

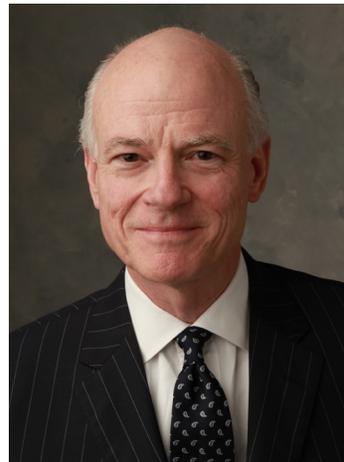


HARVARD LAW SCHOOL

Center on the Legal Profession

“Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century” Commentary

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Response to "Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century"

By William C. Hubbard, President, American Bar Association

David B. Wilkins, Ben W. Heineman, Jr., and William F. Lee are to be commended for their thought provoking essay, "Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century." They offer an insightful look at the impacts and pressures of globalization, technology, and other economic forces on large law firms, the legal departments of multinational companies, and leading law schools. I am not aware of any writings that hone in, as this essay does, on how these disruptions affect this particular trio of legal institutions. Likewise, the authors uniquely address how these tensions play out in the context of what they identify as the three sometimes overlapping roles that lawyers occupy and four concomitant ethical responsibilities. The authors identify those ethical responsibilities as: (1) the lawyer's responsibilities to the people and organizations they serve (i.e., clients); (2) the lawyer's responsibilities to the legal system and the rule of law, including contributions to increasing access to justice; (3) the lawyer's responsibilities to the institutions for whom they work (i.e., law firms, corporate legal departments, and law schools); and (4) the lawyer's responsibilities to society and the public good. I also am not aware of any writings that offer up for debate a similar array of proposed actions that may be taken by these three institutions, individually and collectively, to reposition themselves to continue to meet their ethical responsibilities and succeed in the 21st Century.

Since its creation, the American Bar Association has contributed constructively to addressing the issues that the authors raise, and it has a considerable role to play in marshalling the forces of prominent law firms, legal departments, and law schools in the sense the authors propose. The ABA has long served as successful convener of all segments of the legal profession. Its ability to do so remains unparalleled.

The ABA provides a ready platform to bring together leaders of leading law schools, large law firms, and legal departments of multinational corporations to synthesize and act upon the authors' recommendations. Historically, major shifts in our profession have been propelled through the ABA. Two watershed events involving the future of justice attest to this role. In 1906, the legal scholar and later Harvard Law School Dean Roscoe Pound presented to the ABA his legendary speech, "The Causes of Popular Dissatisfaction with the Administration of Justice." Pound's observations led the way to improvements in judicial administration and other justice system reforms. Seventy years later, the themes and critiques from Pound's speech continued to resonate. In 1976, Chief Justice Warren Burger convened the historic Pound Conference through the ABA, the Judicial Conference of the United States, and the Conference of Chief Justices to discuss ways to address popular dissatisfaction with the American legal system and to examine how to make the justice system more responsive to the public. The Pound Conference led to our modern alternative dispute resolution movement, the implementation of which the ABA actively supported and promoted.

These two events, along with the ethics commissions and task forces described below, exemplify why the ABA is optimally situated as the voice of the U.S. legal profession to inculcate and implement the authors' recommendations. Further, to the extent that their recommendations are directed to the development of well-rounded young lawyer leaders, the ABA and its organized bar partners at the state and local levels are the most accessible and effective platforms for this leadership development.

Since 1908, when it adopted the original Canons of Professional Ethics, the ABA has committed itself to leadership in ensuring the highest standards of ethical conduct and professionalism for the legal profession. The Association fulfills this mission and sustains its leadership role in myriad ways, including through its amendment of existing policies such as the Model Rules of Professional Conduct. By doing so, the ABA ensures that the legal profession has consistent and broad-based guidance to tackle increasingly difficult ethical problems in the practice of law. The Association also does so by recognizing and evaluating change and then developing and adopting policies and initiatives based on focused study by expert commissions and task forces. Such entities include the ABA Commission on Ethics 2000, the ABA Commission on Ethics 20/20, the ABA Commission on Multijurisdictional Practice, the ABA Task Force on the Future of Legal Education, and the new ABA Commission on the Future of Legal Services, which I will discuss further in these comments.

