a member of the Florida Supreme Court that would have to promulgate rules to that effect, to establish two-tiered regulations, apart from the practicality of it, can you see Marc’s proposal as a course worth pursuing, or is it simply too disparate?

HON. HARRY LEE ANSTEAD: Well, it seems to me, initially, what you’re talking about is creating a separate, new paradigm for this group of order that, in essence, engages in the corporate world or the business world.

I think the first problem that you have with that is this sort of class system within the legal profession. In fact, one of the law teachers here, during the break, observed that one thing that has happened is that the business paradigm has already come in and been in place in a lot of the legal profession with the larger firms, the business firms, and that it is the dissatisfaction with the influence of that paradigm that is creating a lot of the anxiety and is the basis for the renewed debate within the profession itself. That model is a lessening, really, of the professional regulations. Stress and pressure are a part of that model, as is a lack of personal satisfaction in the individuals participating in those kinds of firms. Really, we’ve had that swing going on for the last twenty years, and it is the dissatisfaction with that model that is creating a lot of the basis for the movement in the profession right now.

I must say, I would be greatly concerned with having two different sets of standards and, in essence, a lesser standard of conduct for this larger percentage of the legal profession. Initially, that is my reaction.

I was very stricken by the two initial speakers today, and, really, the common ground that they had. I didn’t expect to hear as much common ground. But both speakers were focusing on this element of the public good and moral values, if you will. And even with the business paradigm, there was an emphasis here that there is—and I’ll wait and see, I’m not going to hold my breath—an emerging trend in the business community toward serving the public good, and of moral values.

12. JONATHAN HARR, *A CIVIL ACTION* (1995).

But there was a heavy emphasis, in terms of goals, I thought, by Professor Pearce. Because, really, when he concluded his “Law Day 2050” speech, he was saying that we have now accomplished and achieved much higher moral standards in the profession, and we are doing much more good out there in the community by virtue of this accomplishment.

The difficulty that I have with the business paradigm is that it does not make sense to me that you can do better by *not* focusing on issues of ethics, values, and professionalism in some organized way. Yet, you are going to do better by not having that paradigm to serve you and not focusing on those kinds of things, intentionally. In other words, we need some sort of a structure to follow in this ongoing debate about who we are and what we are about.

Now, changes are going to occur. I don’t think there is any question about that. But I was struck the other day—if we are allowed to tell war stories—listening to a debate on public radio by a group of economists. They were talking about this thing that has been going on—about mission statements, if you will. So I got a big kick out of it. They said there is one mission statement, by the Ritz Carlton Hotel chain, that says: “Ladies and Gentlemen Serving Ladies and Gentlemen.” They said, boy, isn’t that a catchy one? They said that they could use the statement both for their employees, and for the public, too.

But when they got to the bottom line—and they all came to sort of a consensus—they said mission statements were not really of great value out there in the corporate or business world, because, really, the only mission statement was “let’s make as much money as we can.” That was underlying everything that they did.

So, if we are going to maintain the distinction, we *must* focus on value. These values are always critically important to lawyers, because they are integrally connected to a system of justice in a particular society. We always have to have an ongoing dialogue, because we have to debate those things. Some values, as Rob Atkinson points out, are obviously more important than other, perhaps, more superficial ones.

But, I like the fact that in this country we have a mission statement, and we have placed it above our highest court: “Equality, Liberty, And Justice For All.” I like that very much.

PROF. JEFFREY STEMPEL: Martha Barnett, you’ve been the closest to practice of anybody on this panel. Is it the case that the business paradigm has already taken over, or that the professionalism paradigm is irrelevant, or that you would like a two-track system as outlined by Galanter, notwithstanding Justice Anstead’s reservations?

MS. MARTHA BARNETT: I’m just glad you called on an *artificial person*. I didn’t think I’d get to talk. (Audience laughter)

I made a list of many of Marc’s comments. We don’t have time to go through some of my reactions to them, but I reject his thesis and his proposal. First, I don’t necessarily think there are two different universes of practicing lawyers. I think there are a multitude of ways that lawyers practice law, whether it’s in a large firm, a small firm, corporate America, or even the Academy, which, in some ways, is engaged in the practice

of law. And, I think that the uniformity we have in our current system serves us well.

These are, to me, in many cases, minimum standards that I would like people to comply with. Some of them are clearly mandatory and prohibitory. But, some of them are also aspirational. I think they have served us well. I don't see any benefit at all in having a lesser standard for people who are in large firms or who have primarily a corporate practice.

The fact that a corporation is not a *natural person*, or is an *artificial entity*, is irrelevant to me. Corporations really are there to do things. They are made up of real people and the problems and issues that arise in a corporate practice are people problems, by and large. They are not artificial problems that result just because you have a legal fiction of an artificial entity.

I see no reason to have different standards. For one, I think it would be a practical impossibility to enforce it. Many small office practitioners have a very sophisticated corporate practice. Many people in large law firms deal with very personal issues for their clients. There is just not the dichotomy—as has been described here—in the real world.

Also, on the question of a business model versus a professional model, I don't think you have to have an either/or. In fact, I see a trend, and it may be because I'm fortunate to be in a law firm that feels very strongly about our professional obligations and exists to do more than just make money. In fact, I see similar trends in law firms of varying sizes. There is a commitment to client service. After all, we are in the business of practicing law, and if creature comforts are important to people, there is nothing wrong with having an aspiration of making money or even making a lot of money. But, oftentimes, making money can facilitate the professional activities and the activities that would be, such as Professor Rhode was saying, pro bono participation in your community. Often those activities are facilitated because a lawyer or law firm has been successful, and, therefore, they have resources that enable them to carve out and devote to community service.

So, I think I would have the same concerns that Justice Anstead had about this particular proposal.

