

Remarks of
Judge Deanell Reece Tacha,
Dean of the Pepperdine School of Law
at the
LSC Board of Directors Luncheon
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San Diego, California

It is such a privilege to be with the Legal Services Corporation Board. I thank you for your diligent work on behalf of the underserved legal needs in this country. I have been honored to work on the Pro Bono Task Force that you established. I am so grateful to Harry Korrell, John Levi, and Martha Minow for their inspired leadership

I listened to Dr. Ross with great interest. I was particularly taken with his observation that innovation by itself is not enough in the nonprofit and social service world. Innovation may be enough in the for-profit world where one sells innovation, but in the philanthropic world innovation must be paired with effective advocacy and policy change. We who care deeply about legal services and pro bono representation would do well to learn from this wisdom. It is clear that the time has come for both advocacy and policy development to address some of the structural issues that plague the legal profession and the delivery of legal services.

In some ways I am picking up where my friend and former colleague, Judge Diane Wood, left you last fall. She reminded you of the crush of pro se criminal and habeas cases in the federal courts, the extraordinary demands of pro se representation, and the fiscal constraints that increasingly hamper the ability of the courts to respond adequately to this growing sector of its workload. The situation is even worse in the state courts where budget cuts are forcing severe cutbacks in services and threaten the very availability of courts for judicial business. I applaud One Justice for convening hearings to address state court issues in California.

As I have returned to the legal academy, I do so wearing many hats—judge, lawyer, legal aid attorney and director, and now Dean. What I see is a disastrous disconnect in the legal profession. Let me start with my current challenge.

Perhaps since the earliest days of lawyers in this country it has never been more difficult for a new lawyer to get a legal job. Looking back historically, many new lawyers trained at the elbow of senior lawyers and judges—hence the term “elbow clerk.” Very few lawyers today are willing to work closely enough with new lawyers to make this a real possibility. Even judges are turning to more experienced lawyers for their law clerks. Apparently, the historic role of senior members of the profession contributing to the development of new lawyers and the transmission of the professional values is no longer viewed as a profession-wide responsibility. The profession seems to be increasingly relinquishing these tasks to the law schools and abdicating one of the most effective ways to bring new generations of lawyers into common understanding with the bench and the bar. This is not just about teaching information. It is about living as models of the rule of law at work for future lawyers. In Kansas we have a favorite saying: “Don’t eat your seed corn!” Well, by not participating in the formation of new lawyers, I believe that the profession is eating its seed corn!! How can we expect a commitment to equal justice under the law and all of the idealistic values of the legal profession if we are not working with these new lawyers to transmit a sense of our professional calling and commitment to the public good?

In boom economic times, BIGLAW became a reality. Jobs were plentiful. Pay was good. Law school applications exploded. Law schools became the cash generators for universities. Tuition went up exponentially. As I have said, the traditional legal market has, to a great extent, become unavailable to new graduates. Law firms are themselves financially stretched. So, jobs and opportunities for experience for new lawyers are all rapidly diminishing. And then there is the debt! Law school graduates are leaving law school with staggering student loan debts that only a very high paying legal job offers any hope of repaying.

At the same time, it is absolutely clear that the unmet legal needs of the American public are exploding. What was once a problem of the very poorest among us has become a problem for all but the most wealthy among us. What we once patched up with wonderful, well-intentioned efforts at providing legal aid for the indigent has become an issue that threatens the very fabric of the rule of law in this nation. When the great majority of the individuals and small businesses of the nation no longer can, or believe they no longer can, get a lawyer, be represented effectively, go to court, settle their disputes in a fair and

impartial way, and be treated like every other citizen, we, quite simply, have lost the guiding principle of our republic—equal justice under the law. When that goes, the rule of law goes, and when that goes, the great dreams of those patriots who founded and fought for this republic go with it—never to be reclaimed.

Something must be done!! To me, it is the tragic irony of our time that we have these two yawning chasms on the landscape — vast numbers of lawyers seeking meaningful legal work and experience, and similarly vast numbers of people whose legal needs are not being served. It is the additional tragic irony of our time that young people are being advised—in the media and even in their own homes—not to pursue a legal education because it has no value! Oh, my friends, where would this great nation be without the lawyers who founded it, who fought for the many rights we enjoy, who have been informed policymakers, corporate, educational, and philanthropic leaders? Where would we each personally be without our legal educations? I, for one, can say that I left my undergraduate world as an educated “Miss Pillsbury Bake-off” and emerged from law school as a pretty decent lawyer equipped to work in many aspects of the profession. In our profession we learn to be problem-solvers, model civil debate, and lead in so many aspects of the economy and our culture. Our mandate is to build human potential through orderly problem-solving. When has society needed these skills more? This is not at all about whether a career or training in the law is valuable!! It is all about bridging those great chasms I have described. It is about a profession that needs to pull itself back together—BIGLAW, little law, law schools, judges, legal aid, and pro bono advocates. We cannot continue to pursue self interest in our own silos. Judge Wood said—and I loudly concur: “WE NEED NEW MODELS!”

