The Year: 2075, the Product: Law

Stephen Gillers
Yesterday was March 11. The year is 2075. I want to tell you about four or five lawyers and what they did yesterday. I want to tell you first about a lawyer named Jane Darrow, who lives half the year in Aspen. Jane is repeatedly acknowledged to be one of the ten best trial lawyers in America.

Jane woke up March 11 and to her glee, there was a new snow. An avid skier, she prepared for the slopes, but first she checked her e-mail and faxes and communications from around the globe.

Jane had received a pre-trial memorandum in a case that was about to be heard at an international arbitration in Geneva. It came via e-mail from co-counsel in San Francisco. She reviewed it on screen, made some hypertext suggestions, and then sent her revised copy to another co-counsel in London.

And there was a motion for discovery in a criminal prosecution that Jane was going to defend in federal court in New York later in the year. She reviewed the motion, made suggestions, and returned it to local counsel.

Jane has two associates. She spends her winters in Aspen and her summers on Martha's Vineyard. She brings her office with her wherever she goes because it only weighs about five pounds, mostly in bits and bytes on what used to be called floppy disks.

Jane has been doing this for about 12 years. She was once part of a law firm, but she chose to leave. She was much the best business-getter at the firm, but staying caused her no small amount of consternation. For one thing, the conflict of interest rules had become inscrutable, impossible to predict. They often prevented her from accepting interesting matters around the globe because of her partners' clients. Not only did she not know these clients; she did not even know the partners, who themselves were spread all over the globe. Breaking from her former firm

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freed her from those problems and enabled her to accept cases she would never otherwise have been able to take.

What Jane now does is affiliate seriatim with different law firms as they need her particular and very unusual skills in courtrooms and other tribunals. These seriatim affiliations create no or only limited imputed conflict problems for Jane.

The technology that allows Jane to practice in this way also eliminates commuting time because Jane’s office and her home in both Martha’s Vineyard and Aspen are adjacent. Jane remembers her great grandfather, who was a Chicago trial lawyer. She recalls that he would spend more than 2 hours a day travelling to and from his office. At close to forty-five weeks a year, after deducting for vacations and holidays, Jane figures she saves the equivalent of 12 weeks of billable time annually, enabling her to spend more time with her children and doing things she likes to do.

Jane isn’t the only lawyer to go off on his or her own in this way, but very few have, because very few lawyers have the specialty in the market that Jane has, a specialty that makes her attractive to many other firms. Nevertheless, in various ways, technology and information transmittal advances have made it possible for Jane’s former partners, while remaining at Jane’s old firm, to practice in different physical spaces, often to live and work in the same or adjoining spaces, throughout the United States and around the world. That in turn has led to a departure of many middle class professionals from cities — not only law professionals, but other professionals too — eroding the tax base of those cities. The consequences have not been happy ones for places like New York and Chicago and Los Angeles.

Next I want to tell you about another lawyer who awoke March 11, this time in San Francisco. I said “lawyer” and that was technically a mistake. David Deal has a master’s degree in Elizabethan literature. Unable to find remunerative employment much above the minimum wage for several years, he went back to school. He went to Stanford Law School and got a degree as a legal technician. Stanford introduced that degree into its curriculum some forty years ago. David passed a legal technician’s exam and got a license from the State of California. Then, so long as he honored certain yearly continuing education requirements and carried malpractice insurance, David could provide simple legal services to individuals and small businesses. These included representation on residential real estate transactions, simple bankruptcy, simple divorce, estate planning, counseling on HMO rights, advice to small
businesses, and government benefits counseling and advocacy — e.g., social security, Medicare, and the like.

So David hung out his shingle, as he is allowed to do in California, and began to represent small businesses and individuals. He did so well at it, that he began to build a firm of legal technicians. Today, David has 120 legal technicians and six lawyers working for him. The lawyers are there just in case more complex problems come along, as they do. The legislature implemented new rules fifty years ago to let lawyers work for legal technicians. In a role reversal, it acted at the behest of lawyers, who needed the work.