PROF. JEFFREY STEMPEL: Sandy D'Alemberte, you've worn so many hats. One that I forgot to mention earlier was state legislator.

Much of the professionalism debate is focused on private practice serving individual clients. We also have lawyers in government. We have the bench. We have lawyers engaged in ADR. We have prosecutors, defenders, and many different bar association constituencies.

Are we forever wedded to a one-code or one-construct system? Should we consider different regulatory models and codes for lawyers in different walks of life? How do you react to some of the things you've just heard in the last fifteen minutes on that topic?

TALBOT "SANDY" D'ALEMBERTE: Well, I think the legislature seems to have a perennial interest in directly regulating the legal profession and taking it away from the courts. That was one of the themes, I

think, in remarks made from this podium earlier. I think that will be something we'll continue to live with.

I don't see the legislature taking much interest in a bifurcated code. I've heard none of that, and I doubt that it will come up. Let me go back to Marc's premise and see if I'm right. Marc, as I understand it, that Chicago study, which shows us the proportion of lawyers serving corporate clients and those serving individuals, really is a study about Chicago. As such, the results would not really be true if you looked across the profession. For instance, in Quincy, Florida, you would probably not have quite the same proportion. Am I right in saying that really quite a large percentage of the practicing bar are still practicing as solo practitioners?

PROF. MARC GALANTER: That's right. There are about 300,000 solo practitioners. Although the percentage has declined, they still comprise almost half the lawyers in private practice.¹³

It's true that the Chicago study deals with a big metropolitan area and major business center. So the trends are going to be accentuated there. But the Census data, which is national and covers virtually the entire private bar, shows things moving in the same direction.

TALBOT "SANDY" D'ALEMBERTE: Again, the Census data looks at the income, correct?

PROF. MARC GALANTER: Right.

TALBOT "SANDY" D'ALEMBERTE: As the income of the large law firms goes up, it is disproportionate, perhaps, to that of the smaller practitioner.

PROF. MARC GALANTER: That's right. The Census data measures the source of income; the Chicago study measures lawyer effort.

TALBOT "SANDY" D'ALEMBERTE: At this point, I want to get in a remark about the "Big Eleven". I enjoyed that prediction, but I wonder if that will really happen. I have some doubts that it will happen.

I even see a possibility that technology might have something to do with how law firms organize. I've frequently thought that at the turn of the last century we had this magnificent new technology called the typewriter. We had carbon paper, and, suddenly, secretarial schools were popping up.

PROF. MARC GALANTER: Telephone.

TALBOT "SANDY" D'ALEMBERTE: Telephone is a very important technology.

We reorganized the legal profession into law firms, and, as Marc has pointed out in several of his books, we had this great growth of law firms. You could not find a five-person law firm in the United States at the turn of the new century. It was unheard of to have a law firm that large. All of a sudden, we now have an organized legal profession with a profound impact on legal education, which has led to the increase of law schools, as well. This technology, obviously coupled with many economic factors, has really transformed the profession. We threw the copyists out of the law firms, we witnessed a need for law schools, and we created all kinds of impact.

13. See BARBARA CURRAN & CLARA CARSON, *THE LAWYER STATISTICAL REPORT 1995* (1999) (providing comprehensive information about the number and practice-settings of lawyers).

Now, at the turn of the century, we have new technology. I've seen a tremendous impact in higher education in just about every place *except* legal education. That's curious to me, because law schools were really the first to use the new technology in any substantial way. Legal research was being done on computers long before most of our colleges and departments were employing computers to further their missions. But, it seems to me, most other places in the university are walking past law schools now. But, back to the law firms.

If computers are going to change higher education, is it possible now to provide a way to serve people and corporations other than through services offered by a large law firm? When you go to Holland & Knight, you have a pretty good chance of getting a good lawyer working for you. Holland & Knight certifies that you are going to get good service—expensive service, but it is going to be good. (Audience laughter)

Are there other certifying mechanisms? Is it possible that we can *credential* in a different way if it is possible for me, today, to sit at my desk and communicate with the best copyright lawyer in the United States, the best tax lawyer in the United States? I can, and anybody can do that today.

Well, if a law firm is essentially a networking mechanism that is also a credentialing mechanism, are there other ways to organize the mechanism? Of course, if you say that there are, who is going to run those networks? Will people who we think of as lawyers run those networks, or will commercial entities be able to put those kinds of networks together? It seems to me quite likely that we will see very different law schools and a very different legal profession.

PROF. JEFFREY STEMPEL: I want to return to this: What will the law firm of the future look like?

Deborah Rhode, you're probably the leading advocate of nonlawyer practice in the country, or have been certainly perceived that way by some of the viewers. Should law schools become not just lawyer schools, but schools more for the delivery of law-related *things*? Do you hear these clarion calls for changes that some of the others on the panel have suggested, or is the traditional law school going to be okay if it simply integrates ethics into the program as you suggested earlier in the afternoon?

PROF. DEBORAH RHODE: That last question seemed a bit rhetorical. So I'll take advantage of it. No, I don't think it's enough to just add ethics and stir throughout the curriculum. There have to be fundamental changes in the structure of legal education that will more adequately reflect the needs of the world outside of it. I think we should recognize, in form, what is increasingly true: that we have a heterogeneous profession that serves very different clientele, in very different contexts, with very different needs.

I probably would not endorse the dichotomy that Marc Galanter put forth as a possible starting point for conversation, rather than the framework for an entire regulatory structure, because I think it would be over *and* under inclusive. For the same reason, I'm also a little resistant to the tripartite scheme that Russell Pearce described this morning.

I'm not particularly wedded to what the structure should look like, but I am attentive to the fact that the devil is always in the details. So, I can't take up your earlier call to say what ideally we should do—what is practical is a key consideration.

