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ADDRESS

REMARKS OF THE CHIEF JUSTICE: THE CATHOLIC UNIVERSITY OF AMERICA, COLUMBUS SCHOOL OF LAW COMMENCEMENT

*Honorable William H. Rehnquist**

Congratulations to each of you graduates, and to your families, upon receiving your law degree today. I received mine *in absentia* forty-four years ago. I was the first lawyer on either side of my family, and knew almost nothing about what the practice of law was like. In my day there were not the clinical programs which gave one some feeling of what it was like to be in court, nor were there summer associate positions, at least so far as I knew: if you wanted summer work while you were in law school, you became a laborer on a construction project.

I daresay many of you, even with the benefit of clinical programs and summer associate positions, are wondering “what is the practice of law really like”? Unfortunately, there is no one who can answer that question for you on any sort of a universal basis. Each lawyer knows what the practice of law is like in his own firm, and maybe in the firms where close friends practice. But beyond that, the evidence is almost entirely anecdotal. There are eight hundred thousand lawyers in this country, and they practice in large firms in large cities, small firms in large cities, in medium sized firms in medium sized cities, and as solo practitioners everywhere throughout the fifty states. Even if you narrow it down to the greater Washington area, where you have attended law school, there are too many permutations and commutations for any one person to speak about authoritatively. Speaking of Washington, it may interest you to know that the District of Columbia has more lawyers than all but two of the states, and it has a higher ratio of lawyers to population than any state. In 1991, there were almost 40,000 lawyers practicing in the District.

* Chief Justice of the United States.

I left the private practice of law more than twenty-five years ago, after having practiced in Phoenix, Arizona for fifteen years. In order to bring home to you the way the legal profession has changed in the last generation, and perhaps suggest ways in which it is going to change in the future, I will tell you briefly about my practice in Arizona.

When I moved to Phoenix in 1953, the entire metropolitan area had a population of about three hundred thousand, and I joined one of the two largest firms in town. I became the ninth lawyer in that firm. I left that firm after a couple of years, and with another lawyer friend about my age opened up our own office. This is an option still available to anyone not too risk averse to try it, but I have a feeling it is less likely to be successful in a large city in the present day than it was when we tried in Phoenix. At first we had very little business, and to get relief from the monotony of counting the cracks in the office ceiling I took on some assigned criminal defense work which proved to be good experience. Pretty soon things picked up, and I ended up for most of my time in Phoenix in a four lawyer firm doing mostly litigation of cases referred to me by large firms because of conflict of interest.

I greatly enjoyed my fifteen years of practice in Arizona; I did not amass any great wealth, but I provided my family with a good living. The profession in those days was not nearly as time demanding as it is now, and I found time to be active in bar association matters, local politics, and the affairs of my church.

I have a sense, based on the sort of anecdotal evidence I described before, that the practice of law today has vastly changed from what it was in my time. I think probably the lawyering today is of at least as high a quality as that of the past, perhaps higher, and law firms today are certainly more efficient. I also think that similarly situated lawyers make more money now than they did a generation ago, even after adjusting for inflation.

If all this is true, why are there so many dissatisfied younger lawyers?

Some lawyers, particularly older lawyers, say that the practice of law has changed in their time from a profession to a business. Sometimes this complaint merely represents a yearning for the "good old days," or a conviction on the part of the speaker that he regrets that lawyers now advertise and openly compete for business. If there were no more to it than the inevitable criticism of change from old timers like me, it would be no great cause for concern.

But this observation — that the practice of law is today a business, where once it was a profession — has considerable truth, I believe, beyond the views of those who, like Sir Bedivere in Tennyson's *Morte*

D'Arthur, bewailed the fact that "the old order changeth." Market capitalism has come to dominate the legal profession in a way that it did not a generation ago. Law firms, whether in 1956 or 1996, have always had to turn a profit if they were to stay in business. But today the profit motive seems to be writ large in a way that it was not in the past. In any sizable firm, the partners leverage their earnings by employing associates, and billing the associate's time at a significant profit. New associates must steadily be brought in to expand the base and allow senior associates to make partner. The investment necessary in office equipment for a modern law firm is notably greater today than in the past.

Perhaps nowhere in the profession is this tendency more developed than in the emphasis on billable hours. It appears that recently clients are insisting on some changes in this form of billing, and perhaps it will not be as dominant in the future as it has been in the past. I served on the Arizona state bar committee on the economics of law practice for a period during the 1960s, and I recall that at that time the American Bar Association did a survey of the average number of hours billed by its members. The survey result: The average number of hours was fourteen hundred and fifty per year. Today, I understand, that figure is up around two thousand, or even more in large firms in large cities.

Hourly billing rewards inefficiency: The work of lawyer A, who spends one hundred hours preparing a motion for summary judgement, costs the client one hundred times the billing rate; the work of lawyer B, whom it takes two hundred hours to do the same work, costs the client twice as much for the same service.

