Legal Perspective Series Lecture

INTRODUCTION

During the week of February 23, 1995 Judge Robert E. Keeton delivered two presentations to the University of Arizona College of Law on changes in the law. The *Arizona Law Review* is honored to publish the following comments of Judge Keeton in a two part format. The first part contains Judge Keeton's remarks to the University at large on developments in the law as part of the College of Law's Legal Perspective Lecture Series. The second piece consists of the Judge's presentation entitled *The Changing Nature of Legal Issues in State and Federal Courts* to the University of Arizona College of Law Faculty. In order to preserve their full meaning, the *Review* has elected to publish the Judge's comments to the University in substantially the same form in which they were delivered.

PART I: THE CHANGING LIVES OF PROFESSIONALS IN LAW

Judge Robert E. Keeton*

My subject today is change. Of course, change can be threatening. But it can also open doors, create new opportunities, and affect the ratio between misery and fun in being a student of the law. I hope to suggest some ways you may improve that ratio to an even more favorable one than you are enjoying now—whatever your particular ratio may be.

The special focus of these remarks is change in each of the most familiar roles of legal professionals beyond being a student of the law.

Because law is changing, and more rapidly today than in earlier times, what you need to get from your legal education—even more than knowledge of the law applied to resolve disputes of the past and present—is a depth of understanding of law in action that will prepare you to understand the law of the future. The law as it evolves during your life in the legal profession will be materially different from the law of the past and present.

Let us start by thinking about some of the changes that are going on, and

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how they may affect life in the legal profession for you. I use, as an opening illustration, a part of the day in the life of a judge—a federal trial judge. Yesterday morning I was intent on catching a plane to come here. Commencing a week and a half ago, I had started trying a longshore worker's case—a claim brought by a longshore worker because of injuries he sustained while unloading a Dutch vessel in the port of Gloucester. If that case had arisen fifteen years ago, instead of recently, the law applicable to the case would have been undisputed. Probably I would have pulled out of my files the last charge I had used in a similar case, and the lawyers would have made not a single objection to the Charge to the Jury. In contrast, the case that I was trying to finish yesterday required major additional commitments of time of the trial lawyers and the trial judge because of intervening changes in the law.

First, Congress stepped in and amended the statute. Second, the Supreme Court construed the statute, as amended. Third, the First Circuit construed the case construing the statute. So, the lawyers and I had to construe the case construing the case construing the statute in order to answer some questions that none of these three sources of authority had precisely answered. Yes, each of the three had given us some directions. Yet, some questions that had to be answered in fashioning the verdict form and the Charge to the Jury in this case had not been answered by any of the three sources of authority. So the lawyers and I, over the course of the last week, spent a substantial amount of time conferring about the charge.

After all this, both lawyers stood up and objected to my charge. I turned and saw my law clerk, with a bit of a frown on her face. How could they be objecting to this charge that they, and she, had helped the judge perfect? But they did.

From time to time during the next morning—yesterday morning—I kept receiving messages from the jury asking questions they thought our perfected charge had not answered. We gave them the best answers we could fashion. Conferring with the lawyers and responding to the jury's questions occupied a fair amount of my time. Meanwhile, I had my eye on the clock. Would I make that flight to Tucson?

Between questions from the deliberating jury, I was trying to hold a Case Management Conference on a CERCLA case. There is one common characteristic between a CERCLA case and a longshore worker case, different as they may seem in other ways. For both kinds of cases, Congress had stepped in with a statute, and changed the law.

What happens when a legislative body, Congress or a state legislature, steps in and changes the law? You may have guessed already.

One way of looking at legislation is to observe that Congress and the state legislatures are prime actors in creating full employment for the bar. Legislators, solving some problem, always create new questions that make people want legal service, more and more and more of it. So every time you hear about another statute being passed, you can say, "Hooray, more work for us." Because, of course, though the statute will give us a mandate on something, inevitably it will also create new unanswered questions.

