

THE OPTIMISM OF UNCERTAINTY

by John W. Reed

Editor's Note: This article comes from the keynote address made by Professor Reed at the 2009 NCBE Annual Bar Admissions Conference held on April 23–26 in Baltimore, Maryland.

Through all of last year, the predominant theme in public discourse was change. Initially and most prominently the idea of change was at the heart of the Obama campaign, but it swiftly became the theme and catchword of all of the other campaigns. If as voters we took the candidates' promises to heart, we could not stay as we were, because a vote for any of the candidates was a vote for change. Both in the primaries and in the general election, it was impossible to vote against change.

So we voted. And so we got change. But unhappily, the change we got is not the change we sought. Clearly the course of our lives in these past several months has been characterized, both individually and corporately, by a change imposed on us, rather than change sought by our leaders or by us. Indeed, many of the changes we voted for—in education, public health, and environment; in access to the economic and social middle class; in energy independence—are imperilled by the magnitude of the changes in the economy of this nation and of the world. It's a rare front page or newscast that does not feature the vocabulary of economic distress: foreclosure, bailout, bankruptcy, layoff, pyramid scheme, moral hazard.

We didn't vote for those changes, but they are full upon us nevertheless, and there is great distress. The magnitude of all this is almost incomprehensible.

THE LEGAL PROFESSION IN A DIFFICULT TIME

Lawyers as a class may be affected by these troubles less than some other categories of workers. Indeed, in some specialties—bankruptcy practice and securities fraud, for example—one may profit in the short term from the terrible dislocation. But the legal profession is not immune. And the word is not good in large sectors of the profession, especially in transactional practice, where there are now fewer transactions to practice. One has only to look at the *ABA Journal's* online daily newsletter, *Law News Now*, to get a notion of how severe the downturn is in the legal profession—at least in the big firms. Let me read you a sampling of recent headlines from *Law News Now*. The last day of January, the headline was "January's Carnage—1,381 Layoffs." On February 13, the headline was "Bloody Thursday—Six Major Law Firms Axe Attorneys." The article listed cuts of about 500; and the next day's posting added 300 to the list of layoffs, from which another journal, the *Legal Times*, estimated \$100,000 of annual

savings of compensation per layoff. Under a heading “March Mayhem,” *Law News Now* reported over 1,200 layoffs in the first four days of March.

And the carnage continues. On April 20, *Law News Now* reported, “So far this month, 232 lawyers and 556 staffers have been axed at major law firms. The total for the year: 3,381 lawyers and 5,280 staffers have lost their jobs.”

These figures report shrinkage only at what the publication calls “major” or well-known firms, and we don’t have reliable information about midsize and smaller firms. But unquestionably, law firms are being reconfigured, and reconfigured painfully.

By the way, if you are not a reader of the ABA’s *Law News Now*, you may not know that it is really *People* magazine for lawyers, with some news and a lot of gossip. Or maybe more accurately, it is like a grocery checkout-line tabloid newspaper—a lot of sex and violence (which reminds me of the critic’s complaint about Lawrence Welk’s music: “Too much sax and violins”). Let me give you three illustrative headlines: “California Courtroom Melee: Defendant Stabs Judge, Is Shot Dead by Detective.” “Playboy Model Sues Sharon Osbourne, Claims Assault.” And one that really fits the *People* magazine model: “Philippine Lawyer Disbarred for Infidelity.” I read that article, of course. The lawyer had left his wife and 12 children to live with another woman, with whom also he had children. The remarkable thing is that his wife had sought to have him disbarred back

in 1975, but the court didn’t act for 33 years because he failed to appear for a hearing! Incidentally, the integrated bar in the Philippines recommended only a three-month suspension.

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for example, courts with shorter hours, courts that have suspended jury trials—all as cost-saving measures. Some are predicting that lawyers’ work will be broken up into discrete elements, with more of it assigned to support staff, or outsourced, or even performed by computers.

