

Washington University Journal of Law & Policy

Volume 53 *WashULaw's 150th Anniversary*

2017

Worst Law School Advice Ever

Michael A. Kahn

Follow this and additional works at: http://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Legal Education Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Michael A. Kahn, *Worst Law School Advice Ever*, 53 WASH. U. J. L. & POL'Y 147 (2017),
http://openscholarship.wustl.edu/law_journal_law_policy/vol53/iss1/17

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Worst Law School Advice Ever

Michael A. Kahn*

There we sat, incoming 1Ls, our last day of orientation, wide-eyed and attentive as the next speaker stepped to the podium. He embodied our vision of who we aspired to become as 3Ls. He was an editor of the law review. Yes, an editor! Better yet, according to rumors, he'd already accepted an offer from a prestigious Wall Street law firm. Apparently even better, he'd deferred his employment start date in order to serve as a clerk for a judge on something called the Second Circuit.¹ And here he was, standing before us, generous enough to offer advice to this incoming class. He got right to the point:

“You won't have many options as a 1L. Almost all of your courses this year are required—Criminal Law, Contracts, Torts, Property, and so on.”

We nodded earnestly.

“But for half of your second year and all of your third year, you will be free to select whatever courses you desire. Here is my advice. Heed it well.”

He paused, surveying the room, intense. We leaned forward, rapt.

“Conflicts of Law,” he said. “Take as many conflicts classes as you can. Why, you ask? Here's why: Your practice of law will take you to many jurisdictions, both here in the United States and overseas. Each of those jurisdictions will have their own

* Mr. Kahn is a shareholder in the St. Louis law firm of Capes Sokol, an Adjunct Professor of Law at Washington University and the award-winning author of a dozen novels and several short stories.

1. Remember, we had not yet started law school, and thus had no idea what the Second Circuit was, much less why someone would defer a law firm job to serve as a clerk. For many of us, our image of a court clerk was that grumpy municipal bureaucrat who processed our parking ticket fines.

set of laws, including laws governing the conflict of laws. You will thus be confronted with the choice of which of those laws should apply to the transaction or dispute involving your client. Thus, Conflicts of Law. Make that your focus at Harvard Law School.”

I can sum up my reaction to that advice in one word: Buzzkill. Like so many law students of that era—especially those with no attorneys in our families—my vision of a lawyer had been shaped by Gregory Peck as Atticus Finch² and Raymond Burr as Perry Mason.³ And thus as I sat there in the audience, struggling to make sense of what I had just heard, I thought back to that movie and TV series, trying to remember if Atticus Finch or Perry Mason ever confronted the issue. Had Perry ever stepped out of that Los Angeles courtroom and phoned Stella to have her ask Paul Drake to run down a California conflicts-of-law question? Had Atticus ever summoned Scout to go ask one of his colleagues whether Alabama law would govern an automobile accident involving a Mississippi resident driving a car with an Arkansas license plate?

I came up empty, and a tad disillusioned. Thus, I began my law school career with the numbing image of an endless line conflicts-of-law classes looming on the horizon.

Now I should point out here that my reaction would likely have been the same if the advice had instead been to take as many antitrust courses or administrative law courses or tax courses. And with no disrespect to the field of conflicts of law or the brilliant scholars working in that corner of jurisprudence, I confess that I graduated from law school without having taken a single class on that topic.⁴

2. TO KILL A MOCKINGBIRD (Universal Pictures 1962).

3. *Perry Mason* (CBS television series 1957–1966).

4. Rachel Gold, the fictional attorney-protagonist in my mystery series, did take one such course in law school. In Chapter 6 of *The Flinch Factor*, she is about to meet with a noted legal scholar who, she explains,

made her reputation in the field of conflicts of law, which examines how a court in State A decides which state’s laws should govern a case involving litigants from States B and C in a dispute over a defective product manufactured in State D, purchased in State E, and causing injury in State F. In the only conflicts class I took in law school, I fluctuated between the states of confusion and boredom.

MICHAEL A. KAHN, *THE FLINCH FACTOR* 33 (2013).

While I have actually confronted many conflicts-of-law issues during my years of practice, I further confess that I have not regretted my failure to focus on that topic during law school. So, you may ask, why didn't I follow the advice of that esteemed 3L? And why am I glad that I didn't follow that advice?

