



Game

By Patrick A. McGuire
Illustration by Kevin McSherry

Changer

Why the rapidly evolving landscape for clients requires creative new moves from lawyers and the profession.

LIKE GRANDMASTERS OF CHESS, the best lawyers win far more than they lose. Looking many moves ahead of their competition, they marshal logic, creativity, and daring to set themselves apart.

But suddenly, some of the law's top practitioners find themselves struggling to adjust to rules that are seemingly being rewritten in the middle of the game. Consider:

- ▶ Unprecedented numbers of litigants are representing themselves—an increase not only among those who can't afford a lawyer, but also among middle income individuals who are opting to Web-surf hundreds of cheap, do-it-yourself approaches to divorce, bankruptcy, and automated assembly of contracts, leases, and other legal documents.
- ▶ In new books like *The End of Lawyers*, legal experts warn fellow attorneys that the market for their services has gone bump in the night. The public no longer is willing to pay high fees for legal procedures they now believe they can do themselves.
- ▶ A critical report by the Carnegie Foundation has cited law schools for overemphasizing the mantra “think like lawyers,” while doing little to prepare graduates for dealing with real people.
- ▶ Traumatized by the financial crisis, many blue-chip corporate clients routinely assign millions of dollars in legal work to their usual external law firms. Instead they are now watching costs closely, sometimes making law firm hiring decisions based on price. In response, previously unthinkable layoffs have decimated Big Law firms, some of which have stopped hiring young associates right out of law school.

The ongoing upheaval in the legal landscape poses challenges today to every kind of attorney—from those with million-dollar salaries in firms of 4,000 lawyers to the solo practitioner who works writing wills through his lunch hour to make ends meet.

It has also challenged law schools to ask themselves some hard questions about how they do what they do. In response, a handful, including the University of Maryland School of Law, have taken the lead in identifying and implementing changes aimed at preparing their students for a legal world unlike that encountered by their traditionally trained predecessors.

While a nationwide self-examination by law schools is now prompting other institutions to begin considering revamped curricula, UMDLaw is already moving ahead. For decades, its innovative commitment to linking theory and practice and the nationally ranked Clinical Law Program have helped students gain practical skills requisite for career success. Now, the School of Law is building upon this foundation to prepare creative, efficient, and client-focused lawyers whose problem-solving abilities will always be in demand—regardless of how the legal landscape unfolds.

“We are at a time when there are major changes in the profession,” says Michael Millemann, the Jacob A. France Professor of Public Interest Law at the University of Maryland School of Law. “Large numbers of lawyers, the legal profession, and some legal educators are engaged now in redefining and rethinking the ways in which lawyers deliver legal services. The changes are coming in all forms of practice, with some of the most significant in solo and small firms.”



Richard Susskind, an internationally known lawyer and author of *The End of Lawyers*, warns that the law profession faces the threat of being eroded out of existence. His prescription calls for attorneys “to introspect, and to ask themselves, with their hands on their hearts, what elements of their current workload could be undertaken differently—more quickly, cheaply, efficiently.”

Watching the Clock—and the Bottom Line

Much of the change has been building slowly. Over the past 20 years, a steady movement toward self-representation has now reached a point nationwide where courts are saturated with inexperienced litigants; many stumble through the legalese of statutes and struggle over the various forms and documents required in legal proceedings. But a lot of the change—especially unsettling disruptions in the once rock-steady world of Big Law—has been accelerated by the economic meltdown of the past three years. Once seemingly unthinkable developments, like the outsourcing of legal work overseas and the commoditization of legal services, are now becoming increasingly common.

“Within Big Law firms,” says Millemann, “there is a real restructuring going on. There’s been an assault by clients on the hourly rate, which I can understand. The rates keep going up and up. But now you’ve got increasingly good consumers as clients. So big law firms are rethinking their economics.”