So there is a lot of change. And the more of these reports we read, and the more we consider their significance, the more uncertain we become. Almost all of the pronouncements from the White House, from Congress, from Wall

Street, from the pundits say, in one way or another, that they don’t know whether any particular remedial measure will be efficacious, that they don’t know what will happen next, that the future is uncertain. Uncertainty is everywhere. The banking system, health care, education, manufacturing, retail trade, newspapers—their futures are uncertain, every one of them.

A LAWYER’S ADVANTAGE IN TIMES OF UNCERTAINTY

Uncertainty is generally regarded as not a good thing. We don’t much like uncertainty. It’s human

nature. We don't want questions, we want answers. As I hear the repeated plaint that now, more than ever, the future is uncertain, I remember a statement by the late Edwin M. Borchard of Yale Law School that, though puzzling at first, has meant more and more to me over the years. (You may remember him as the author seven decades ago of a book called *CONVICTING THE INNOCENT*—long before the Innocence Project—and also as the father of the summary judgment.) Borchard's provocative statement was this: "An optimist is a person who believes that the future is uncertain."

I'd like you to think about that for a moment. "An optimist is a person who believes that the future is uncertain." In a way, that's a chilling statement, and its truth is not immediately obvious. Indeed, some would think that uncertainty is the hallmark of the pessimist, not the optimist.

But a little reflection will bring us to an understanding that uncertainty about the future necessarily means that the future is not foreordained and that it remains to be affected by what you and I do—that we have a role to play in determining the shape of that future. Therefore, as talented men and women, and privileged men and women, most of us with training in law and all of us with influence in our communities, we have a chance—I daresay a duty—to bring about that better future, about which we can therefore be optimistic.

Let me press the point. If there is any category of human beings able to deal productively with uncertainty, it ought to be lawyers. Most of us have had exposure to the humanities, particularly as undergraduates, where the study is not of answers but of questions, a study not so much of facts but of meaning. And then our training as lawyers taught us to reject easy answers in favor of searching and persistent inquiry. We're always asking and testing.

Some years ago, when school dances still had chaperones, there was a University of Michigan Law School dance, and one of the young law students who was there had his fiancé with him. And again in a kind of etiquette that has gone out of style he sought to introduce her to the chaperones, a law professor and his wife. After a few moments of conversation, the young woman said to the wife, "What's it like being married to a lawyer?"

After a moment's reflection, she responded, "Oh, for the joy of one uncontested statement." (There's more to the story. That marriage, unfortunately, came apart, and in due course the law professor remarried. Some years later, one of our colleagues was leaving Ann Arbor to live in Florida. There was a farewell party, and as we were all visiting before dinner, I somehow had occasion to relate that story to two or three younger faculty members, at which point the new wife, a lovely lady, came on to the scene. I immediately neutralized the story by

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leaving out names, and when I came to the punch line, she said, "Oh, how true. How true!")

That background, that legal training, and our licenses impose on us an inescapable responsibility to use our talents in the service of our profession and our society, seeking to resolve all these uncertainties in the direction of justice. Martin Luther King, Jr., said that "the arc of the moral universe is long but it bends toward justice"; but there is so often injustice that the truth of Dr. King's assertion seems uncertain itself. That uncertainty, however, offers room for hope because the outcome is not foreordained; and with that hope, you and I can work optimistically toward that end.

TURBULENT TIMES: CHANGES AFFECTING THE BAR ADMISSIONS PROCESS

What steps we take, what we do, depends on our positions in the profession. Whether advocate, counselor, judge, or administrator, we have various obligations and opportunities. But whatever our respective roles in the profession, those of us who are gathered here have an additional, particular responsibility in common. That responsibility is to increase the probability that those who are admitted to the bar and become, in effect, ministers of justice in our system are qualified to serve as lawyers in a changing, uncertain world.