I am struck by the parallels between the issues identified and thoughts conveyed in the Introduction, Framework, and Context Sections of the essay and the observations of E. Norman Veasey, former Chief Justice of the Delaware Supreme Court and Chair of the ABA Commission on Ethics 2000, in his Chair's Introduction to the Model Rules of Professional Conduct in August 2002. In that Introduction he stated that the Ethics 2000 Commission was:

...constantly mindful of substantial and high-velocity changes in the legal profession, particularly over the past decade. These changes have been highlighted by increased public scrutiny of lawyers and an awareness of their influential role in the formation and implementation of public policy; persistent concerns about lawyer honesty, candor, and civility; external competitive and technological pressures on the legal profession; internal pressures on law firm organization and management raised by sheer size, as well as specialization and lawyer mobility; jurisdictional and governance issues, such as multidisciplinary practice and multijurisdictional practice; special concerns of lawyers in nontraditional practice settings, such as government lawyers and in-house counsel; and the need to enhance public trust and confidence in the legal profession.

The more things change, the more things stay the same.

Like the parallels between the essay and the 2002 words of former Chief Justice Veasey, further symmetry exists between the essay's presentation of the three roles of lawyers and their accompanying four ethical obligations, which are comparable to longstanding language from the Preamble to the ABA Model Rules of Professional Conduct. After discussing the lawyer's roles as a representative of clients and an officer of the legal system, the Preamble focuses on the

lawyer as public citizen, which encompasses the “leadership” role identified by the authors. Of particular importance, for purposes of this response, is the language of paragraph [6] of the Preamble:

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

I agree with the authors that the business success of lawyers is not inherently in irresolvable conflict with the concepts of service and professionalism. The sustainability and success of the “business” of law is facilitated by recognizing and adhering to ethical precepts and obligations, and by lawyers (and law students) acting to fulfill the public citizen and leader role. However, the three legal institutions that are the subject of this essay can, and must, contribute in a broader way in the public citizen and leader role.

A starting point for this analysis is the important fact that the United States suffers from a persistent civil justice gap. The legal profession already devotes considerable attention and resources to reducing it. Thirty-seven states have established Access to Justice Commissions to identify ways to help close the justice gap. The ABA is proud to provide support and technical assistance for these commissions. Despite these efforts, the profession has barely moved the needle on access to justice in recent years. Funding to expand access to justice continues to be scarce. This year, congressional funding for the Legal Services Corporation stood at \$365 million—\$121 million less than requested and \$35 million less than 20 years ago, when the demand for services was not as great. That \$400 million of funding from 20 years ago translates into \$600 million in today’s dollars.

Consider also the following figures:

- Eighty percent of people who are poor, and many others of moderate means, do not get the civil legal assistance they need.
- In some states, in 95 percent of cases in the family courts, at least one party is not represented by counsel.
- Half of those who apply for legal aid are turned away because legal aid organizations lack resources.

- In the World Justice Project’s 2014 Rule of Law index, the United States ranks 65th among 99 countries in accessibility and affordability of civil justice. The United States is behind almost every developed country in North America and Western Europe, ranking 18th of 24 countries in those regions on civil justice, largely because we perform so poorly on access to justice.

According to American Bar Foundation research, less than one-quarter of civil justice problems in the United States are taken to a lawyer. While the poor are likely to do nothing—many not understanding that an eviction notice creates a legal issue—the middle-income population is more likely to engage in some form of self-help. Some use the online services or self-help centers at courthouses, but many try to go it alone.