David's employees work in 8 offices in the Bay area. He's about to move down to Los Angeles. This has been an interesting development for people like David, but has seriously impinged on what used to be called small firm practitioners. The general practice section of the American Bar Association is barely a ghost of its former self as a result of the advent of legal technicians. But the change has provided access to many individuals who need legal counseling, and who theretofore could not readily afford it or were afraid of the expense and of dealing with lawyers.

Len Friday woke up yesterday near Chicago. Len is a lawyer. Len's odyssey is somewhat different from David's and Jane's. He lives and works in adjoining buildings on the North Shore and has a pretty good life. About fifty years ago, sophisticated entrepreneurs started producing high-density CD-ROMs containing just about every kind of information anyone would ever want in certain basic areas of law, including tax law, estate planning, and government benefits. These are, in fact, many of the same areas that Dave Deal's firm works in. A customer can buy a CD-ROM in an area of interest, take it home, and use it. The program will ask you questions. You can ask it questions by searching an index or using key words. It's pretty much like talking to a lawyer except more user-friendly.

So people who thought they could handle their problems without counsel might buy one of the CD-ROMs. There was no danger of the CD-ROM forgetting something because CD-ROMs do not forget, as lawyers might. The CD-ROMs could also be state-specific. That was easy to do. Mostly it was unnecessary, though, because of the homogenization of so much American law in the last half-century.

The manufacturer of many of the CD-ROMs was Microsoft Corporation, which long ago recognized that not only could you reduce information to bits and bytes, but you could also reduce judgment to bits and bytes, at least judgment at the level that purchasers of its legal CD-
ROMs required. Microsoft, however, went a little further. It recognized that there could be changes in the law postdating the manufacture of a CD-ROM. Also, it anticipated that a user might get stumped and need to pose a question. Or a user might just want to check his or her conclusion with a biological lawyer. So what Microsoft did was create a space on the Internet for people who bought its CD-ROMs where, by using a special password, they could ask lawyers about changes in the law or get answers to specific questions.

Microsoft had to do battle to establish the legality of its CD-ROMs. Lawyers fought hard. But Microsoft had ample precedent. Some of you may recall Norman Dacey. He published a book called *How to Avoid Probate*. This was in the 20th Century. Dacey was not a lawyer, but he published his book and it was an enormous success, so successful of course that lawyers at the time tried to stop publication on the ground that the book, or Dacey behind the book, or both together, were practicing law without a license. That effort failed because the First Amendment allowed people to publish books containing legal advice so long as they didn’t actually counsel the purchasers of the book.¹

The cases Microsoft won established that a CD-ROM was just a more complicated version of Norman Dacey’s book. More information. Better index.

Norman Dacey’s legacy was a necessary but not a sufficient basis for the new Microsoft Legal Network, as it was called. Needed too, as I said, was access to biological lawyers. So Microsoft and other publishers of legal CD-ROMs began to hire lawyers, some on payroll, some as independent contractors. They were divided by zip code and specialty. When you bought a CD-ROM, you also got the phone number of a lawyer who would answer any questions. Or you could correspond with a lawyer via e-mail using a password. The lawyer would earn a reduced fee, charged to your credit card. You never had to leave your house, and the lawyer never had to leave his or her office.

That is what Len Friday does in his area of specialty—pension rights—in his and six other zip code areas. Len receives about one hundred calls or Internet queries per week. A few of these turn into more substantial consultations. Len’s workdays run about seven or eight

hours. He makes a very nice living, thank you, handling the Microsoft clients plus a little other work on the side.  

Now I want to introduce you to Beth Diggs, who awoke yesterday in Paris. Beth Diggs is a law professor on the Paris campus of Hofstra Law School, a campus that opened up about 35 years ago. A student from anywhere can go to Hofstra Law School’s Paris campus and get an American law degree in three years without ever leaving Paris and without ever stepping foot in New York City or on any other part of American soil.