The answer to both questions is serendipity. I had a transformative experience one afternoon in the law library my first year as I idly paged through a legal journal in an effort to postpone a reading assignment for Contracts. The title of the article—something to do with advice to law students—must have been sufficiently intriguing to make me pause to read the first paragraph.

The author opened by reciting what he characterized as one version of the standard advice given to incoming law students, namely: spend the first year in your required courses searching for the legal niche that most interests you. Maybe it is securities law, or antitrust, or tax. And once you find that niche, so goes the advice, double down on it during your second and third years of law school. Take as many classes and seminars on the subject as your law school offers, and once you have exhausted that list, seek out one of the professors to host an independent study group on a topic not fully explored in the classes.

And, the author asked, how would he classify that standard advice? Easy, he answered: "Worst Law School Advice Ever." Well, he had me hooked by then. I continued reading.

The mistake too many law students make, he explained, is focusing on an individual tree in the legal forest—on its leaves, its bark, its root system, its seedlings—instead of trying to understand ecology of the forest in which that tree exists, along with other trees and forms of life. Or, to offer my own metaphor looking back from today, a detailed study of the mechanics of a steam locomotive back in 1900 would have provided you with a deep understanding of the mechanics of a steam locomotive but little preparation for responding to the future of commercial transportation, including the impact of diesel fuel, trucks, paved roads, and FedEx.

The law is the same. The specifics of securities law or the federal tax system are not carved in granite and do not exist in isolation from the rest of the legal ecosystem. The particular laws and regulations governing, say, financial institutions will change over time,

occasionally suddenly, more often gradually, and always in response to developments occurring elsewhere in society. Similarly, some key rules of trusts and estates you memorize in law school will no longer exist years before you retire—and others will have come into existence within a decade of your graduation. And just as that expert in steam locomotives could not envision a world of transportation that would include interstate trucking and intercontinental airplanes, whatever field of law you choose will be transformed by inventions and societal changes you cannot imagine as a law student.

In short, the author explained, your goal in law school should be to prepare yourself for the unknown future. And what does that mean? To prepare for the future, you need to understand the legal ecosystem. Consider a course in legal history, he suggested. You will learn how legal principles evolve over time, adapting to changes in technology and society. While the Rule in Shelley's Case⁵ and the Doctrine of Worthier Title⁶ have no relevance to the real estate lawyer of today, the reasons and societal forces behind the creation and the eventual demise of those two doctrines will contain lessons and instruction for future changes in the technologies and societal mores that will impact property ownership concerns.

So, too, he wrote, you need to understand the basic underlying principles of law, since those principles will shape the future just as they have the past. Consider taking a course in jurisprudence. To prepare for whatever the future may have in store for you, expand your perspectives. How do laws of property operate in a hunter-gatherer society? Are there parallels to our society's conception of property? Same question regarding the laws of marriage in Iran versus Kenya versus Japan? Accordingly, he wrote, consider taking a course in anthropology and the law. And be sure to look through the

5. *Wolfe v. Shelley* (1581), 76 Eng. Rep. 206; 1 Co. Rep. 93 b, generally known as Shelley's Case, is the origin of the so-called Rule, which states that when "the ancestor by any gift or conveyance takes an estate in freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail; that always in such cases the heirs are words of limitation of the [ancestor's] estate and not words of purchase." *Id.* And yes, I confess I have no idea what that means.

6. This is a common-law doctrine originating in English feudal real property law. It creates a presumption that when a grantor conveys a future interest to the grantor's own heirs, the grantor actually intended to keep the interest in himself or herself. BLACK'S LAW DICTIONARY 1601 (7th ed. 1999). Got it? I didn't.

course catalogs of the other graduate schools to see whether there is something of relevance to your legal education.

I followed his advice, and it had a profound impact on my education and career. I took a course in the history of contract law and another in anthropology and the law. I even took a case-study class at the Kennedy School of Government where we examined how government officials, politicians, and political activists sought to fashion solutions to societal challenges, including enactment of the Civil Rights Act of 1964 and the handling of the Cuban Missile Crisis.

And based on the recommendations of others, I took a course in what back then was the emerging realm of practical lawyering. My class, *Rough Justice*, assigned each of us to a Massachusetts trial judge in the lowest tier of the court system. We spent a semester in what was essentially the misdemeanor court, i.e., the people's court—a realm that most of us would rarely encounter in our careers. There is an old saying that the law is like a sausage—it is best not to watch either being made. For a future lawyer, however, it was best to watch it being made up close, as I did that semester.