It's a truism that if we are to test and screen well, we must have some idea of what lawyers will be doing once they are admitted. The admission process

must be relevant to the desired outcome. I have told some of you before that when I was young, I saw a question on the Oklahoma bar examination that read, "Define a corporation sole." It seemed to me then, and still does now, that knowing about ecclesiastical properties was not very important for a beginning lawyer. It was about as bad as the question "Summarize Magna Carta." However broadening

and desirable that knowledge is, it probably is not among the most necessary pieces of information needed for admission to the bar. And, of course, there is the possibility that such a question will produce an answer like the schoolboy's essay on Magna Carta. He wrote,

Magna Carta was when, to protest taxes, Lady Godiva rode through the streets of Coventry naked on a horse. She rode side-saddle, which is the origin of

the phrase "Hurrah for our side!" Sir Walter Raleigh gave her his cloak, saying, "Honi soit qui mal y pense," which, translated, means "Thy need is greater than mine"; to which she replied, "Mon dieu et mon droit," which means "My God, you're right!" That was Magna Carta.

When we say that the admission process must be relevant to what lawyers will be doing, there's the rub, there's the uncertainty of which I speak. We test for admission to a profession that is in flux, with more rapid change, I believe, than at any other time in my 67 years at the bar. You well know the changes in the legal profession.

The most obvious driver of these changes is the continuing turmoil in the economy, of which I have

spoken. There's a kind of poetic justice in the fact that as law has become less a profession and more a business, it is being hammered by the same economic forces that have hit the general business community.

As clients seek to reduce spending, there is speculation that the billable hour may be nearing its end, which would change the structure and dynamics of law firms. Those same concerns are leading some clients to refuse the services of first-year associates. Outsourcing, even to foreign shores, may lead to further narrowing of what is deemed unauthorized practice. The ongoing decline of generalists is of course a consequence of more and narrower specialization. All of these moves, and others, are consequences of economic pressures; and all of them pose the possibility of changes in what lawyers do—which must bear uncertainly on what competencies we test for.

Another area of change is the increasing globalization of commerce and communication, which brings with it a globalization of legal practice. It is the rare firm with a commercial, corporate practice that does not have auxiliary offices in one or more foreign countries. What uncertain implications does globalization have for us as examiners?

A third element of change in law practice is the exponential growth of government regulation that is under way not only in this country but in other nations as well. Once again a product of financial

malaise, that growth in regulation appears destined to continue for the foreseeable future. Inevitably, with regulation comes the need for law-trained people. The people we admit to the bar should be qualified

to serve competently in a growing administrative regime.

And then there is the increasing importance of understanding and using science and technology, both because lawyers represent clients and government agencies whose subject matters are scientific or technological and also because lawyers need to use technology in managing a practice.

Finally, what changes, if any, do we make in the admission process to account for changes in legal education? For many years now, both individual law faculties and groups such as the Association of American Law Schools and the ABA have debated the merits of theoretical versus practical training. (One must question whether the term

“versus” is appropriate.) Do we respond to the fact that some law schools are converting their third-year curriculums into forms of hands-on training such as clinics, practicums, and internships? As the law schools and the bar swing back and forth in their emphases on the theoretical and then the practical, what knowledge and skills are we to assess? One issue in that uncertain future is whether we are to follow the lead of the schools or to lead the educators ourselves by what we test for.

FINALLY, WHAT CHANGES, IF ANY, DO WE MAKE IN THE ADMISSION PROCESS TO ACCOUNT FOR CHANGES IN LEGAL EDUCATION? . . . DO WE RESPOND TO THE FACT THAT SOME LAW SCHOOLS ARE CONVERTING THEIR THIRD-YEAR CURRICULUMS INTO FORMS OF HANDS-ON TRAINING SUCH AS CLINICS, PRACTICUMS, AND INTERNSHIPS? AS THE LAW SCHOOLS AND THE BAR SWING BACK AND FORTH IN THEIR EMPHASES ON THE THEORETICAL AND THEN THE PRACTICAL, WHAT KNOWLEDGE AND SKILLS ARE WE TO ASSESS? ONE ISSUE IN THAT UNCERTAIN FUTURE IS WHETHER WE ARE TO FOLLOW THE LEAD OF THE SCHOOLS OR TO LEAD THE EDUCATORS OURSELVES BY WHAT WE TEST FOR.