Despite other differences, almost everybody who's been involved in this symposium has pledged rhetorical allegiance to one general premise, which is that we need some kind of regulatory structure that better serves the public interest.

The genuine points of division are how to get from here to there and whether the call to professionalism is going to help. My own sense is that we need much more context-specific regulations that address the needs of particular consumers and particular practice contexts. And, if we are going to get that kind of regulatory framework, I think we are not going to get it entirely from the profession. I am, of course, happy to appeal to those aspects of professionalism that call on the best instincts of lawyers, I think there is a "there" there, to some extent, for the reasons suggested this morning.

Professional education is a powerful socializing mechanism, and we ought to try to build on idealized traditions that work. But, we also need some way of shedding those aspects of the professionalism tradition that have gotten in the way of seeing how our own professional interests can conflict more with the public's interest. We are going to need more accountability without the risks of undue politicization mentioned this morning.

I don't think it is impossible for us to develop regulatory structures that will build in some elements of control by the highest judicial body and would also provide more regulatory accountability than the structures we currently have. All too often the organized bar has acted as a trade organization on a number of issues where there are profound societal interests that cut in the other direction.

Legal education, like the legal profession in general, needs to recognize reality. We need to prepare individuals who will be serving different clientele with different needs. Law schools now both underprepare and overprepare their students. We overprepare graduates for routine services. Nonlawyer specialists in the areas can often provide more cost-effective assistance. You don't need a brain surgeon to pierce an ear.

Conversely, law schools underprepare other students. Those who will assist sophisticated corporate clients need better skills in problem solving, finance, management, alternative dispute resolution, and other allied disciplines.

In other words, more diversity in educational structures is the direction that is likely to best serve societal interests.

PROF. JEFFREY STEMPEL: But not necessarily a move from the three-year to the two-year law school, which was briefly discussed for a while in the 1970s but seemed to die out, or the externship law school, such as the northeastern model where several externships are required to graduate. None of those invariably follow from what you are saying?

PROF. DEBORAH RHODE: In general, my instinct is: if not let a thousand flowers bloom, at least offer more choices between delphini-

ums and dahlias. Different forms of educational structures are necessary to serve different needs and different populations. We have an unduly homogenized version of what *good* legal education is and one in which our own profession is deeply vested. Monopoly control gives monopoly rents.

History suggests that the ABA is an unrealistic entity from which to expect huge amounts of change on the accreditation level. So, how we're going to get from here to there is to me the most interesting question. As someone who has worked on bar regulatory issues for two decades now, I am ever hopeful but not overly optimistic about the prospects for fundamental change. But, I am open to ideas from the audience, as well as the other members of the panel, about how to push us in the direction that I think we are all generally suggesting we ought to move.

PROF. JEFFREY STEMPEL: The argument can be made that the cows are out of the barn door in terms of the bar's control over regulation. There is market regulation, legal malpractice carrier's regulation, third party payor insurance regulation, direct governmental regulation through securities law and other things. These all impact lawyers.

Is this debate relevant and what should the bar's role be? Should the bar be exceeding some of that authority or restructuring, whether it's a politically practical proposal or not?

MS. MARTHA BARNETT: I'm not sure exactly which part of that question you want me to answer. So let me just try. Because you gave so many facts, you answered it in many ways in setting forth the question.

There are many forces that come into play and impact a lawyer in his or her role as a professional. Many of which you listed, and I'm sure there are others. I think the point that perhaps I could speak to would be the continuing role of the organized bar in regulating lawyers.

That primarily comes through the disciplinary committees, as much as anything, and in establishing the *Model Rules*. I think that's a perfectly appropriate role for the bar to continue. It smacks a little bit of regulating ourselves. Certainly the perception by many people has been that, it is a trade group and that we are not perhaps as diligent as we should be. I think that perception over the years has proven not to be true, as bars have become much more sophisticated in the regulatory/disciplinary aspects of the profession.

I think there will always be a role for a profession to regulate itself. We see it in many professions. I think that's a very healthy thing to do. I also think that market regulation and other governmental regulations, are appropriate too, and work. I certainly don't think we as a profession have or should exceed that authority.

PROF. JEFFREY STEMPEL: Marc Galanter, earlier you mentioned that the big firms don't seem to be the subject of bar disciplinary proceedings anyhow. Do you have a view as to whether that is because in the "bus-fession" there aren't those instances occurring or that because of the politics of the bar perhaps those investigations are not being pursued?

PROF. MARC GALANTER: I don't attribute it to politics as much as to the fact that you are dealing with very sophisticated consumers who

basically are sufficiently protected by market controls and reputational controls.

MS. MARTHA BARNETT: In law firms, there are other dynamics working there that benefit the lawyer. As Sandy said, you have a network of people. There are many more people who are available to mentor, to educate, to counsel, and to collaborate. You have a lot of resources available to you.

You also have some pretty strict internal controls within law firms themselves. We regularly, and I don't think we're unique in this, have programs in our firm for lawyers about what their responsibilities are as a lawyer. So there are a lot of mechanisms built into a law firm that I think assist so that you don't have the pure disciplinary problem.

What you may have more of—and I don't know if there are any studies or statistics—you may have more malpractice suits. Because the money either may be larger or the issues more important. You may have more of a tendency to have malpractice suits against a law firm because it's perceived to have a good insurance carrier and maybe some deep pockets that are involved there. So it may be a different way that the market speaks to large law firms.

PROF. JEFFREY STEMPEL: Sandy, you were suggesting a few moments ago that a "Big Eleven" law firm, similar to "Big Six" accounting firms, is not necessarily a *fait accompli*. What do you see as being the shape of the law firm or the structure of the legal profession in the next several decades?

TALBOT "SANDY" D'ALEMBERTE: Obviously, I don't think any of us can predict with any certainty how we will get pushed around by the forces of technology and the forces of international economics. I can see a number of different possibilities.