Before the meltdown big firms lived off big mergers and big litigation. “When Time Warner and AOL merged they hired big firms,” says William Reynolds, the Jacob A. France Professor of Judicial Process at the School of Law. “You need to throw a lot of bodies at these sorts of things. Law firms were charging what seems like tons of money, but in the context of a corporate acquisition worth billions of dollars every year, no one even notices a \$50 million legal fee.”

A common practice among large firms was the annual recruiting of star graduates of prestigious law schools. Hired as associates they were paid upward of \$165,000 a year. It became common practice for a big firm lawyer to bring several associates to a client meeting. Each would then submit a breathtaking bill. When the economy imploded, clients immediately limited the number of lawyers they’d allow used on a given issue.

“Those clients very likely felt that they were essentially paying for that associate’s on-the-job training,” says Professor Robert Rhee.

One of the long-term trends that has played out in large corporations since the most recent fluctuation, says Rhee, is a new mindset regarding external lawyers. “It asks whether there are certain aspects of a legal practice that may not require the unique talents and skills of a lawyer who is at, say, the prestigious firm XYZ. It asks what legal services are subject to efficiencies that can be gotten from the use of technology and from lower-paying contract attorney services that can be more cost effective.”



“LARGE NUMBERS OF LAWYERS,
the legal profession, and some legal
educators are engaged now in
redefining and rethinking the ways
in which lawyers deliver legal services.”



Michael Millemann, the Jacob A. France Professor of Public Interest Law at the University of Maryland Law School

Clients are also increasingly unwilling to foot the bill for firms' overhead in areas not essential to their own legal needs.

“The client is saying is that we want you to serve us well, but we don't want to buy a bunch of services we don't need,” says Millemann. “The question is, how far can you cut and not affect the quality? The answer is, you can cut substantially and not affect the quality. Another way of putting it: It's becoming more competitive.”

Jolted by such changes, many big law firms have instituted painful layoffs. According to figures published in April 2010 by *American Lawyer Magazine*, nearly 15,000 people—a third of them attorneys—have lost their jobs in major law firms since Jan. 1, 2008. In addition, more and more basic legal work is being outsourced to India, where lawyers tag documents for as little as \$20 an hour. According to Forrester Research in Boston, 50,000 U.S. legal jobs will move overseas by 2015.

“There is a great deal at stake for the corporate client,” says Rhee. “Just a very minute extraction of efficiencies from the cost of legal services translates into large value added for corporate America. I don't think right now that law firms are providing legal services at those efficient levels. And if that's the case, the next assumption is that clients will continue to search for efficiencies.”

But continue forever? Or just until the economy gets better?

“The thought is that these changes will be permanent,” says Reynolds. “I don't believe that for a second. Somehow, if the economy tomorrow was the same as it was three years ago, I think we would be back to where we started.”

Ward B. Coe, III, a 1973 UMDLaw grad and a veteran Baltimore litigator, takes the long view. “Things have changed in the profession all along,” observes Coe. “There's the pervasiveness of technology that's been both good and bad. And there are financial troubles that create terrible problems for lots of clients of law firms. But on the other hand, there are an awful lot of lawyers out there still doing what they've always done. Which is representing clients.”

Going It Alone

Whatever the case for the permanent or temporal nature of changes besetting Big Law firms, only a quarter of America's lawyers are employed there.

“I think we are missing the mark if we only emphasize changes in large law firms,” says Lynne Battaglia '74, a Judge on the Maryland Court of Appeals. “We need to look at the impact economically on solo practitioners and their clients, practitioners in businesses, and the advent of self representation.”

Courts around the country are noting a remarkable rise in the numbers of *pro se* litigants.

“The working assumption,” says Millemann, “is that in litigation you've got two sides: two lawyers who fight with each other. But the accurate model is that one or both sides are not represented.”

