

CHALLENGES FOR AGRICULTURAL LAWYERS FACING THE 21ST CENTURY

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I. INTRODUCTION

Today, agricultural and rural communities operate in a changing economic and political environment. The United States economy is rapidly evolving from an industrial to an informational base. Economic globalization and the increasingly market-oriented food system are replacing government supported agriculture. Structural links are changing as food processors and retailers seek to strengthen their control over input sources. Confusion and uncertainty exist about how traditional rules apply to this evolving economic environment. The current system may allow some groups to seize control over this changing environment unless effective new rules require a more balanced approach.

Agricultural lawyers must serve the evolving needs of clients and the public in this dynamic situation. This address will review some of the forces shaping the economy and policy issues facing the agricultural community, draw implications for agricultural lawyers, and summarize some ideas which may influence the future of your practice and our profession.

II. CLIENT CONCERNS

Members of the American Agricultural Law Association (AALA) work with a wide range of potential clients and face individual problems and concerns together with public or group concerns. Our identity, as agricultural lawyers, derives from our application of legal principles and their relationship to agricultural, rural, environmental, and food issues—including their relationship to domestic and international economies.

Clients are concerned with a wide variety of issues relevant to our interests. Producers and landowners seek help structuring appropriate lease arrangements under the new freedom-to-farm policy. Agricultural groups and agribusiness are concerned over the command and control of environmental and other regulatory

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schemes that may be too stringent and costly for the agricultural community. Environmental groups are concerned that focusing on private costs ignores the externalities and full economic costs of agricultural production, thereby distorting incentives for adopting new technologies which may be detrimental to the environment. Some producers are negatively impacted by increasing global competition under negotiated trade agreements, raising concerns about the benefits to the United States from adverse global economic policies. Large production operations and globally integrated agribusinesses are viewed as undesirable by some farmers and community groups as they tend to decrease opportunities for entrepreneurship in agriculture and bypass local businesses. The declining auction markets and the rush to integration in some segments of agriculture require new legal relationships and institutions. Individual producers are concerned about contract certainty in vertically-linked production systems. Consumers are concerned about food safety, including the potential impacts of biotechnology and other new food technologies, despite scientific assurances. Producers are interested in documenting production practices for managerial decision making and for possible environmental and food safety defenses, but are concerned about maintaining the privacy of the resulting data.

The concerns of the client involve some societal cross-cutting issues. Industrialization and the changing structure of agriculture and the global food system create both individual and societal concerns. The appropriate role of the public and private sectors in agriculture and our economy is being reexamined. The changing economic and political environment increases the conflict between the public interest and private rights. The changing structural relationships within agriculture raise questions about the institutional framework and legal foundations of our current production and marketing system. This framework has evolved within a political and economic context that is undergoing rapid change.

Industrialization is an overused term that has many meanings which depend on an individual's perspective. Generally, it denotes the changing methods of doing business in the agrifood sector of the economy that manifest themselves in issues such as increasing farm size and reduced farm numbers; new linkages among suppliers, producers, processors, and retailers; precision farming and other information based production practices; and the introduction of transgenic plant materials and other bio-technologies to produce attribute-specific foods.

Re-evaluating the appropriate balance between the public and private sectors cuts across the priority concerns of various groups and clients. As international and domestic agricultural policy reforms proceed, renewed attention will be given to appropriate government safety nets and private sector risk management strategies. Rebalancing government regulation and marketing incentives to provide environmental amenities in concert with agricultural production will also require attention to the legal frameworks involved.

Environmental regulations, food safety concerns, and information-rich production practices are some forces that are changing the relative importance of

private rights versus the public interest. When do land use restrictions take private property rights? Who controls site specific Global Positioning Systems data? Do trace-back proposals create a public right in private information? All three of these cross-cutting issues are, at their core, institutional issues. They are manifestations of creative destruction in a market economy. The old institutions no longer serve the emerging information-based global agricultural economy. New institutions are emerging, but are not completely formed. Most neo-classical economists either ignore the impacts of this institutional change or assume them away. The new institutional economists are helping us understand institutional change and are trying to look forward. But it is the agricultural lawyers who are on the firing line of this institutional change. They are writing the new contracts, drafting the new regulatory schemes, shaping the new business entities, and litigating the cases that help build these new institutional arrangements. The agricultural lawyer, more than any other profession, will build the institutions that will serve twenty-first century agriculture.