One that I quite distinctly see is the idea that there will be other forms of networks, other kinds of credentialing mechanisms that say to people, if I go to this place I will get good service.

I had a problem with cancer. How do I find out where I get cancer treatment before I even see my physician? I get on the Internet. What do I look for? I look for Johns Hopkins and I look for other distinguished medical centers. I find my information there because it's reliable information.

By analogy, if you're looking for information about the law, I can see the consumer of legal services getting to a respected site that then leads him or her on to other lawyers. That may look like a law firm, but it may not look like a law firm. It really may be an information service that connects you. For example, you're sitting in a remote place of the world, like Tallahassee, Florida, and you invent something that you think is of great value and you want a patent lawyer. There are some lawyers in Tallahassee practicing patent law, but you may want to find out what the alternatives are. I see us getting our legal services through that kind of process.

I also see at least a possibility that people will begin to listen to Deborah, and that we will start having other types of professionals who are serving and providing services.

As I look at FSU's School of Social Work today, an awful lot of what they're doing, and preparing students to do, is beginning to look a little bit like what my father used to do as the only lawyer in Chattahoochee, Florida. They're really helping people solve problems, getting through government structures. They're doing an awful lot of that out of the School of Social Work, I think, fairly well. We're teaching people dispute resolution today. This is a nice open area where anybody can play. Lawyers and retired judges have tended to try to monopolize the area. But as Carrie Menkel-Meadow has said, "it ain't necessarily so." So I see a lot of vitality and real chances for changes. I'm not sure they're all going to be great, but they're going to be large.

PROF. JEFFREY STEMPEL: Steve Gillers, I think you have something to add.

PROF. STEPHEN GILLERS: I have two comments. One is incidental to Sandy's last statement. The patent lawyer you contact through the internet who lives, say, in Chicago, may today have to worry, following the California Supreme Court's ill-fated, ill-conceived, ill-reasoned—

PROF. JEFFREY STEMPEL: Oh, don't sugarcoat it. Tell us what you really think about the decision.

PROF. STEPHEN GILLERS:—decision in the *Birbower* case, that by giving you advice, even if that person is a very good patent lawyer, he or she will have practiced unauthorized law in Florida while never leaving Chicago. So that's a real problem we haven't talked about that we as a profession have to think about for the future.

It seems to me that the notion of self-regulation, at least today, is not correct. The ABA, quite laudably, promotes a model document for ethics, and states change it, as they will. I think it's fair to say that today every state goes its own way in adopting variations. Florida is a primary example, New York another, California a third, New Jersey, a fourth. So, whatever the bar groups do, it's going to be the courts that make the decision about what the rules say. The court is the government. It's not self-regulation when government is doing the regulating. Although some courts defer in large measure to what lawyers want.

However, whose voices are not being heard in that debate? Who does the court not hear? Recently the ALI adopted a *Restatement of the Law Governing Lawyers*. I had occasion to read the provisions regarding the lawyer/client economic relationship. Those provisions would get an F from any consumer advocate. They do not protect the small client. In fact, they're heavily weighted in favor of lawyers. When you look at the membership of the ALI, it's all lawyers—big firm lawyers, small firm lawyers, judges, and law professors—no consumers, as such. No consumers were invited to debate their points of view with the group.

When you look at the Ethics 2000 Commission—that is to recommend changes to the *Model Rules*—there is one nonlawyer, which, as I understand ABA protocol, is why it's called a commission and not a committee. That one nonlawyer is a former corporate executive.

We are generating these rules, purportedly self-regulatory, though not entirely, but we're doing it in a closed room with few voices heard, other than those of lawyers. As we think about the practice of law twenty,

thirty, forty years from now, to the extent we envision changes—and there will be changes—we will do a great service, even if we keep the same regulatory structures, if we invite “lay people” to participate in the generation of the regulatory rules rather than simply talk to ourselves.

PROF. JEFFREY STEMPEL: Justice Anstead, that seems to call for a response.

HON. HARRY LEE ANSTEAD: I think so. First of all, I believe that is a legitimate criticism in terms of lawyer regulation.

In Florida, and, to some extent, around the country, the governing boards and the disciplinary boards of the bar that are actually out there doing work with reference to lawyer discipline have requirements for nonlawyer, citizen participation, starting with the grievance committee at the very local level with reference to lawyer discipline, all the way up to the Board of Governors, the Governing Board, the Policy Board for Lawyer Regulation.

In addition to that, in Florida, the Florida Bar, to its credit—this was an initiative of the leadership of the bar—has recently created, and we’ve approved something that’s tantamount to a citizen’s advisory board to the bar, made up wholly of nonlawyer citizens out there from around the state.

I think that this is a legitimate criticism that the bar was late reacting to. In terms of the numbers of citizens participating at these various levels and, in these various capacities, are not as great as they should be. But there is movement in that direction.

I think you pointed out something very important—and whether you call it government or not—that while judges are lawyers so you could say that it is still lawyer regulation—it’s lawyers that have become judges, and therefore they have become part of the government. More importantly in our view, they’ve become part of the justice system, which is more than just a rhetorical phrase there. I think this is the very important connection in terms of lawyer regulation with oversight from the justice system and judges, who have a very much a different obligation to society out there than lawyers who are practicing law. Also that this really is the critical distinction, I think, between regulating lawyers by some board that is designated by the legislature. It’s that connection with the justice system that gives you the most direct connection to these other values that we’re talking about, and service to the public in that regard.

You know, there’s going to be change. We always, all of us, institutionally and individually, lag so far behind in reacting to the reality of change that’s out there.

We were talking about legal education, for instance. If you think about it, it’s really only been maybe twenty years since we’ve had paralegals, and that that phrase had some meaning and everybody knew what you were talking about.

