SPEECH

THE LEGAL PROFESSION: INDEPENDENCE AND SCHOLARSHIP
REMARKS OF PHILIP S. ANDERSON, PRESIDENT-ELECT, AMERICAN BAR ASSOCIATION, TO NATIONAL CONFERENCE OF LAW REVIEWS, LITTLE ROCK, ARKANSAS, MARCH 27, 1998[*]

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Good afternoon, and welcome to Little Rock. I am confident that you are having a productive meeting, and I am pleased to be with you at the invitation of your host, the *UALR Law Journal*.

Today, I am going to talk to you about the independence of the legal profession, but before I do that, I want to pay tribute to the work that you are doing in continuation of a long tradition of legal scholarship. That tradition began in the Fourteenth Century with

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Mr. Anderson is a member of the Council of the American Law Institute, and he serves on the Advisory Committee for the *Restatement of the Law Governing Lawyers*, which is in preparation. He is a former member and co-chair of the Federal Advisory Committee to the United States Court of Appeals for the Eighth Circuit. In 1978 and 1979, he was appointed by President Carter to the United States Circuit Judge Nominating Commission and he served on the Panel for the Eighth Circuit.

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the publication of the *Year Books* in England, which essentially were case reporters.[1] They were published for 200 years, and were succeeded by other types of commentaries on the law.[2] The first American case reporter was published in the late Eighteenth Century, and the West Reporter System began in the 1870s.[3] Prior to West, the *American Law Register* was founded in Philadelphia in 1852.[4] It was a scholarly publication that relied on articles from law professors.[5] The *American Law Register* was taken over by Dean William Draper Lewis in 1895, who arranged for it to be published by his law school, the University of Pennsylvania.[6] The publication eventually was edited by the students, and the name of the *American Law Register* was changed to the *University of Pennsylvania Law Review*.[7] It is "the oldest continuously published legal periodical" in the United States.[8] It was not the first law review that was published by students — the first was the *Albany Law School Journal*, which was started in 1875 and lasted for only one year.[9] The *Harvard Law Review* was established in 1887.[10] And law reviews came of age ten years later when a law review article was cited in a dissenting opinion by a Justice of the United States Supreme Court.[11] You have been influencing the law ever since.[12]

You can also influence the profession.

What I want to touch on briefly is an issue that will have a profound effect upon your professional lives and that will play out in the next ten years. Someone has said that it is a curse to live in interesting times. We are living in interesting times in the profes-

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1. *See* Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 748–49 (1985).
2. *See id*.
3. *See id*. at 749–50.
4. *See id*. at 755.
5. *See id*. at 755–56.
6. *See id*. at 756–57.
7. *See* Swygert & Bruce, *supra* note 1, at 756–57.
8. *Id*. at 757.
9. *See id*. at 764.
10. *See id*. at 742.
11. *See id*. at 788 (referring to United States v. Trans-Missouri Freight Admin., 166 U.S. 290, 350 n.1 (1896) (White, J., dissenting)).
12. For a more complete treatment of the history of law reviews, see Allen W. Bird II, *The History of the Arkansas Law Review*, 50 ARK. L. REV. 5 (1997); H.E. Heine, *Brief History of the Section of Legal Education and Admissions to the Bar*, 1970 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR; Swygert & Bruce, *supra* note 1.

sion. I think that it is a challenge more than a curse, but what is occurring will affect you, and the type of law that you practice, and how you practice, and where you practice, and it will affect your clients and the protections that are afforded to them.

I can classify this challenge under the rubric of the independence of the legal profession, but for you to understand what is happening, I am going to have to tell you a story. If the story had a bad ending from our standpoint, it would have the title "The Triumph of Capitalism." But the story is far from finished, and that does not have to be the ultimate title or the judgment of history.