A recent report issued by the American Bar Association's Standing Committee on the Delivery of Legal Services (Millemann is a panelist) offered this sobering snapshot:

“When going to state court, most people proceed *pro se* most of the time. High volume state courts, including traffic, housing, and small claims, are dominated by *pro se* litigants. Over the course of the past 20 years, domestic relations courts in many jurisdictions have shifted from those where litigants were predominately represented by lawyers to those where *pro se*'s are most common. In these areas of the courts, *pro se* is no longer a matter of growth, but rather a status at a saturated level.”

In half of all divorce cases in Maryland, neither side is represented; in 85 per cent of Family Court cases, only one side is represented by an attorney, notes Battaglia. She sees it even at the Court of Appeals level, where almost all cases heard come through the granting of a writ of certiorari—a complex legal petition detailing arguments and precedent for hearing the appeal of a case.

In response, a practice known as “unbundling”—officially termed “Limited Representation”—is becoming commonplace. Lawyers agree to represent some clients for only particular parts of a case. While unbundling is popular with *pro se* litigants, courts and lawyers only recently have begun adapting to the growing reality of such services.



An increasing number of states have drawn up rules, approved by the ABA, governing the practice. Many courts now offer *pro se* litigants many kinds of help in navigating unfamiliar procedural hurdles. Some offer self-service kiosks in their courthouse and personal guides.

Still, says Millemann, “When you talk about partially representing someone it raises a lot of challenging issues, lots of ethical issues that arise out of changes in structures and functions of lawyers and law firms.”

The trend highlights areas that many law schools traditionally do not cover—preparing lawyers to act as entrepreneurs, to negotiate limited service contracts, to essentially be flexible and willing to adapt on the run. In many smaller law firms,

attorneys often find themselves competing with inexpensive, do-it-yourself services, many offered online with attention-getting headlines such as “Easy Divorce—\$199,” and “Win Without a Lawyer.” Readily available software encourages people to forego lawyers to create their own wills, leases, and other legal documents.

“I think the middle class fears that they can’t afford a lawyer,” says Battaglia. “But what we’re seeing is not only people who can’t afford it but those who can afford it yet think they can represent themselves.”

Missing, she says, is the perception by the public that lawyers are actually worth the time and money. “I believe we have to distinguish ourselves as having some knowledge that is important to impart. We need to reinforce to the public that there is something lawyers bring to the table, specific knowledge that can’t be purchased on the Web.”

Adapting to the Rules of a Changing Game

UMDLaw is working to ensure that its graduates will continue to possess the kind of skills and abilities that Judge Battaglia says are indispensable to clients. At the same time, it is trying to ready students for the changing professional landscape they will encounter.

In 2008, in a three-year \$1.6 million partnership with the Fetzer Institute, the School of Law started the Leadership, Ethics and Democracy (LEAD) Initiative—a program in response to “a range of societal pressures and cultural forces [that] have converged to create many challenges for the legal profession.”

“Leadership will be critical,” predicts Millemann, who directs the project. “[We need] lawyers who are flexible, who respond well to change and the challenges it provides. They can work with others, are creative, and can understand and move organizations. In the changing legal arena, good leaders will be better able to succeed.”

To Professor Ellen Weber, leadership means understanding a client’s problem and taking the actions necessary to solve it. Students in her Drug Policy and Public Health Strategies Clinic have employed a wide range of tools in their effort to expand access to drug treatment services in Baltimore.

“OUR STUDENTS have learned that there are many ways for lawyers to attain their clients’ goals. And not all of them are expensive. They’ve learned to take into account what resources are available.”



Professor Ellen Weber

“Drafting legislation, publishing educational materials, organizing public protests and attracting media attention, attending mediation, pursuing litigation; they’ve done it all,” says Weber. “Our students have learned that there are many ways for lawyers to attain their clients’ goals. And not all of them are expensive. They’ve learned to take into account what resources are available.”