We now have separate programs for paralegals at our colleges and our universities here in Florida, and at the community college level. There is a degree or certificate program for paralegals and we have thousands of paralegals out there that go through a program like that.

Certainly, just like the medical profession has been protectionism-oriented, so has the legal community, and especially the law schools. As far as programs like the ones Larry alluded to, going from three years to two years—right now I'm sure it would be heresy anywhere here in this building to talk about granting some kind of certificate or degree for such a program.

PROF. JEFFREY STEMPEL: Almost as political as restricting the entry in class size at the state college.

(Audience laughter)

HON. HARRY LEE ANSTEAD: There is so much cultural protection and institutional protection there, and institutional bias.

We have an ongoing problem right now, in trying to be innovative in providing access to our courts. We have encouraged the creation of self-help centers in all of our courthouses around the State of Florida. These self-help centers are sometimes manned by lawyers, sometimes by paralegals. But they're people that work for the government, they work inside these courthouses, and they're consumer-friendly.

So when people that want to represent themselves come into the courthouse and say I've got to appear in a child support litigation situation, for instance, and, I've got the summons but I don't know where to go or what to do; or my former husband hasn't been paying child support, are there some forms that I can file to try to get him to pay or complain about that and do that?

We recognized that we are basically in the public service field. That is, that there is a huge public out there that needs to be served by the justice system and by the legal profession. So we're experimenting at this stage with these self-help centers. Now, of course, at the same time, the bar is coming in and crying foul, that is, that we're taking away business from the lawyers.

Recently we had a dispute because, at least up to this point, we haven't said that you have to show that you're below a certain income, or whatever, to use these self-help centers. The bar is outraged. They think, well now you're not only steering business away from us, but you're letting people that probably can afford a lawyer go forward in that regard. Now these things have to be worked out.

There is going to be change. But as long as we regulate lawyers, I think we all recognize there has to be that public service. That's whom we serve, that's who the justice system serves. It's so underserved anyway.

One of the problems that occurs when we come together in gatherings like this is that we rarely speak in the area of juvenile or criminal law. This is probably the thing that the public out there notices the most. This is where the headlines are about crime and things like that. Here, and throughout the country, essentially, we labor under systems of public defenders' and prosecutors' offices—in other words, the lawyer part of that—that have these huge caseloads.

We were comparing just caseloads within our courts recently, for purposes of certifying to the legislature our need for new judges. We noticed the priorities in our individual courts—the family courts and civil

trial courts and probate courts and criminal courts and juvenile courts, these divisions of the courts—that, in essence, the juvenile courts are at the bottom of the barrel. That is, that they get the least judicial resources, but they have doubled in size.

If you just leave it to the individual circuit, they're giving those juvenile judges twice the caseloads of the civil trial judges, for instance. So we've got lots of access and quality of service problems out there that we have to react to. So your complaint is a legitimate one, but we're trying to do something about it.

PROF. JEFFREY STEMPEL: I know Deborah Rhode wants to jump in on this, and I haven't forgotten that Carrie Menkel-Meadow also has a point on this.

PROF. DEBORAH RHODE: To respond briefly: I couldn't agree with you more on the need for greater access and innovation. The self-help center is certainly a step in the right direction, as is lay representation on disciplinary committees.

But I just think, to follow up on Steve Gillers' point and add a cautionary footnote, the issue is: Whose voices are left out? Just to put one or two nonlawyers on a committee doesn't really adequately deal with that problem.

We know, for example, that the ABA commission on non-lawyer practice had one or two nonlawyers. But, who are the nonlawyers that get to serve in the contexts in which they're always grossly outvoted? It is not "Nader's Raiders." It is not members of the only national organization that speaks for consumers on these issues, the Americans For Legal Reform. Consumer advocates don't get put on these committees. Lay members are selected normally by judges or bar leaders, and they don't want people who are going to rain too hard on the parade.

Almost every study that's been done of lay representation on these committees has found that non-lawyer members are still at token levels and that they tend to vote mainly with the lawyers who are on it. There is a good reason for that. If we don't figure out some way to come up with an accountable structure for non-lawyer appointments and give them the information and resources to do an effective job, it's unlikely that just adding their voices here or there will fundamentally change the structure. So I think we have to build on what we've done, but identify ways to get further along that line.

There was a huge scandal about the lawyer disciplinary process in California, about a decade ago, that got a lot of attention and mobilized the public. Proposals were made in the legislature to take the disciplinary authority away from the bar. That got everybody's attention.

A group was formed of distinguished academics and lawyer representatives of consumer groups to come up with an alternative proposal. Ours built in some checks and balances. Different members of this bar commission for regulation would be appointed by different constituencies, all under the nominal authority of the Supreme Court. We specified groups to be represented, such as the organized bar, consumers, and so on.

Well, who would support that alternative? No one, it turned out. We quickly learned that in the current political climate, the bar was adamantly opposed, and the legislators didn't like our proposal very much either because it didn't give any real power to them. Our constituency, consumers and the general public, weren't organized in any way that would be meaningful in that political climate.

This is an example of something that was reasonably pragmatic on one level—it would have addressed many of the practical regulatory problems that we've discussed at this symposium. But, it was unrealistic on another, more political level. These examples make clear that we need ways to build a constituency that's going to press for such reforms.

Self-help kiosks are another good example. Some of us have been recommending them for decades. If the discussion were left to a disinterested regulatory body, we'd have huge numbers of them. But we don't. In part, this is because the bar, the only powerful organized interest group, is adamantly against it. And, courts, in many jurisdictions, truthfully, have found themselves bumping up against this opposition from a group that they are, by nature and tradition, a part of and on whose support they so much depend.

We need to figure out some ways to create counterweights for change from the public generally. I am still thirsting for ideas about how to do it.

PROF. JEFFREY STEMPEL: Let me go to Carrie, and Marc cued up next.