Beth Diggs, in addition to her generous salary from Hofstra, makes additional money in a very interesting way. About 85 years ago a young man named Dov Seidman, working as an associate at O’Melveny & Myers in Los Angeles, realized that law firms often reinvent the same product. They may customize it slightly for particular clients, but often it’s basically the same product. Clients keep paying for the same product and the payment includes all of the law firm’s large overhead. And so, Seidman decided that perhaps it would be better to recycle this work — maybe go right to the general counsel of the corporate client, or even to law firms, and persuade the law firm or the general counsel to let his company do particular research when it was sufficiently generic.

Seidman formed Legal Research Network (LRN). Others formed similar organizations. They identified people like Beth Diggs, who happens to have an expertise in international intellectual property law. Beth does research for LRN. If, for example, the GC of a major media company calls LRN for a particular research task in Beth’s area, LRN will negotiate a price with Beth, negotiate a price with the customer (not a client), and eventually deliver the product that Beth produces. Beth, of course, being an expert, is able to produce that product faster and better than most anyone else in the world.

Beth has very little overhead. She works out of her law school office. LRN has overhead but far less than a traditional firm. Beyond all that, the genius of this distribution system is that LRN owns the product that Beth produces. As a result, LRN can recycle that product for other customers or use it in the publication of a book about the particular area of law, omitting specific factual information. And as a result, the ultimate customer, who agrees to this, pays less than it would otherwise

2. For authority that would tend to support the propriety of Len’s arrangement with Microsoft, see ABA Opinion 355 (1987).

3. A description of Legal Research Network and Sieman’s goals for it can be found in D.M. Osborne, “Should You Be Afraid of This Man?,” The American Lawyer 70 (June 1995).
have had to pay had it been the sole beneficiary of Beth’s work through a law firm.

Now this development has had a deleterious effect on the size of law firms, just as Jane Darrow’s departure has, because there is less need for the kind of library drone who used to produce massive memoranda for particular clients. Instead, people like Beth, and the 2000 other experts around the globe that Legal Research Network and its competitors use, do the same thing better and cheaper.

Finally, I want to introduce you to Kiyomi Hayashi, who is a lawyer in Tokyo, having graduated with a three-year degree in American law at New York University’s Osaka campus without ever having left Japan. Kiyomi, a member of the California bar, works for a large international law firm. She counsels its clients, wherever they are, on American law. Fourteen other lawyers from her firm, based in Tokyo, Hong Kong, and Singapore, are also admitted to an American bar and offer the same service. Their clients may be in Japan, they may be in the European Community, they may be in the United States. Indeed Japanese nationals with American legal problems feel very comfortable talking to Kiyomi, who is also a Japanese national. They avoid travel to the United States to confer with American lawyers, and they like the fact that they can talk with someone from a similar background.

Kiyomi Hayashi’s work has benefitted enormously because of the change in the balance of commercial power. Just as in the 20th century other nations displaced American primacy in the production of automobiles and televisions, so we now find that law firms abroad are competing with American firms in the sale of the product called American law. American lawyers, whether or not American, can do legal tasks for clients needing advice on American law elsewhere than in the United States. This is indeed what Kiyomi does.

So here we have five individuals who are selling the law product in ways that would not have been recognizable, much less tolerated, a century ago.

Jane Darrow — a freelance specialist who has escaped the mammoth firm and instead forms ephemeral professional alliances as client need dictates.

David Deal — a paralegal entrepreneur whose firm has more clients than most firms and who earns more money than most senior partners.

4. Kiyomi benefitted, of course, from the Supreme Court’s opinion in In re Griffiths, 413 U.S. 717 (1973), which held that states may not deny bar membership to noncitizens; and from the decision in Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985), which held that states could not condition bar membership on residence within the state.
Len Friday — a lawyer who backs up a CD-ROM network, who earns a lot less than Darrow or Deal but has a sure source of clients and an enviable life.

Beth Diggs — a law professor who triples her income from her Paris school office by selling her special knowledge through an intermediary that repackages her work to its customers.