In last April, the LEAD Initiative worked with former UMDLaw Dean Michael Kelly to organize a conference at the School of Law to discuss the impacts of change on the practice of law. The papers delivered at the one-day conference by faculty, invited guests, and alumni will be reviewed in an upcoming edition of the *Maryland Law Review*.

“Good organizations need to do a self-assessment,” says Millemann, one of the conference organizers. “In some senses [the conference] was a sort of taking stock of where is the practice today. Is there an appropriate connection between what we do at the law school and what goes on in the practice world?”

On the minds of many attendees was the report published three years ago by the Carnegie Foundation, which criticized law schools for failing to better translate case law learned in the classroom into real world practice. The report also charged that “students are often warned not to let their moral concerns or compassion for the people in the cases they discuss ‘cloud their legal analyses.’ Students have no way of learning when and how their moral concerns may be relevant to their work as lawyers.”

One of the report’s recommendations was that law schools pay more attention to developing students’ professional identities.

“Values are how we deal with each other,” says Battaglia. “What are our priorities? Faced with a decision between the best interests of the client and our own self-interest, the core tradition is that the client value comes first.”

The import of that value, she believes, is being eroded “by our concern about economic well-being. There’s always been a survival element to being a lawyer,” she says, “but there is a difference between aggrandizing wealth and what’s good for your client.”

A key point of the change debate is to what extent—if any—a law school should modify or even blow up its curriculum. Reynolds, for instance, notes that every new specialty track introduced takes away time from study of the basics. “I think the old way [of teaching] turned out superb lawyers,” he says. “You studied the basic stuff like contract law. I don’t know what the law is going to be like 50 years from now, but people properly prepared in the basics can make the shift.”

An interesting example of a hybrid course that blends the traditional approach with modern questions of ethics is one taught by Rhee. His corporate ethics seminar gives students a chance to apply ethics to the real world problems of corporate decision-making. Case studies include analysis of the Enron collapse and the J.P. Morgan takeover of Bear Sterns.

Rhee teaches pretty much the same course in the Robert H. Smith School of Business and intentionally does not try to slant one strictly for lawyers and the other for budding business executives.

“I don’t believe in false separations between the professions,” he says. “In order to deal with issues we need to be familiar with law, economics, and policy and be able to speak the language.

I think, at least in the field of business, that’s where professionalism should be headed. The world has gotten very complicated. We shouldn’t be compartmentalizing knowledge along the silos of professional schools.”

The debate, of course, has only just begun.

“We’ve got a terrific set of classroom teachers,” says Millemann, “terrific clinical teachers, and lots of specialty programs. I’m proud of where we are. So I start with the premise—rightly or wrongly—that we are not going to gut the structure of what we do. I don’t think we should.”

Then, again, he says, “I think we’re talking about more than just tinkering.”

The Next Move?

IN APRIL, UMDLaw, as part of its Leadership, Ethics and Democracy (LEAD) Initiative, hosted a national symposium to examine major changes in law practice and their implications for law schools. Suggestions from the symposium for legal education included:

- ▶ **Teach students about organizations, including legal organizations.** As lawyers, they will both represent organizations and work in one. Include in this education the macro-ethics issues that derive from the structures of organizations, law office management, and getting and retaining legal work.
- ▶ **Improve “transactional” legal education.** Teach accounting and corporate financing and more about drafting and negotiation (for organizations as well as individuals). Show students how lawyers and corporate clients reach and execute agreements.
- ▶ **Introduce students to new forms of representing individuals,** including unbundled (limited scope) representation. Diversify teaching methods and goals to include more experiences with and information about the importance of interdisciplinary and team work, creative problem solving, alternative dispute resolution, and leadership.
- ▶ **Better prepare students** for international and transnational practices.
- ▶ **Add practice-based experiences to the curriculum,** including by integrating more practice into theoretical courses.

— *Michael Millemann*
Jacob A. France Professor of Public Interest Law and Director,
Leadership, Ethics & Democracy Initiative