In this role, agricultural lawyers can provide two major services to society during the next decade. First, they can assure that the new institutions facilitate productivity and economic growth, providing mechanisms to balance public interests and private rights. Second, they can help clients manage the changing business environment. These roles require a proactive, forward looking approach in order to reduce turmoil and contentiousness inherent in such institutional change.

This situation will create greater opportunities and challenges for the agricultural law profession and for the American Agricultural Law Association.

III. AGRICULTURAL LAW PROFESSION OPPORTUNITIES

Farmers have traditionally gone to lawyers, accountants, consultants, and other service providers separately to obtain the expertise they need. Some services have been provided by the universities, some by large and small suppliers, and some by specialized service providers including consultants. Opportunities to package the needed services may offer interesting challenges for the agricultural lawyer. Input suppliers increasingly need to take into account legal issues regarding environmental regulations. As suppliers deal with producers, they may provide this legal advice directly. Alternatively, they may expect producers to shoulder more of the compliance burden of environmental regulations, thereby creating an increased opportunity for legal services.

How will lawyers interact with farm management companies in the future? A recent study sponsored by United States Department of Agriculture's Economic Research Service and the Farm Foundation found increased interest in custom farming in response to the new "freedom to farm" provision of the 1996 Farm Act.¹ Where do legal advice and practice fit in if more landlords shift to custom farming

1. Lyle P. Schertz & Warren E. Johnson, *Farm Act '96: Managing Farm Resources in a New Policy Environment*, AGRIC. OUTLOOK, Aug. 1997, at 18, 19.

rather than leasing their own land or farming themselves? As farm management companies become increasingly sophisticated in the analysis and service they provide, there will be opportunities to bundle legal services directly with other farm management services. Should agricultural lawyers take the lead in putting together such packages of advice integrated with a whole package of farm management services? Or are there overriding ethical and practice issues regarding who is the client, conflicts of interest, and relationships between the lawyer and the various parties involved?

As rural communities seek to attract new businesses to maintain their economic viability, what role is there for legal firms, either as businesses operating in rural communities or in creating legal structures that encourage businesses to remain in local communities? What role is there for agricultural lawyers to inform businesses or cooperatives that are adapting or developing in order to provide access to markets in the increasingly industrialized sectors of livestock, grains, and specialty crops? Agricultural lawyers may also have a role advising farmers about legal arrangements with those above and below them in the production-marketing chain. Thus, as producers are locked into this changing structure of agriculture, they may need to have a "team" of legal, economic, environmental, and other advisors to make the system work to their advantage. This may be a major area of opportunity for agricultural lawyers. But it may also raise ethical questions about how we define the practice of law.

IV. AALA OPPORTUNITIES

The AALA annual symposium for the last two years has focused squarely on priority policy and economic issues dealing with the above challenges. By looking ahead at important trends, the AALA provides a continuing forum wherein the academic community and practitioners can exchange ideas and interact with government and business colleagues. At the same time, everyone's knowledge of the issues is updated and guidance regarding the potential ethical dilemmas raised earlier can be provided.

Individual lawyers responding to new questions can facilitate even more sharing with fellow AALA members and provide access to the information and approach used in dealing with the issue. This may be a particularly valuable service that the AALA can provide. The opportunity to use electronic means to quickly seek suggestions from fellow lawyers throughout the country is made feasible through the AALA Web Page.² The AALA Publications Committee, recently renamed the Communications Committee, will work with the executive director to establish an

2. <<http://www.aglaw-assn.org>>

improved web page to facilitate such exchanges. The potential importance of this to members is supported by results of the survey reported on during this conference.³

Another opportunity for the AALA is to more widely publicize our organization, its valuable *Agricultural Law Update*, our annual symposium, the resulting proceedings, our evolving web page, and the opportunity to interact with the wide array of members. Each of us as AALA members can serve as an ambassador to help spread the word. The Membership Committee, armed with a new brochure, will initiate an aggressive renewal and new member drive this year. Each member can work to make AALA even more valuable to all its members.

In conclusion, the AALA challenges members to join the process of building the new institutions to serve the agricultural and rural communities in the next century. Recent experiences in Eastern Europe's emerging economies demonstrate the critical importance of legal and economic institutions to growth and prosperity. We must build or rejuvenate our institutions to assure a bright future for United States agricultural and rural communities.

3. James R. Baarda & L. Leon Geyer, American Agricultural Law Association Survey, Sept. 1997 (on file with the *Drake Journal of Agricultural Law*).