This is the story: Once upon a time, seven hundred years ago, in the city of Florence, in the shadows of the prodigious accomplishments of the Renaissance, there emerged a system of guilds.[13] The Guild of Doctors, Apothecaries, and Grocers was established in 1293.[14] At about the same time, the Guild of Lawyers and Notaries was founded.[15] These guilds were powerful forces in the Florentine economy.[16] There were other guilds — eighteen of them[17] — but only the guilds of the doctors and lawyers required a degree from a university.[18] Control over the workplace and regulation of members of all of the guilds were entirely in the hands of their respective members.[19]

During the Industrial Revolution, the guilds of the tradesmen lost control over their workplace because of the demands of mass production and regimentation.[20] The tradesmen, and those who would have been tradesmen, for the most part, became employees.[21]

The professions of law and medicine, however, grew and prospered. Within a hundred years of the founding of the Guild of Lawyers and Notaries, in the Anglo-Saxon legal tradition, the law claimed a place between commerce and government that it contin-

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13. *See* KATHARINE PARK, DOCTORS AND MEDICINE IN EARLY RENAISSANCE FLORENCE 15–16 (1985).

14. *See id*. at 15.

15. *See* ELLIOTT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT 11 (1996).

16. *See* RICHARD MACKENNEY, TRADESMEN AND TRADERS: THE WORLD OF THE GUILDS IN VENICE AND EUROPE, c.1250–c.1650 1 (1987).

17. *See* PARK, *supra* note 13, at 15; *see also* MACKENNEY, *supra* note 16, at 10.

18. *See* KRAUSE, *supra* note 15, at 8; PARK, *supra* note 13, at 21.

19. *See* PARK, *supra* note 13, at 15.

20. *See* 5 THE NEW ENCYCLOPAEDIA BRITANNICA 550 (1994).

21. *See* 13 ENCYCLOPEDIA AMERICANA 578 (1990).

ues to occupy.

For centuries, the popular tradition regarding the professions of medicine and law was that their practitioners were more interested in the welfare of their patients or clients than in the fees received for their services. Both professions were seen to be impressed with an obligation of public service, and the professions were viewed in a class above that of the businessman, whose primary if not sole interest was profit. In both professions, responsibilities to the patient or client and to the profession came before self-interest. That was the popular tradition about doctors and lawyers because they earned it. It was true.

The medical profession maintained control over its workplace from the late Thirteenth Century until the Eighth Decade of the Twentieth Century, when the troubles began. Managed health care has removed the control of the workplace and important decisions pertaining to the care of patients from the treating physicians and placed the responsibility for those decisions in the hands of a faraway bureaucrat who may or may not have a medical degree. Doctors have sold their medical practices to corporations, and the corporations, quintessentially creatures of capitalism and by nature oriented to the bottom line, are incapable of having a bedside manner because that is a quality reserved for humans. Doctors are now forming rebel groups in an effort to regain their independence and free themselves and their patients from the restrictions of managed health care. Will lawyers find themselves in the same position as doctors ten years from now?

The theory that the learned professions are now about to suffer the fate met by the tradesmen's guilds during the Industrial Revolution is advanced by Elliott A. Krause in a recent book titled *Death of the Guilds: Professions, States, and the Advance of Capitalism, 1930 to the Present*.[22] Critics of his theory say that the profession of law changed so much in the Nineteenth Century that it cannot be compared to its medieval origins.[23] Nevertheless, I think that Professor Krause has a point.

Those who would perform services traditionally reserved to lawyers now propose to unbundle legal services. At the lower end of the chain are the non-lawyer practitioners in free-standing paralegal

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22. KRAUSE, *supra* note 15, at 280–86.
23. *See* Thomas L. Haskell, *The New Aristocracy*, N.Y. REV., Dec. 4, 1997, at 49.

offices without the supervision of a lawyer, offering services that were once within the purview of a law-school trained, licensed lawyer. These paralegals draft deeds, wills, probate forms, divorce papers, and the like, but do not go to court. That type of practice started in Florida and has appeared in California. It will work its way across the United States. At the highest end of the chain, all of the Big Six accounting firms now offer unbundled legal services from due diligence designed to support a lawyer's opinion in mergers and acquisitions, to legal advice in mergers and acquisitions, estate planning, tax planning, and litigation management. There is a bill now pending in Congress that would extend the protection of the attorney-client privilege to accountants in matters within the jurisdiction of the Internal Revenue Service.[24] The IRS takes the position that it, the SEC, and ultimately members of the public are entitled to the benefit of independent audits by accounting firms unencumbered by privileged communications withheld from the public, and that the privilege is, therefore, inconsistent with the role of auditors.[25] The bill has passed in the House and has a good chance of passing in the Senate.[26]

All of the Big Six accounting firms have acquired law firms in Europe and are fully engaged in the practice of law there. Those lawyers go to court and try cases, as well as provide every other kind of service law firms provide. There are restrictions in the United States, but watch for those to come under increasing attack.