At least as to large firms in large cities, it seems at times that, as the ancient Romans said, they have a wolf by the ears; they must at all costs hang on.

The results of this approach, that may be summarized in the phrase "time is money," are several. Large firms simply cannot economically justify taking on small matters, and so they end up with only large clients. Large clients have large cases, if we are talking about litigation, which require an enormous amount of time devoted to relatively uninteresting discovery work — work which falls to the lot of the young associates. But since the cost of having a large matter tried by a large firm is so staggering, very few of these cases go to trial. Economic, and perhaps other corporate considerations, compel settlement. So although the litigation departments of large firms may be generously staffed, the amount of actual trial experience obtained in these firms is not great.

Another result of this emphasis on profit is that clients have become very cost conscious, and do not hesitate to shop their business among

several different firms, rather than giving it all to one firm. This cost-consciousness has also meant that firm associates must specialize in one branch of the law or another at an early stage, because clients are simply not willing to pay for any part of the educational process of a young lawyer who is learning about an area of the law for the first time.

Yet another result is that firm loyalty to partners, and the converse loyalty of partners to firms, is greatly attenuated. A group of partners and associates in one firm who feel they can make more money at another firm has no hesitation in moving. And partners whose production declines can expect their income percentage to decline accordingly, and perhaps to be "let go" in some way by the firm.

Adam Smith, of course, would be pleased with all these developments. There is nothing like market capitalism to bring economic efficiency to any operation. But in the past the idea of a profession was subtly different, in both self-congratulatory respects, and in other more important respects, from that of a business. There was a personal relationship built up among lawyers in the same firm which meant that income producing ability, though a very important factor, was not the sole basis on which the status of a partner depended. It also meant that between clients and law firms with whom the clients had a long-term relationship, there was an element of trust and understanding which may be diminishing today. Clients then regarded lawyers as supplying a sort of service different in kind from that supplied by their vendor of office supplies or raw materials. But if the law firm simply counts the number of hours spent and sends a bill for that amount, perhaps there isn't any great difference between the law firm, on the one hand, and the office supply vendor who simply counts the number of pencils furnished and sends a bill for that amount, on the other.

Having said all this, I should add something on the positive side, and it will be a very large factor for many of you who must pay off student loans. Other things being equal, a large firm in a large city will pay a new associate more than other kinds of law firms. Some people regard this as comparable to combat pay in the service; others do not need this additional incentive to thrive in the highly competitive environment I have just described. If you take this option, you will have to devote a large part of your waking hours to the practice of law, but you will be well rewarded for it.

What other options are open to you?

For those who seek trial experience, the position of assistant United States Attorney in any of the ninety-three United States attorneys' offices across the country offers a better opportunity of getting trial experience

than almost any other position. The disadvantages are that it doesn't pay as much as a large firm, and that there is presently a hiring freeze on in many, if not all, of these offices which makes it difficult to obtain employment there. There is also a commitment for a certain number of years required.

Public defender offices and county and state prosecutors' and defenders' offices are also options which will provide more trial work than large firms, but they vary so much from one another, I believe, as to make it very difficult to generalize about them.

I sense that firms in smaller cities — not small towns, but good sized cities like Indianapolis, Sacramento, and Oklahoma City — have smaller clients, and don't pay as well as large firms in large cities. But the positive side of these firms is that the cost of living in these cities is less than in the great metropolises, and that litigators probably get into court a good deal more than they do in the large cities.

Finally, of course, there are smaller boutique firms even in large cities, which vary a great deal from one to another and then there is, as I have previously mentioned, the option of hanging out your own shingle. But to do that you should have available, by borrowing or otherwise, enough money to support yourself for a while.

For those of you interested in the formation of policy, a job working as counsel for a federal, state, or local government agency which prepares or enacts legislation could be of considerable interest. And, of course, for those of you who have done very well in law school, the academic side of the law may offer an appealing lifestyle and an opportunity to develop your own ideas of the law without the necessity of tailoring them to the problems of one client or another.

How do you decide between these options, if more than one is available to you? Ask yourself if you want to live in a big city, a smaller city, or a small town. Do you want to maximize your income above everything else, or do you wish a more controlled pace, with time for outside activities such as bar associations, local government, and charities.

Don't forget that in choosing a job, you are very likely choosing a lifestyle. Just as time is money in the law practice, don't forget that your supply of time is no more inexhaustible than your supply of money. In the words of Omar Khayyam,

“the wine of life keeps oozing drop by drop;
The leaves of life keep falling, one by one”

Things you would like to do today but feel that you can't because your job is so demanding, may never be done. But whatever you choose to do, I wish each and every one of you the greatest possible success and enjoy-

ment in what I believe still remains the most satisfying way of making a living that I know of.