PROF. CARRIE MENKEL-MEADOW: Very briefly. I thought your question to the panelists to imagine the law firm or legal education in the future is a useful thought experiment in time. There are also thought experiments in space.

And just one thing that this conversation needs to think of is two other sources of comparison.

We think of both the United States and the legal profession as being a leadership. My experience in travelling around the world lately is that, in fact, we're followers in two respects.

There are a number of interesting things that originated in the United States. We had law students in our law schools learning American ways: rule of law, constitutionalism, common law and economics.

But when they go home, there actually are quite wonderful improvements, or at least modifications, in what we've taught some of our foreign law students who take some of our American ideas and transplant them and actually come up with some very terrific variations on our themes. So we could stand, in the future, to take a look at some of the other things that are going on.

I mentioned earlier, one thing going on in England. We former colonies don't like to look to England for innovation anymore. But I attended a very interesting conference on legal change in London at which members of the law reform participated. It was quite interesting to learn some of the innovations that were going on. As Marc Galanter and others know, a reduction of the barristers' monopoly over courts and the solicitors' monopoly over financing has actually lead to some interesting competitive market activity.

England also has a much more diverse legal education system. And there are certificate programs for graduate schools for all kinds of paraprofessionals. Some still take undergraduate law degrees. Others, now in these commercially-run proprietary law schools, which banned a long time ago. In many respects they are trying to be like us, but in other respects they are far more diverse. The self-help kiosk has just taken over parts of Australia, not all parts.

And South Africa, with its constitutionalism, has also done some remarkable things, not only in the practice of law but with class actions and my area with using ADR, handling very complicated property disputes that occur there. So here are some wonderful examples. And I think we in the United States might stop being so ethnocentric about where we think innovation comes from.

My second example, very briefly, is comparative professionalism. I attended a very interesting conference at the University of North Carolina a couple months ago, put together by the deans of all the professional schools. A lot of what Sandy talked about was spoken of—social work schools and medical schools. For example, one of the doctors of the medical school reported a statistic—and I can't remember the numbers—he said that kids have been seen by pediatric paraprofessionals probably eighty percent of the time in the last ten years. There will be more pediatric physicians' assistants than there will be pediatricians. That's a good thing for services. There will be more access. But, it causes the medical profession to have to rethink some things.

At least from that, some parts of the medical profession have done better than we have on the paraprofessional front. I think they're way ahead of us.

So this is just a long speech to say that in addition to time, space and comparison to other places might give us some ideas. We tend to be, not just as the legal profession, but as Americans, incredibly insular in how we look at these problems.

PROF. RUSSELL PEARCE: I'd like to make a quick comment.

Justice Anstead mentioned this radio show he'd heard where the economists were discussing businesses that say, "let's make as much money as we can." My rejoinder is that many people would say that today, no matter what big law firms say about professionalism, their credo is let's make as much money as we can.

I don't think the answer to that is more professionalism. I think it's been demonstrated that professionalism is not a persuasive way to motivate the interests of the common good; it is no longer a powerful socialization tool.

My view is that changes are going to come. The question for the bar is whether the organized bar is going to become irrelevant, or whether it's going to try to make the changes as positive as they can, and look for other ways to promote a culture of commitment.

HON. HARRY LEE ANSTEAD: Well, you have to realize that I was listening to that. Those were the observations of the economists about that.

Indeed, I think you're absolutely right. With reference to the big law firms that are making money, that is the philosophy.

But I'm hearing from hundreds, if not thousands, of lawyers out there that are talking about that culture taking over their law firms, and that this philosophy is directly related to their dissatisfaction with the practice of law. They're saying they don't look forward to getting on the train to go into the firm in the morning, or to driving in, or they don't feel satisfied as they're driving home or on the train home, at night.

Their conscience is bothering them when they mandate that first year associates have to put in seventy or eighty billable hours, a week. They've actually now mandated these kinds of standards in many of the firms and they're very distressed that larger law firms now have a culture that, while they require these mandated billable hours, they give no credit to these new associates for pro bono work. In other words, they don't allow them a trade-off: If you do five hours of pro bono work a week, we'll trade that off for some of the billable hours that we require of you.

They're saying now that as opposed to teaching by example, the example is the other way around; that is, in many instances, the experienced practitioners in the firm are setting the bad examples, and the young associates have no recourse. It may be written in a procedures manual or an ethics manual for the law firm that, yes, if you see a problem like that, there is a partner to go to, or somebody in the firm to go to, in fact, however, there is no recourse for a lawyer in that situation.

Much of what we see in terms of the response is, indeed, in these firms where young lawyers are choosing to do something else, rather than practice law. It is those business forces focusing solely on money that are making the change there.

The other side of that is my view that if, indeed, your goal is to serve the public good and to look to these moral values in an attempt to come to a consensus, I think it is far better that we have some kind of a structure that allows an ongoing focus on who we are and what we're about, as opposed to just abandoning this underlying premise and then letting it *happen* in some natural way as it may or may not be happening out there in the business community.

TALBOT "SANDY" D'ALEMBERTE: I thought that it wouldn't be very elegant of Martha to defend Holland & Knight, (audience laughter), so I thought that I should.

Indeed, I think there is a very special culture in a handful of large firms. Martha said she thought she saw that through a large range of firms. I think there are few firms that have the kind of public service culture that Holland & Knight has.

While we're on the topic of culture, I also think that plays into our discussion about institutions, and into this self-regulatory issue.

It is possible to say nice things about the Florida Bar—but not always. It really has a very checkered history in terms of public service recommendations.

But the Florida Supreme Court has a culture that has had consistent concern for public interest. You begin viewing things that originated in Florida such as, dispute resolution, interest on trust accounts, compre-

hensive pro bono plans, simplified legal forms, which made it easier for people to have access to legal services through self-help. There is a culture in the court that is really important.