Now to be clear, I did not graduate a Philosopher Prince or Jurisprudence Guru. But, to borrow the title from my favorite Sam Cooke song, I did enter the profession with a keen awareness that no matter what specialty I might choose, “A Change Is Gonna Come.”⁷

And it most certainly has. One area of my practice has been copyright law, the roots of which date back to Article I, Section 8, Clause 8 of the United States Constitution⁸ and the Copyright Act of 1790.⁹ During my first year of law school, Congress enacted the Copyright Act of 1976,¹⁰ which replaced the Copyright Act of 1909.¹¹ But by the time the new Copyright Act took effect in 1978,¹²

7. SAM COOKE, *A CHANGE IS GONNA COME* (RCA Studios 1964).

8. This Clause gives Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

9. Copyright Act of 1790, 1 Stat. 124 (1790).

10. Copyright Act of 1976, 90 Stat. 2541 (1976).

11. Copyright Act of 1909, 35 Stat. 1075 (1909).

12. Copyright Act of 1976, 90 Stat. 2598 (1976) (“This Act becomes effective on January 1, 1978 . . .”).

as many commentators have since noted, technological advances had already rendered several sections of it obsolete.¹³

And that obsolescence became even more pronounced as technologies never dreamed of by the lawmakers—or by my Copyright Law professor—transformed the fields of art and expression in the succeeding decades. When I began my career as a young associate in 1979, there was no Internet, no personal computer, no cell phone. Vinyl was not the hipster choice back then; it was the only choice, unless you were willing to splurge on an eight-track tape player. Microsoft was in its MS-DOS infancy, and the first Apple iMac would not be introduced for nearly two decades. I was five years into the practice of law before Mark Zuckerberg was born. He would launch Facebook twenty years later—three years before Apple introduced the iPhone.

In § 102, the Copyright Act states that copyright protects “original works of authorship fixed in any tangible medium of expression.”¹⁴ In the good old days, a tangible medium of expression was something physical—something you could hold in your hand, hang on the wall, put on the record player. But lawyers and judges soon found themselves confronting the meaning of “tangible medium of expression” in the context of new technologies. An image on a computer screen? Background music on a homemade YouTube video? Did a publishing contract from 1987 authorize the publisher to “publish” the book as an eBook—a format that did not exist until two decades after the signing of that contract? Then came Hulu and iTunes and Twitter and Spotify and *Grand Theft Auto* and so on. We copyright lawyers found ourselves constantly trying to figure out how to pour new wine into old bottles or to fashion newfangled containers for that new wine.

And each time Congress tried to update the copyright laws, new technologies rendered parts of those updates obsolete while interest groups stepped forward to challenge those updates in court. As both a

13. See, e.g., Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 555 (2007) (“[T]he 1976 Act was passed with a 1950s/60s mentality built into it, just at a time when computer and communication technology advances were about to raise the most challenging and vexing copyright questions ever encountered”).

14. Copyright Act, 17 U.S.C. § 102(a) (2012).

copyright lawyer and a member of the Authors Guild, I kept pace with the seemingly endless battle between the Authors Guild and Google over Google's Book Project. The Guild's claim was that Google's scanning of millions of library books and displaying free "snippets" of those books online violated its members' copyrights in those books. Google defended its practice as a "fair use" under the Copyright Act.¹⁵ Suffice it to say, the drafters of the "fair use" section of the Copyright Act of 1976 never envisioned such a dispute.¹⁶ Filed in 2005, the case bounced back and forth between the Southern District of New York and the Second Circuit until the Supreme Court finally drove a stake through its heart with its denial of cert. in 2016.¹⁷

The Copyright Act is just one example of how the law you study today will morph into something far different in the future. That same has been true for those who practice corporate law, labor law, securities law, trusts-and-estates, and so on. One example: the Great Recession prompted passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act in 2010,¹⁸ which, among other things, required regulators to create scores of new rules, conduct dozens of studies, and issue numerous periodic reports—all of which have

15. *Authors Guild v Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

16. *See Davis v. Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001) ("Fair use is a judicially created doctrine dating back nearly to the birth of copyright in the eighteenth century, but first explicitly recognized in statute in the Copyright Act of 1976.") (internal citations omitted). Under the Copyright Act, to determine whether the use of a work is a fair use, courts consider four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Copyright Act, 17 U.S.C. § 107 (2012).

