The Transformation of the Legal Profession
Convocation Address
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You’ve all heard of Warren Buffett, but maybe some of you don’t know that he is a genuine wit—the witty multibillionaire. About the exposure of Bernard Madoff’s Ponzi scheme last fall as the economy was collapsing, Buffett said, “until the tide goes out, you don’t know who’s swimming naked.” Like any Ponzi scheme, Madoff’s was doomed to fail eventually. But the economic collapse that began last September accelerated existing tendencies: not only the unraveling of Ponzi schemes, but also the rapid and perhaps terminal decline of the newspaper industry and the Detroit auto industry—and the transformation of the practice of law, which is the subject of my talk today.

A professional service is a service that involves a degree of specialized knowledge that the customer for the service cannot understand. And so he takes the provider on faith, trusting him not to abuse his superior knowledge. Law and medicine are the professions one thinks of first, the professions that seem to embody most perfectly the concept of the profession as the embodiment of expertise.

Traditionally the legal profession conformed closely to what I’ll call the “professional model.” Limits on competition, on commercialization, assured the lawyer a safe, steady, upper-middle-class income in exchange for tacit self-restraint in billing. The limits on competition were, and to some extent still are, legal restrictions, such as no advertising or soliciting, no ownership or control by nonprofessionals, and licensure requirements designed to limit the size of the profession. Or they were legal authorizations, such as price fixing of legal services by means of fee schedules approved by bar associations. But the limits on competition were also customary, such as lockstep compensation of partners and de facto tenure of partners—both measures that reduce internal competition among lawyers—and the expectation that a partner would remain with his firm for his entire career—so no jumping ship and no raiding.

The model never dominated the practice of law completely (the practice of tort plaintiffs’ lawyers and criminal lawyers, for example, never fully conformed to it). But it characterized the kind of lucrative and dignified and prestigious corporate practice that most of the graduates of this law school embarked on, and that most of you, the members of the class of 2009, may have expected to embark on.

From the perspective of the professional model, hourly billing can be seen as transitional. It is relatively new, having been uncommon before World War II. Before it took hold, a law firm would generally bill for services rendered without itemization. But that is a viable practice only when clients repose a great deal of trust in their lawyers, in accordance with the professional model. Hourly billing requires itemization, and this gives the client some basis for evaluating the cost that the lawyer incurred. But hourly billing is cost-plus pricing, which is not businesslike. It invites padding, for example in the form of repricing the time of inexperienced new associates.

The professional model in law (in medicine also, but that is a topic for another day) is giving way to a business model; the current economic downturn has revealed that the transformative process is almost complete. The big corporate law firms, and the lawyers who work for them, are now profit maximizers, in part because the legal struts of the professional model have collapsed or been circumvented.
in part because of changes in client demands. Many of the leading law firms now are global businesses, some with annual revenues in excess of $1 billion. They are professionally managed and highly competitive, gaining and losing clients, gaining and losing top lawyers who take clients with them, riding the business cycle, which produces, at its bottom, the layoffs, furloughs, and wage cuts or freezes that we are seeing. New York hours have become the norm everywhere. There is, as in medicine, growing role differentiation within the firm. And gone is lockstep compensation (ask a service partner); gone is de facto tenure (and not just for service partners—for everyone); gone is any expectation of job security; gone is client trust; and going is hourly billing. 

Cost-plus pricing is, as I said, un-businesslike. Businesslike is fixed-price competitive bidding with adjustments, whether specified in the bid or negotiated, for exceeding or falling short of performance targets.

Soon to go, I predict, is the ban on selling equity interests in law firms to nonlawyers, which has forced banks to raise their needed capital mainly by borrowing; this has inhibited growth, earnings, and professional management.

So, in short, while law in its highest corporate reaches used to be a gentlemanly cartel, it is now a competitive industry. Old-fashioned lawyers will shudder at the transformation that I have been describing, as will some of you, the members of the class of 2009, and, fortunately, for those of you who feel that way, there remain alternatives to big-firm practice and giant corporations’ legal departments—alternatives such as government service and teaching, or the more exotic alternative that you just heard Mr. Haugen describe. But most of you I predict will not only adapt but thrive in the new, the competitive big-firm environment. Competition is the

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application of Darwinism to societies dominated by commercial values. You, most of you at any rate, are the fittest.

The end, which I foresee, of hourly billing will be a godsend to the fastest legal workers, because they’ll enable their firm to underbid its competitors yet reel in profits. And you are fast workers I am sure. The end of hourly billing will also spell the end of busywork, which is demoralizing to able, ambitious lawyers—and you are able and ambitious. And perhaps it will spell the end as well of yearly quotas of hours billed and of recording time in six-minute slices.

Furthermore, the more businesslike the law firm, the greater is the commitment to merit, and therefore the abler are the senior associates and junior partners—and those are the two ranks for which new associates will mainly work—and you will learn a lot from working under them for a few years even if the prospect of a career as a lawyer in a modern-day corporate firm does not entice you. But you will have to understand that bringing business into the firm is a dimension of merit, as in any business.

Above all, competition is rendering the legal services industry immensely fluid and diverse. Entrepreneurial opportunities abound. Law firms that are too highly leveraged, either in staff (a very high ratio of partners to associates) or financially (heavy borrowing), are vulnerable in the new, competitive environment. Likewise law firms that are poorly managed, that for example fall behind the electronic revolution and the march of statistics and economics into law as into other fields. Some law firms, under pressure of the current highly adverse economic conditions, have already fallen. Their fall creates opportunities not only for the surviving law firms but also for lawyer-managers with fresh ideas for the organization of a law firm, the compensation of staff, and the provision and marketing of legal services.

I am not a Pollyanna. I know that the short-term prospects for new and recent law school graduates, even graduates of the best law schools, are clouded, and I know that the “short term” can be of indefinite length. But the clouds will lift. The future beckons. Forswear nostalgia. Would you rather work for the post office or FedEx? The future is now. Embrace it. The challenges are great, but the opportunities limitless.