I wouldn't argue very long for the Florida Bar being in control of the profession. I would, however, argue very long and hard for the Florida Supreme Court being in control of the profession—at least this Court. Because among all courts in the United States, you could make the argument that this court has had a very special culture that has led us into doing some things not done in other states.

So when we start tampering with the self-regulation issue in Florida, I think you simply have to look back and say, "Well what are the courts doing here?" And it's really been pretty good.

PROF. MARC GALANTER: It has been pointed out that some firms do have a culture that says we should look for fulfillment not only in more money but in other ways.

Non-monetary rewards take many forms: participation in pro bono activities, time off for childcare, sabbaticals, and many other things. As firms get larger and more diverse the general problem of negotiating an agreed schedule of priorities and deciding what is equivalent to what becomes more and more difficult.¹⁴ Success requires not just general interest in non-monetary rewards, but the presence of leadership that can produce the "political" deal that enables people to accept a non-monetary compensation regime.

It's very hard, because people may disagree about all the various non-monetary rewards but money is usually the second or third on almost everyone's lists. If you don't have the kind of leadership that can hold in place a complex agreement on all the diverse things that people would like, it is very easy to gravitate to a simpler second arrangement in which everyone agrees to take their rewards in the form of more money.

One of the things that we should be looking at in the legal profession is the way that firms like Holland & Knight have successfully generated and maintained a culture of public service. We need some case histories to capture in detail just what has gone into these success stories so we can see whether they are replicable.

PROF. JEFFREY STEMPEL: Let me shift gears to maybe just a couple specific things. I know it's getting to be later than we had planned, but everybody seems to be staying with us.

Florida has been so innovative in so many ways, and also notorious in some ways. Two or three years ago now, the U.S. Supreme Court decided the *Florida Bar v. WentForIt, Inc.*¹⁵ case in which Florida's thirty-day rule prohibiting contact by lawyers with personal injury victims was sustained. It was a five to four, Supreme Court decision. Justice O'Connor issued the majority opinion. Justice Kennedy wrote a dissent, and made the point—that is hard to argue with: It seems odd to say that the lawyers can't be in there, overbearing the will of the poor personal

14. For an elaboration of this observation, see MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 127-29 (1991).

15. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

injury victim, but that the insurance adjusters can be all over the victims like a cheap suit during the same thirty-day period.

Is this the sort of regulation that reflects protectionism, misunderstanding of a now archaic professionalism paradigm, or simply a wise resistance to the siren song of business and marketing?

HON. HARRY LEE ANSTEAD: Let me work my way back on this one—with good news and bad news.

The good news is that the decision occurred at a time soon after I joined the Florida Supreme Court, and I was trying to create this initiative with reference to professionalism, here in the State of Florida—that is, by creating a state Supreme Court Commission on Professionalism.

You may be happy to know that I took my marching orders from the dissent, in that particular opinion. For as all of you know, as was indicated, it was a five/four decision.

A couple of years before the decision in *WentForIt*, imagine a law firm that was going to litigate an issue like this tagging a name *WentForIt* and then going into the court, especially the U.S. Supreme Court, and saying “rule for us.” That was a lot of baggage to carry at the time.

But, indeed, in a five/four decision, and with the majority going on the importance of public confidence in the legal profession and the justice system, stating the old adages that the justice system doesn’t have an army and can only enforce its rulings by confidence from the public and the system, and how critically important that was.

And I think we all have to agree that none of these decisions are made in a vacuum. Decisions that are made around times that you have disasters, and when there is adverse publicity about lawyers being at the scene and that kind of thing, are surely influenced by these circumstances.

I agreed with the dissent, wholeheartedly, and it remains the theme of our professionalism initiative in Florida. First of all, Justice Kennedy, in talking about the prior decision but then turning and saying to the Florida Supreme Court and the Florida Bar, in terms of improving the administration of justice and inspiring confidence in the justice system, said, in other words: The only real way for you to inspire public confidence is to look inside your own house and to be absolutely certain that you have the finest justice system that there can be in terms of the quality of what you’re doing. That’s what you should be doing if you want to inspire public confidence. Do that in your own house, and then open up the drapes and let the sun shine in and let everybody look at that.

In point of fact, believe it or not, courts do long-range planning, too. In addition to technology and alternative dispute resolution and these self-help centers and other things in our plan, in terms of what is at the top of the list for improving the administration of justice in the future, we have focused on our professionalism initiative. Our belief being that if we improve and focus on the performance of the people who carry the system around on their shoulders—the lawyers and the judges—we will improve the administration of the justice system at all levels. In a sense, I am deflecting the question.

I think that with the culture of the time, the public view of the role of lawyers—the old adage of lawyers being the ambulance chasers, which has been with us as long as ambulances have been with us—and all the negative connotations associated with that, it is not unreasonable to say that there should be some regulation of whether you can be in touch with people who are grief-stricken. The fact that another group that is not regulated like lawyers will go out and do something like that is a different question than whether or not lawyers should also be taking advantage of people at that particular time.

PROF. DEBORAH RHODE: I agree. However, the fact that people now are pressured by insurance companies at a time when they can't get any kind of in-person contact from lawyers, may be somewhat of an over-inclusive way of handling the problem.

There is an enormous need for reasonable time, place, and manner restrictions on both insurance adjusters and lawyers. The real question is: In a second best world in which you don't have restraints on insurance adjusters, is the right solution to ban contact for lawyers?

I am agnostic on that point. I'd like to know a little bit more about how the thirty-day solicitation rule operates in practice. Certainly there were real abuses. Lawyers lining up outside of emergency rooms, or employing runners to try to get around the solicitation rules, is not an attractive sight.

We need to rethink the structure of delivering services to people who are victims of these mass disasters in a way that is responsive to their immediate-felt needs, and, also, to the other information that they are now getting out on the market.