Kiyomi Hayashi — a Japanese citizen with a U.S. law degree, admitted to the California bar, and who spends all her professional time counseling clients in Tokyo on American law.

Let me briefly underscore changes that have made it possible for each of these five individuals to be doing what he or she is doing. One is, as I've just mentioned, the shift in corporate power from domestic to foreign companies. Powerful law firms tend to emerge where powerful clients are. Witness the fact that the national and international law firms that appeared in the United States in the late twentieth century were originally based in large urban states. Not rural ones. Powerful companies increasingly reside and are formed under the laws of other nations. Consequently, the legal advice they need on internal corporate matters is advice under the law of other nations, not American law. And the foreign firms are attracted to the prospect of getting advice on American law, when they need it, from lawyers in their own countries.

Next, technological change, both in the ability to access information from anywhere and the ability to transmit information to anywhere — and information here includes virtual conferencing via video — has in the last century made an enormous difference in the way in which people are compensated, and the identity of the people who are compensated, for providing legal advice. Foreign law firms encroaching on what had theretofore been largely an American monopoly, and the advent of legal technicians, like Dave Deal, whose numbers now equal about a third of the population of the American bar, have both, from different ends of the spectrum, challenged the traditional in-country law firm dominance for the sale of the law product.

The utter inability of the unauthorized practice of law rules to contain these market developments must also be noted. Those rules depended, when you came right down to it, on the definition of a preposition. The preposition was "in." One could only be punished for practicing law without authorization in a particular jurisdiction, but nobody is in geographical space when they work in cyberspace.5

The final trend that has made a great deal of difference in the ability of a host of competitors to market legal services worldwide is the advent of democratic control over rulemaking for the profession. There came a point, it was about 2012, that American voters began to doubt the profession's insistence that only it, in conjunction with judges (who were really lawyers in disguise), could regulate lawyers. Voters began to take back that power. Perhaps the very first sign of this effort occurred in 1996 when California voters nearly passed a referendum changing the rules governing maximum percentages for contingent fees on early settlements. A rather small and insignificant event, but March 26, 1996, the day of the vote, is as good as any to mark the assent of democratic control of the profession. Although the referendum failed, it highlighted the issue of control and led to subsequent successful assertions of popular authority.6

So far my talk has been entirely descriptive. But because I'm a professor addressing an audience whose work will influence the rules that govern lawyers of future generations — the generation of Jane Darrow, Len Friday, and the others — let me also be prescriptive.

To simplify: Professional ethics rules are of two types. One type regulates the lawyer-client relationship. Conflict rules are in this category. So are confidentiality rules. Another type regulates the market for the sale of legal services. Advertising rules are in this category as are rules on unauthorized practice and lay participation in the law industry.

Rules that regulate the market — or as some would say interfere with the market — have to be justified with some salutary effect for the consumer of legal services. These things are hard to measure and we have to accept some propositions on faith.

For example, a rule requiring licensure of persons who render legal advice tends to ensure competence and provides a mechanism for control. But licensure can be overdone. Many tasks nominally "legal" do not require three full years of law school. Excessive educational requirements raise barriers to entry and increase price.7


7. For an example of one court that showed an unreasonable refusal to accept a legislature's effort to license insurance adjusters, see Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982). This case turns on an unduly broad view of the meaning of "practice of law" and the court's inflexible refusal to share licensing authority with the legislature. For more enlightened
Rules that once permitted minimum fee schedules, like rules that once prohibited virtually all law firm marketing, also artificially increase prices.\(^8\)

Rules that once prevented clients from organizing to reduce the cost of legal services by combining their purchasing power regulated the market to the consumer’s disadvantage.\(^9\)

The Supreme Court has severely restricted or prohibited each of these kinds of rules, but others remain. Among them are rules that largely forbid lay equity investment in for-profit law firms.\(^10\) So are rules that forbid nonlawyers from practicing law coupled with a broad definition of law practice.\(^11\)

The trends described here will make it harder to shelter the legal marketplace from the traditional influence of the forces of supply and demand. To some extent, regulation will become impossible.