17. *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016).

18. *Dodd–Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

radically transformed the legal landscape for financial institutions and the lawyers who advise them.¹⁹

For even something as seemingly “old school” as trial practice—where there is still a courtroom inhabited by a judge, a bailiff, a jury, a court reporter, and hearsay objections—the mechanics of a contemporary lawsuit would baffle Atticus Finch and Perry Mason, starting with the concept of a “document.” When I graduated law school, a client responded to a document request by going to the appropriate filing cabinet in its office, pulling out the relevant folders, and sending them to the copy room. Now that same document request can result in the production of 500,000 “electronic” documents in various formats—native, text, image, data—that the parties need to agree upon in advance. And pity our dear old Atticus as he fumbles with the Elmo projector or tries to load the PowerPoint presentation or attempts to cue up the excerpt from the videotaped deposition while the judge and the jury and the bailiff roll their eyes.

In short, a change is gonna come. One last example: when I graduated law school in 1979, the top six companies on the Fortune 500 list were General Motors, Exxon, Ford Motor, Mobil, Texaco, and Chevron, respectively.²⁰ For the savvy law student that year—or at least one who believed he was savvy—the best place to land for your career was somewhere within the Oil & Gas Industry or in Motor City (a/k/a Detroit).

The top six companies on the current Fortune 500 list include only one—Exxon (now Exxon Mobil)—from the 1979 list and several others, including Walmart (#1) and Apple (#3), that did not exist in 1979.²¹ If your preferred measure is market capitalization, the Top 5 in 2016 were Apple, Alphabet (Google), Microsoft, Amazon, and

19. See, e.g., Martin Neil Baily & Aaron David Klein, *The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth*, BIPARTISAN POL’Y CTR. (Oct. 24, 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/Baily-Klein-PPTF-1.pdf>.

20. *1979 Full List*, FORTUNE 500, http://archive.fortune.com/magazines/fortune/fortune500_archive/full/1979/ (last visited Jan. 9, 2017).

21. The other newcomers are Berkshire Hathaway (#4), McKesson (#5) and United Health Group (#6). FORTUNE 500, <http://beta.fortune.com/fortune500/list/> (last visited Jan. 9, 2017). And if you scan further down the list through the top 20, you will find several others that didn’t exist back in 1979, including AmersourceBergen (#12), Verizon (#13), Amazon.com (#18), and Costco (#15).

Facebook. Only Microsoft, in its pre-Windows phase, existed back in 1979.²² As for the survivors from 1979, think how much their universes, and the laws and regulations governing their universes, have changed over those decades. The Ford Motor Company and the Exxon of today are dramatically different enterprises than the Ford Motor Company and Exxon of 1979.

In short, the advice I came across in that article all those years ago still applies today. Just as no one back then could have envisioned the existence, much less the profound impact on the law, of Google or Facebook or YouTube, we cannot know what industries and technologies will dominate our lives and transform our laws in the future. What issues will labor lawyers face with the employment challenges created by self-driving interstate trucks? How will medical malpractice lawyers and health care lawyers adapt to a world where everything from patient diagnostics to surgical procedures is conducted by robots. The impacts of climate change, renewable energy, artificial intelligence, genetically-modified organisms, and plenty of other developments we can't even imagine in our current bubble will ripple throughout our legal system in ways unknown today.

Thus, my advice: Because you and your clients will confront legal issues in the next decades that you can neither imagine nor plan for today, keep that in mind as you go through law school. Yes, find some areas of the law that interest you and take some courses in those areas. Above all else, you want your practice to be interesting and challenging. If tax law lights your fire, take some tax courses. If environmental law is your passion, sign up for a course or two. But save room for at least two courses (and preferably more) that can help you and your future clients navigate through an ever-evolving legal ecosystem. Because I guarantee that a change is gonna come.

22. Evelyn Cheng, *Amazon Climbs into List of Top Five Largest US Stocks by Market Cap*, CNBC (Sept. 23, 2016, 3:33 PM), <http://www.cnbc.com/2016/09/23/amazon-climbs-into-list-of-top-five-largest-us-stocks-by-market-cap.html>. And speaking of dramatic changes, think how much more tedious the collection of these facts and the creation of these footnotes would have been back in 1979, i.e., back before the age of Google.