As I said a few moments ago, if we are to choose wisely whom to admit to the bar, we must have some idea of what lawyers will be doing once they are admitted. This has been a little list of only a few of the uncertainties that face us all.

THE BAR ADMISSION COMMUNITY

Much of what needs to be done to resolve these uncertainties favorably, as we move along the arc of justice, as the needle moves toward the goal of justice, can and will be done by each of us individually. But I want now to suggest to you that there is a role to be played by this collective of which we are all a part, a collective that I will call the “bar admission community.” It’s really a profession within the profession, an institution within an institution.

Much of our lives since the end of World War II has been lived in a culture that emphasized the freedom and rights of the individual. All of us believe that we have unalienable rights to life, liberty, and the pursuit of happiness, and we tend to interpret those rights to mean we can do pretty much anything we want. We love the idea of freedom. More than one generation in my lifetime can be fairly labeled a “me” generation. It might also be labeled an “Adam Smith generation,” one that believes that the greatest good is achieved when each individual pursues his or her own self-interest.

In this same era, perhaps as a corollary, we have lost faith in institutions: the church, schools, government, charities, and, especially now, the financial system. And with good reason, as these institutions one after another have betrayed us or simply lost vitality and played a diminished role in society, leading us into an age characterized by a tremendous ambivalence and ambiguity. The legal profession is, of course, one of those institutions. Though it has

retained much of its character and essence, most of us see it as having lost some of its luster as it has become more and more commercial. And we know that the future of the profession and of its components is uncertain.

But as members of that profession, we are debtors to those who have gone before us, obligated to give new life to its traditions, and obligated to find new and better ways to reach its goal of justice. Each lawyer here has an individual obligation to improve our profession, but I submit again that there is a role for us as the bar admission community.

OUR ROLE IN A CHANGING WORLD

We come together to reexamine our goals and recommit ourselves to excellence and relevance in the bar admission process, that society may be better served by the legal profession, the nobility of which we affirm. We come together to broaden our interests and our understanding, that we may serve the cause of justice more profoundly and wisely. We come together, not pridefully, to affirm that we stand for excellence and integrity and honor. And we hope to be a kind of yeast that gives rise to excellence and integrity and honor in those whom we serve day by day. We hope that we will be considered good men and women, knowing however that goodness does not consist of one or even a few good acts.

A friend told me some years ago of his encounter with a Chicago cab driver who had known Al Capone and was tremendously impressed by and made much of the fact that Al Capone had given a 20-dollar tip to a lunch-counter waitress. That was an act of goodness, of course, but surely he was not a good man. And by the way, the Bible doesn’t use the term “good Samaritan.” He’s just called a Samaritan; we have termed him “good” because we happen to

know of one good act that he did. It reminds me of a man who, when asked if he had been faithful to his wife, said, "Yes, frequently."

We do have individual roles, but we need the encouragement and strength that come with being with like-minded people. As John Updike said, there is something to be said for belonging to a group whose members are willing to stake it all on the same bet. Or as Robert Fulghum put it in his little book *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN*, "When you go out into the world, watch out for traffic, hold hands, and stick together." That encouragement and that strength were never more needed than now, as the nations of the world appear to be standing on a precipice, uncertain about the future. But what an opportunity! What an exciting time! The architect David Rockwell said, "What's life-giving is doing something you don't know the answer to before you begin." It's the optimism of uncertainty.

And what steps do we take as we move into that uncertain future? It's like the beginning of a nighttime automobile trip. The headlights never show all the way to the destination, only just far enough to deal with our reaction time. We can't see all the way to the goals we have for ourselves in our profession. But we can see far enough to take the actions we must take.

As members of the bar admission community, we meet here and are met. We get our commitments clarified. We face an uncertain future with optimism because we know we have the talent and will to shape it for good. And we do so communally, seeking to know and befriend and support each other, knowing that the world is too dangerous for anything but truth, and too small for anything but love. 📺

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