My advice is two-fold: First, we must not attempt what cannot be accomplished. Doing so only turns the regulatory effort into a paper tiger and undermines it credibility. Furthermore, the experience over the last half century should make us sufficiently suspicious of market interference. Although consumer protection is one laudable purpose, another is lawyer protection. Minimum fee schedules are the most blatant but not the only example of unjustified interference.

Here is a little-known but telling fact. In 1964, the Supreme Court wrote the first of three opinions striking a state’s effort to limit the ability of laborers (there the Brotherhood of Railroad Trainmen) to use their combined purchasing power to buy legal advice for members more cheaply.\(^12\) After the decision, 48 bar associations joined the ABA in an unsuccessful motion for a rehearing.\(^13\) They presumed to intervene to

\(^8\) Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (striking minimum fee schedules under the antitrust laws); Bates v. State Bar, 433 U.S. 350 (1977) (the first Supreme Court case granting commercial speech protection to a law firm advertisement).


\(^10\) See ABA Model Rule 5.4.

\(^11\) See ABA Rule 5.5. A typical definition of the practice of law can be found in State ex rel. Norvell v. Credit Bureau, 85 N.M. 521, 514 P.2d 40, 45 (1973).


protect the population of clients, but I suggest to you that their futile effort had a less benign purpose.

Faced with repeated efforts to limit this sensible form of collective purchasing, the Supreme Court finally declared, in 1971: "The common thread running through our decisions . . . is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." Since then, states have deferred.

So my first recommendation is for restraint and suspicion before adopting rules that interfere with the legal marketplace.

My second recommendation is that courts, and to the extent they are allowed by separation of powers principles, legislators, focus instead on the fiduciary relationship between lawyers and clients. This is the other kind of legal ethics rule and it is the most important. Indeed, marketplace interference is ultimately justified by an effort to protect the consumer in the individual lawyer-client relationship. I'm suggesting that aggressive enforcement of fiduciary duty norms is ordinarily a more efficient way to proceed.

Breaches of trust, in all of their manifestations, and professional incompetence, must be redressed or punished appropriately, through tort remedies, criminal prosecution, or discipline. While criminal penalties must be saved for the most egregious conduct — e.g., theft of funds — discipline can and should be more aggressive than it now is — and extended to allow discipline of entire law firms. Tort remedies can be strengthened. For example, the courts, as the ultimate regulators of lawyers, can declare that a client who successfully sues a former lawyer for breach of fiduciary duty or malpractice is entitled to counsel fees as an exception to the American rule that each side pay its own lawyer. The Supreme Court of New Jersey recently so held in Saffer v. Willoughby. Discipline can also be strengthened, with especially strong sanctions for lawyers who violate fiduciary obligations and less tolerance for psychological defenses. Discipline also ought to be expanded to permit sanctions against entire law firms. A lawyer’s serious default can often be traced to the absence of oversight in the lawyer's office or to an office culture that has failed to instill proper professional values. Recently,

16. For an example of excessive tolerance, see Matter of Erda, 209 A.D.2d 147, 625 N.Y.S.2d 165 (2d Dep't. 1995) (lawyer who neglected and misrepresented status of three estate matters and also failed to cooperate with disciplinary authority, and who had twice been previously admonished for neglect, is publicly censured after taking "cognizance of [her] psychological condition during the relevant period, and her efforts to seek treatment").
New York courts recognized as much when they amended the State's ethics rules to permit discipline of law firms.¹⁷

In conclusion, let me emphasize that the members of this audience and others reading its proceedings have the duty and the challenge to devise appropriate rules for the new world of law practice that is even now beginning to appear. These rules must be enlightened, they must be prepared to break with tradition when appropriate, they must be creative, and most of all, they must have as their main object the assurance of trustworthy, competent legal advice and counsel at prices undistorted by self-interested market interference.