So, I just flag as an open question whether we've come up with the right solution or one that is both, in some respects, over broad and under sensitive to the pressures that people are now facing.

HON. HARRY LEE ANSTEAD: Just a quick comment, because I should have said this before: You realize, this is just personal contact now, it does not include mailings, etc.

PROF. DEBORAH RHODE: I understand.

HON. HARRY LEE ANSTEAD: I think we should all recognize the controversial nature of this issue. With reference to lawyer regulation, with the prevalence of advertising today, it would be difficult to make the case that anyone is not aware of the availability of legal services.

I certainly agree that with reference to regulation of others such as the insurance adjusters and that industry, there is a corresponding need to have some type of regulation.

PROF. JEFFREY STEMPEL: Let me throw in another wrinkle that I think builds on Steve Gillers' invocation of the *Birbower* case in California, holding that it was unauthorized practice for non-admitted lawyers to handle, I believe it was, an arbitration in California. Recently we had, during the nineties, some controversy over the divergence of jurisdictions in terms of Model Rule 4.2, the anti-contact rule.

The Justice Department, first under Attorney General Richard Thornberg and then later under Attorney General Janet Reno, basically wanted to remove the Justice Department attorneys from some of the

possible strictures of that rule, as applied by state disciplinary authorities or courts following state law.

Where do you see the profession going in terms of the multiplicity of regulation that we have in the state-based system? Is that so hard-wired politically and socially that it won't change? If so, is that the reason we won't have the Holland, Knight & Skadden firm in fifty years? Or, should we be moving more toward federal regulation, having one national bar examination, one federal code of conduct, eliminating all those pesky New Jersey and California and Florida differences from the *Model Rules*? Or are we, in fact, gaining something from the diversity we have of approaches?

HON. HARRY LEE ANSTEAD: Well, obviously cultures are very difficult to change—certainly when it involves a culture of protectionism, of sorts. Very easily, as Professor Pearce indicates, the U.S. Supreme Court could rule that providing legal services is commerce. It wouldn't be much of a stretch from local bus systems, and some of the other decisions that are out there, to see something like that happen.

Or Congress can act. I would see Congress acting less, because I think Congress is much more subject to these forces, and at least for the time being, I think Congress would be on the side of leaving state regulation in place. But, at some point, through the market system, that is going to change. I think that will be one of the interesting, unresolved questions.

With reference to business and activity and the internationalization of everything, I certainly would not have thought, in my lifetime that I would see something that approximates a United States of Europe or the Euro dollar. These are things that are remarkable to me. So I think that is going to be a cutting edge in the next century.

TALBOT "SANDY" D'ALEMBERTE: States will continue to regulate and yet embedded in your question is the reference to the California decision, and to this continuing difficulty that the bar has had in really coming up with a coherent position on unauthorized practice of law.

My hunch is that the bar simply is not prosecuting many things that really lie within unauthorized practice of law. If they do start prosecuting, it will bring the system down. It is just not a system that can be defended as it's presently conceived.

And so if the bar wants to have unauthorized practice, it's simply going to have to do a lot of rethinking. In this area, which is obviously critical to the whole structure, I see the beam being pulled out. Because it is not possible in the long term to regulate the giving of legal advice to a California entity from California. That's simply not going to work.

Former Florida Bar President, Bob Erwin, who is in the audience, represented my father. He was the only lawyer in Chattahoochee, Florida. He loved to call himself the President of the Bar Association. There were people who lived just north of town, and they came to him because he was the only lawyer in town. The difficulty was his property—the town line ended at the Georgia/Florida border. And typically, he gave advice to Georgia citizens about Georgia law.

He was clearly involved in the unauthorized practice of law. These people could not get to the nearest town in Georgia; they could only

come to Florida. And they were not about to go sixty or eighty miles to go see a lawyer for the particular kind of business that my father had. It was not big business. So, I think the bar just simply didn't prosecute him. His would have been an easy case to prosecute.

I think the bar is simply not enforcing this code now. If it does start enforcing this code, it is going to come down.

Now the questions are: What's going to replace that and what does that do to the way we think about the profession? But I think that the bar simply does not have a tenable position on the unauthorized practice of law. Cases like the California case, if replicated over a period of time, will bring it down.

PROF. JEFFREY STEMPEL: Martha, you look like you were about to say something.

MS. MARTHA BARNETT: I was just interested in what Sandy had to say.

I think that with regards to the question of a federal regulation, that's highly unlikely, at least in the next decade or two.

I don't know the numbers, I think it's higher than 250,000, but a substantial number of lawyers in this country still practice in small-office settings. That's a much more localized practice. I think as long as we will have that, this situation will be true in the foreseeable future. You'll continue to have large law firms who have multinational practices. But, a large number of lawyers will practice locally. I think the regulations, and that entire structure, will best serve their needs and serve the public needs if it stays on a localized basis.

PROF. DEBORAH RHODE: Just one more footnote to that.

Lawyers may serve a local constituency, but they are frequently advising on issues that transcend state boundaries. Even a local personal injury case or probate dispute may involve citizens and activities in other states. Standard business agreements for an increasingly national and globalized commercial community transcend state lines. Many implications of a particular local legal dispute require advice to individuals in other jurisdictions, which, technically, under the California ruling, constitute unauthorized practice of law.

Of course, many lawyers provide such advice on a daily basis. They are being called on the telephone by people who might be affected by this local dispute. They are giving advice about local law to people who are in another jurisdiction. And the bar is just winking at noncompliance with unauthorized practice of law, because it's unenforceable in its current form.

PROF. JEFFREY STEMPEL: Even though my list of things I'd love to ask this panel is quite lengthy, we've exceeded our scheduled time by almost thirty minutes. Thanks to our panelists for a wonderful program.