Who is going to answer these new questions? Let me introduce another perspective on legislation by suggesting a different imagery to help you think

about it.

Lawmaking is done by a variety of actors. Legislatures and agencies come to mind first. If we take a more precise focus on the subject matter of tort law, courts come to mind as historically the principal lawmakers, using the common law process.

There was a time when we thought of tort law as quintessentially common law. Courts decide cases within a system of precedent. Each decision has force with respect to the decision of like cases that are coming afterward. Long ago, of course, we imported a little statutory law into torts. You have studied doctrines of negligence per se and evidence of negligence. Those doctrines use statutes for a limited purpose. What I am suggesting to you now is that statutes are becoming a part of tort law in a totally different way.

The House Judiciary Committee in Washington approved, yesterday, a bill that, if enacted, will preempt much of the law of products liability. Of course, it is only a bill at this point. The Senate will do something different with it. And then the Conference Committee may do something different from either—adopting some last minute changes. Congress made last-minute changes to CERCLA, and CERCLA left hordes of questions for lawyers and judges to work out.

A legislature makes law in bursts—or sprints. The statutory mandates go only a short distance, here to there, and say no more about where to go from there.

The completion of that lawmaking job is to be done by someone else. Who? Lawyers and judges. The lawyers make the arguments to the judges about what the finishing touches should be, and the judges have to decide—beginning with the trial judges, whose decisions are reversed, or modified, or perhaps even affirmed. It all works out in the end, but it may take quite a while to finish the lawmaking that a statute started with a burst or a sprint.

The job that lawyers and judges must do is no sprint. It is the long-distance run. And it is not even a marathon. Think about why! The marathon is run over a carefully prescribed and defined course to a finish line. For lawyers and judges involved in this process, the experience is more like a cross-country run over rough, uncharted terrain, through the woods, over the rocks, into the mud, up and down, and around. As you start through the process, you may find a few broken twigs, bent grass, or other marks to show the path of the legislative sprint. You follow what you think to be the right direction, with the help and advice of the lawyers, coached by academics on the sidelines. If the recommended path turns out to be a dead end, you come back, and look for another set of marks to follow.

Judging must be reasoned decisionmaking, so when the judge takes this side trip, and comes to a dead end, the judge must go back and post a sign to warn future runners against reading the legislative directives as pointing toward this path. These posted signs represent lawmaking. Posting these signs cautioning against misreading statutes is somewhat like acting within the common law tradition of lawmaking. But it is different, too. Commentators in the legal community are in disagreement about exactly what differences there are and how they bear upon the roles of the various participants—including trial and appellate lawyers and trial and appellate judges.

There is a theme in the literature that has a lot of support—a theme that when judges are construing a statute, they do not have the same freedom, as when construing the common law, to say, "We made a mistake. We now overrule our mistake." The argument is that the first judicial construction of the statute must stand until the legislature (or a higher court) changes it. I personally do not subscribe to that theme. I think it is unrealistic. An example will help to explain. Congress is unlikely to go back again to revise that longshore workers statute until enough steam builds up that this matter takes priority over all the other things that are on their agenda. Meanwhile, coming before the courts are all these problems that require solutions in order to decide particular cases. My view of the matter is that litigating lawyers and judges not only should, but must, continue to exercise this lawmaking role in order to achieve justice through law. Otherwise, we keep on making the same decisions even after we have come to believe our first decisions resulted from a lack of that depth of understanding that we can now bring to bear upon the matter with added experience and added contributions from all those who have commented on the problem in the meantime.

If you accept the view that I urge upon you, then we are free to discuss this problem of lawmaking candidly and openly. If you do not accept this view, I urge you to explore the idea anyway. Think about it, and think about the fact that judges may be thinking about it, too. But also keep in mind another point.

An advocate should always bear in mind, when arguing to a judge, that the judge has taken an oath of office to decide cases according to law. When you ask a judge to disregard the law—disregard a precedent binding on the judge—you are, in effect, asking the judge to violate that oath of office. Suppose you succeed in persuading the judge to do that? Then what is the judge going to say to explain the decision? "I have been persuaded to violate my oath of office and therefore decide this case this way"? No, no. That won't do.