This is not just a turf issue, although I expect that to be the

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24. *See* Internal Revenue Service Restructuring Act of 1997, H.R. 2676, 105th Cong. § 341 (1998); *see also* Paul Wiseman, *IRS Bill Permits Privileged Tax Talk*, USA TODAY, June 26, 1998, at 1A.

25. *See* Marcia Coyle & Darryl Van Duch, *Attorney-Client Privilege for Bean Counters?*, NAT'L L.J., Nov. 10, 1997, at A12.

26. *See* Lisa Stein, *Accountants Get Privilege in Tax Bill Compromise, Bill Would Also Shift Burden of Proof*, NAT'L L.J., July 6, 1998, at B1. A similar provision has been adopted by the Senate since these remarks were delivered in March 1998. *See* Leslie S. Shapiro, Address on Internal Revenue Service Accountability to Small Business and Self-Employed Taxpayers Before the Subcommittee on Taxation, Finance and Exports Committee on Small Business (May 15, 1998), *in* NAT'L PUB. ACCT., Aug. 1, 1998, at 23. At this writing (June 1998), the provisions are awaiting action by the Conference Committee to eliminate the differences. *See* Stefan F. Tucker & Ellen P. Aprill, *From Both Outside and Inside the IRS, Momentous Change*, NAT'L L.J., Aug. 3, 1998, at C13; *see also* Jeff A. Schnepper, *Restructuring and Reforming the Internal Revenue Service*, USA TODAY, Sept. 1, 1998, (Magazine) at 15 (noting the bill passed in both the House and the Senate).

perception. The issue of client protection should be foremost among considerations when assessing the delivery of legal services by accounting firms. Law firms are, in most states, bound by rules of conduct based on the *Model Rules of Professional Conduct*. All states have some form of conflict of interest rules.[27] Accounting firms are not bound by the same rules. Law firms are also bound by rules of confidentiality regarding a client's business and the client's confidences.[28] Accounting firms are not. The *Model Rules of Professional Conduct* prohibit a lawyer engaged in delivering legal services from being directed by a non-lawyer.[29] There are good reasons for the rules. They are not useless relics from the middle ages as alleged by critics of the profession. When considering the evolution of the profession, think about this: Will the business lawyer be assimilated by accounting firms?

I am convinced that if pure, raw capitalism gets the upper hand in the profession, the tradition of public service as an obligation of every lawyer will be the first casualty. Ours is a noble profession, and it is worth enormous effort to preserve it. We cannot prevent changes from occurring, but we can have a role in determining the nature and character of the changes, if we really care enough to do something about it. The changes that are occurring in the legal profession are the result of market forces. They cannot be stopped, but they can be channeled to protect the public. Whether the market forces overwhelm the profession is up to the lawyers. Are the lawyers in America up to the challenge? I think that we are, but we must have the support of our best and brightest to preserve the independence that doctors have lost.

You are among the best and brightest. The future of the profession will depend, in part, upon you. Do you believe that a profession that has as a component the obligation of public service is worth preserving? I gather that you do, because you have already gone beyond the minimum required of a law student.

I commend you on doing something that you do not have to do in order to obtain a law degree. Your law review work will enrich your law school experience, and your dedication to scholarship will enrich your life. Of all of our pursuits, of all of our accomplishments, the

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27. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8, 1.9 (1995).
28. *See id*. Rule 1.6.
29. *See id*. Rule 5.4(c).

most enduring is scholarship.

Some people, lawyers among them, spend their lives in bleak despair, splashing about in the shallows of thought and experience. You have the capacity to rise far above that and participate in the great things of this life. You can use your talents to change the course not only of the market forces assaulting the practice of law, but of policy and events.

And now I am going to talk to you about the American Bar Association. I believe that it is the role of the American Bar Association to debate the great issues of our time. The great issues of our time are the dignity of humanity and the search for justice, and how a civilized society in the last years of the Twentieth Century defines the former and pursues the latter.

Those are the great issues. This is your time. Where will you be in that debate? I hope that you will be in the American Bar Association helping us to shape legal policy and guide our profession through interesting times.