We need to join together as legal professionals to solve our own problems—problems that have reached proportions that threaten the very fabric of our nation’s commitment to the rule of law. If we don’t address our issues on a profession-wide basis, no one will! There is plenty of evidence around us that the people in the political branches of government at all levels will not step up to address the issues that threaten us. Clearly support for courts at all levels has eroded at a dramatic pace. The discussion about court funding is couched in terms that would relegate the third branch to “just another government agency.” Government funded legal services have all but passed from the landscape. Student loan money and its availability to law students are in

jeopardy. Vocal critics inside and outside of government seriously question the value of legal training. I could go on and on with this litany: criticism of judges, the confirmation process, debate around judicial elections. Suffice it to say, our profession and our nation have a problem and we are the only ones who can address it!!

Let's just take a look at what needs fixing and maybe the new models will become clearer:

1. Law school costs too much.
2. Financial aid is scarce.
3. New lawyers and law students need opportunities to gain practical experience.
4. Millions of Americans do not have effective or adequate access to the judicial system.
5. Extraordinary legal talent is clustered in large urban areas where time constraints, geographic distance, and lack of expertise in non-business areas of the law impede or preclude involvement in addressing the unmet legal needs of individuals and families.
6. The economic climate has forced cutbacks in traditional law firm employment, thus diminishing the opportunities for a new generation of lawyers and future judges.
7. The American ideal of equal justice under the law is not a reality.
8. The American public and the body politic don't care!

So, in the face of this dire scenario, one would assume that any self-respecting law school dean would slit her wrists, resign, and disappear into some faraway nether land—certainly not leave the lofty climes of the federal bench to get back into this troubled legal world!! But no, not me! I have returned with all the chutzpah of a recovering federal judge determined to work with you and as many of my colleagues in the legal profession as will step up to find new models that allow us to address collectively the ills that beset us! In my optimistic way of looking at the world, I think the parade of horrors may actually point us in some directions that we might not have been willing to go back to the good old days when life as a lawyer was much cushier and the folks in government and the media liked us better!!

So, you say, is she nuts, or what in the world is the source of her optimism? I fully confess that no “fixes” to these problems will be easy or fast, but some of us must begin somewhere! Again with the chutzpah of a recovering federal judge, I have lots of remedies, but no money or way of implementing!! That doesn’t stop me. I will quickly outline some possible models or responses that might begin to alleviate the woes that plague us.

Let me begin with one that seems most obvious to me: the disconnect between unmet legal needs and new lawyers seeking practical experience. Certainly, there is the traditional legal education model of creating clinics that are part of the law school curriculum. This is the approach recommended by the Carnegie Commission and the easiest to monitor and supervise. These in-school clinics have flourished in most law schools and provide important legal services, but they are not the full answer to the disconnect. They drive up the cost of legal education because they are expensive forms of instruction. Supervision of students is uneven and often does not include meaningful opportunities to work closely with practicing lawyers. These clinics rarely involve large percentages of the student body. I suggest a couple of models to supplement these more traditional clinics.

One of the inspiring things I have discovered in Southern California is the abundance of outstanding legal services providers that already exist and are meeting a host of legal needs. Such groups as Public Counsel and Christian Legal Aid already work with many private attorneys who do pro bono work through them. I suggest a model where law schools contract with these existing organizations to provide the equivalent of clinical education. These lawyers are experienced and knowledgeable. They have huge potential capacity if they were to have more people and more money. They have built-in structures for working with clients and involving practicing lawyers. They are the “real deal” in providing pro bono legal services. But they, too, are stressed financially and overworked. By “sharing tuition” and student support, law schools, legal services providers, and private attorneys could band together to expand dramatically legal services provided, give students experiential opportunities, and provide the structure and education for more pro bono involvement of private attorneys. The Pro Bono Task Force found plenty of willingness in the private bar to do pro bono work, but widespread reluctance to get involved because of a lack of substantive knowledge in many of the legal areas so much needed—domestic and family law, disability

law, landlord/tenant, foreclosure, etc. One of the clear messages is that if existing legal services organizations could provide CLE that would equip lawyers who practice in other areas to serve legal assistance clients, many more lawyers would be willing to be involved. Of course, if a model like this were to be adopted, ABA accrediting standards would have to be aligned with the goals of the programs.