If you want to make it easy for the judge to decide your way, tell the judge exactly how to explain the decision—what words to use, so the judge can just "write it" that way.

A really good understanding of the law is an understanding of both the legal theory and how that theory works in practice. If you want to succeed in persuading the judge to the course that serves your client's interest, and you think you have an argument that you can do it in a way that is consistent with the judge's role, then, of course, by all means tell the judge precisely the right words to use to accomplish that result. Do not yield to the temptation to overstate your point. If you overstate, you may have achieved a dramatic argument that appeals to the emotions rather than helping the judge come to a reasoned explanation of the decision. That leaves to the judge the hard task of developing an acceptable explanation.

I believe it is important for a judge to try to reach decisions, and to explain them, on exactly the same grounds. If the judge you are addressing believes this way, you need to frame your argument so the judge will not be uncomfortable using it.

Now that I have asked you, when you are in the role of advocate, to keep in mind the constraints of the role of the judge, let me ask you to think also about how the judge's role is changing.

The role of the judge has been changing, I believe, more dramatically in the last ten to twenty years than had been true, decade by decade, earlier in the century. If we take a somewhat longer historical perspective, however, recent changes may appear no more dramatic than some others of the past. For example, in tort law, a dramatic change in the frequency of overruling decisions—explicit overruling decisions—developed very quickly, commencing in 1958. I started counting overruling decisions that year and within ten years counted a hundred. That is, state courts of last resort in the United States handed down 100 explicitly overruling decisions in that period. In no decade before that were there more than a few overruling decisions.

The willingness to make quick changes in another way, also, became very evident during approximately that same period. Strict products liability came to flower in the 1960s. But not one of the 1960s product liability opinions that you have read said, "We are overruling!" Not one of them. They dramatically changed the law, adopting a general theory of strict products liability. But they did it by the common law process, reasoning more as if the issue being decided were an issue of first impression.

Then somewhere along in the late 1970s, another current of development and influence became prominent, and the very meaning of the phrase "tort law reform" changed. Tort law reform, as it was most often used in the legal community well into the middle 1970s, at least, meant expanded liability. Somewhere in the 1970s and 1980s, "tort law reform" as a phrase seemed to be at least ambiguous if not having exactly the opposite connotation. An organization that describes itself as favoring tort law reform today is more likely to be an organization arguing for curtailing liability—for example, by placing caps on damages.

My purpose at the moment is not to invite you to step into the debate over evaluation of those respective trends, but to suggest to you that, as legal professionals, whenever we are called upon to perform in our professional roles of counselors, negotiators, advocates, and judges, we need to understand whatever trends are under way in our society.

Now, of course, you may have a lot more freedom than I do, as a judge, to participate in the political process. Yet all of us, as professionals in the law, in our respective roles, will have to be working with whichever kind of changed law comes out of the political process in the legislative arena, because that is the primary source of changes in the law.

The changes may come in bursts, or sprints. But every time one of them occurs, it makes our work more interesting and more challenging, because it always creates another whole set of problems that we will have the opportunity to deal with.

As I close these remarks, I return to a point to which I barely alluded before. There is no way in the world that you and I together, with all the help we have around us, can predict right now, what the problems will be that we will have to deal with five, ten, or twenty-five years from now.

The important thing for us to be doing and thinking about is preparing ourselves to have lives in the law that are interesting and productive, as well as sustaining to a modest degree. The key is to learn how we can continue learning, on our own, and with the benefit of all the aids around us. The first

step is to continue being a law student all of your professional career. I do not mean, of course, that I urge you to stay longer than you had planned in the delightful, protected atmosphere you enjoy now. I do mean that if you are having fun at it now, you can have even more fun later. If you are having a little misery, well, do not let that discourage your interest. There may be some of that misery along the way, but a life in the law can also be a lot of fun.