We weaken the stability of our society and the success of the profession at all levels when people who are at risk of having their rights denied do not have access to our justice system. The Preamble to the U.S. Constitution articulates our nation's primary mission to establish justice. But we cannot establish justice when people do not have access to justice. Lack of access creates distrust in our system. When trust in the justice system is broken, the rule of law is threatened.

This is why I asked the ABA Board of Governors to approve the creation of the ABA Commission on the Future of Legal Services. The commission will identify and promote innovations to create new avenues for access to justice while staying true to our core professional values of professional independence and client protection. The commission is an influential group of leading innovators, regulators, judges, law professors, deans, and other academics, and practicing lawyers from all settings—large firm, in-house, solo and small firm lawyers, young lawyers, and seasoned practitioners—who too often are isolated from one another.

Professor Wilkins, Mr. Heineman, and Mr. Lee suggest in their essay the need for increased collaboration among large law firms, legal departments of multinational companies, and leading law schools. I agree, and I would add that the ABA has fostered this collaboration and stands ready to do more. Through such increased collaboration we can vivify some of the authors' excellent ideas, like forming alliances and opening legal clinics in underserved areas, both urban and rural—programs that the ABA has supported and encouraged in recent years through its Legal Access Job Corps. The role of leading law schools in partnering with these efforts and placing third year law students in these clinics must also be encouraged.

It was heartening to see the authors recommend that major law firms and corporations work together with local bars, public defenders, and civil justice groups to conduct systemic legal needs assessments for local communities. I also found value in their proposal to encourage corporate law departments, when choosing outside counsel, to incentivize large firms by including in the hiring guidelines factors linked to the importance of lawyers as responsible citizens and leaders.

Law firms with 101 or more lawyers comprise a very small percentage of the practice settings from which lawyers in private practice operate. In-house lawyers in multinational companies comprise a smaller percentage of the lawyer population, but the resources and power of large

firms and in-house departments are comparatively vast. Most private practitioners in the United States operate out of small law firms or are sole practitioners.

There has long existed a perception that the interests of larger law firms and corporate legal departments are not aligned with those of the rest of the profession that practices in smaller firms or as sole practitioners. The concern is, and the essay recognizes, that the focus of these larger firms, many of which serve the legal departments of multinational companies, has become disproportionately fixated on short-term economic goals. In the process of doing so, the profession has suffered, the profession's reputation with the public has suffered, and our system of justice has suffered. We sorely miss those giants of the profession who came from large firms and showed us a better way, such as former ABA presidents Elihu Root, Whitney North Seymour, Lewis Powell, Leon Jaworski, Chesterfield Smith, Wm. Reece Smith Jr., and Robert MacCrate. These and other lawyer-leaders led us to put the public and the profession ahead of profit.

The Commission on the Future of Legal Services and the ABA understand that while change starts at home, the community of the legal profession and the problems faced by those seeking and needing access to the justice system extend beyond local, state, and national borders. I believe that we need to broaden the collaboration recommended by the authors to the entirety of the profession in order to address the access to justice crisis and find a new balance between what the authors refer to as business and commitment to service. By bringing together communities of the profession that have typically operated from different silos, we can reduce misperceptions among members of different practice sectors and among legal educators and law students from all types of law schools about each other, better leverage available strengths and resources, and ultimately drive increased creativity and innovation.

We are at an inflection point. All segments of the bar, including tomorrow's lawyers, must lead the way to ensure that change will increase access to justice while broadening opportunities for lawyers, protecting the public, and preserving our professional independence. We can teach and learn from each other. It is important that the public see the entire profession as united and committed to professionalism and increasing access to justice in times of great change and challenge. Indeed, our very system of ordered liberty depends on public trust. Or, as more eloquently stated by Judge Learned Hand, "Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it." With support from the organized bar, large law firms, corporate legal departments, and law schools must coalesce around a common vision, with enduring effort, to restore that trust and preserve liberty and justice for all.



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