Another model that I suggest we consider is a broad-based national initiative with the bench and bar to establish a 2-year apprenticeship program for third year law students and new graduates during the year in which they take the bar examination. Many observers of legal education are proposing some variant on the third year apprenticeship model. My friend, Judge Jose Cabranes of the 2nd Circuit recently gave a speech suggesting such a possibility. It is clear that the third year of law school is one where students who have already taken the basic doctrinal courses could spend considerably more time in experiential learning opportunities. Many are questioning the third year's classroom value when compared with the cost and resulting debt. I suggest the two-year model because I observed this year the phenomenon that many of our students did not have employment until after they had passed the bar exam—a fact that California students do not learn until late in the fall. Two years would provide a long enough time to do really meaningful work with a lawyer or a judge. What I have in mind is akin to a “Teach for America” for the legal profession, but not funded by government. Funding would be a challenge, but if these apprenticeships were very low cost to law firms, judges, and legal services providers, I wonder if there might not be enough expanded capacity throughout the profession to fund it, at least in part. Not all of the unmet legal needs of Americans are among the folks who can pay absolutely nothing. I suspect that if the cost were minimal, many of these needs could be met by adding apprentices as a regularized part of the acculturation of new lawyers. In important ways, the medical profession has expanded its clinical capacity exponentially with the model of residencies. Practicing lawyers and judges would have the responsibility for mentoring and supervision. They could take pro bono or low compensation cases and use the apprentice lawyers for those cases. The issue of tuition in the third year will be thorny and intractable because of the heavy reliance of law schools and universities on that issue, but if the supervision was largely in the hands of the practicing bench and bar, we might be able to find models that would reduce and/or share tuition costs to fund the apprenticeship program.

All law schools now do externships and internships, but we are spending thousands of dollars and a lot of time in each school to find these opportunities and get our students placed. Again, the in-school supervision is spotty and the quality of each experience varies widely. By joining a profession-wide apprenticeship commitment, even law schools could possibly help support the endeavor.

In what will no doubt be deemed heresy, I also suggest that we need to take a hard look at the bar examination model and accrediting standards. My fellow members of the legal profession, we have done some of this to ourselves!! We have built in and incrementally expanded enormous hidden costs and barriers to broader representation. I ask each of you whether anyone remembers a single question on the bar exam you took? We have piled on subject-matter specifics in these exams and largely ignored what are arguably the most important skills for a lawyer. In the name of testing for competency as a lawyer we have developed a whole industry of bar exam trainers who dish up all the information bar takers can absorb in about six weeks only to find that when they are in practice they may never encounter those subject matter areas again, and, if they do, the law has changed or evolved. As far as I know, no bar exams test such things as client communication skills, the business and economics of practice, advocacy and negotiation abilities, and all of the subjective characteristics of a good lawyer. Similarly, our own organizations have built in so many accrediting standards that those standards alone are driving up the costs of legal education. The entire profession needs to take a very hard look at where we have built in costs and barriers that we could alleviate by some systemic changes.

In this day and age, I think it is always tempting to say that technology can cure some of the ills that beset us. That is, to some extent, true. Clearly the Pro Bono Task Force has found that on-line services and videoconferencing and other similar technological capabilities assist in providing training, document assistance, and even some client contact. But there is no technological gizmo that will ever replace the heart of the attorney-client relationship: the face-to-face analysis of problems, credibility and trust building , and all of the nuanced dynamics of good lawyers working with their clients. New lawyers need to learn this. You simply cannot hope to be a good lawyer virtually.

Finally, I strongly believe that the legal profession must immerse itself in a massive grassroots effort at public education about the role of courts, the meaning and characteristics of the rule of law, and all the attributes of a system of justice where the courts are fair and impartial, everyone has meaningful access to the courts and to legal representation, and why our republic depends on these principles. We must go into classrooms, civic groups, 4-H clubs, and churches—wherever anyone will listen. This is not just about saving the legal profession. It is about saving the rule of law. It falls to us—the legal profession—to begin the task of rebuilding public trust and understanding. It is, after all, about a profession that has a much higher calling than just a day job. To us falls the responsibility for transmitting the values that brought us this great republic—to a new generation of lawyers and to the public at large. It is a big and difficult task, but this cockeyed optimist of a law school dean believes that if we will band together and begin to put in the fix, we can truly adopt some new models that will invite our profession and buttress for the future the rule of law for all people and this great nation. I thank you for your service and thank you for caring. Let's get to work!