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Part II—Lawyers' Papers as a Source of Legal History: The 19th Century

By ALFRED KONEFSKY*

I would like to begin this afternoon by discussing the experience of the Webster Legal Papers in order to illustrate my broader and more general point about the unique opportunity we have in the 20th century to identify, develop, and store today's important sources so that they may be utilized in the future.

I think the best way to define the problem is just to ask the relatively innocuous looking question: What are the Webster Legal Papers? I can provide a clue to the answer by simply stating that the most difficult task in editing the Legal Papers of Daniel Webster was finding them. Let me explain what I mean.

In a volume of Webster's letters prepared by a reliable scholar and published in 1902, mention is made of various Webster manuscript collections, one of which contains a specifically described series of "packages" that appear to be Webster's set of law office papers. We are told that the papers are folded and tied together by string with the name of the case file written on the outside cover of the papers in the file—the common 19th century practice of filing both court and private office papers. Then we are specifically informed, by section, shelf, and number, where these papers are stored in the vault of an historical society. There was only one problem with this painstaking description—the papers have never been found, or at the very least they disappeared in the form in which they were originally stored and recorded.

Needless to say, we have looked and looked for them. We have turned both the old building (now an insurance company) and the new building of the historical society upside down. We have searched neighboring repositories to see if by any chance the papers were accidentally transferred. We have contacted remaining families of the historical society's membership of that time in the hope that an attic or barn might yield the treasure. (It seems the society had the quaint custom of allowing its members to remove whatever they wished from the so-

ciety's collection—not an unusual practice for the time—only most institutions required one to sign out and record what one wished to take home for the night or for 50 years—this society did not require that formality.) We have had total cooperation from everyone in our search, but using this method we turned up nothing.

So the question must be asked again: What are the Webster Legal Papers? First of all, we examined old auction catalogues and found that quite a number of Webster arguments and briefs suspiciously similar in description to what may have existed in the historical society had surfaced over a period of time. We were able to trace them and as a result now have copies of them. Secondly, fortunately, some of Webster's more important legal efforts, for example, the briefs and draft arguments in the *Dartmouth College* and *Charles River Bridge* cases, were initially deposited in different manuscript collections from the bulk of the now missing legal papers. And so we do have some tangible evidence of how he worked. Thirdly, thankfully, a good deal of Webster's correspondence with clients and lawyers (both co-counsel and opposing counsel) has survived; and we have collected it from a variety of individual repositories. Finally, and most monumentally, on the theory that for a lawyer you are, if not what you eat, in part what you file, we immersed ourselves in the court papers of the period in order to reconstruct Webster's practice as accurately as we could. Obviously, not an easy task for the practice covered was a multi-state, multi-jurisdiction one that spanned nearly 50 years. I will not bore you with all the details, but it involved docket searches that led to case files, which were then microfilmed and finally Xeroxed to be worked with. All this to get only the final work product—and for the most part, the important intermediate drafts, notes, or working papers had to be captured from the other manuscript sources. Now why have I belabored you with the litany of woes of the editor of 19th century legal papers? The answer is simple: so we don't repeat the mistakes of the past and in the process deny ourselves the raw materials for writing legal his-

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tory in the future. The most damaging mistakes that can be made now are not those of commission, but those of omission.

What should the concerns of law librarians be in order to make the task of legal paper editors or legal historians of the future much easier and more fruitful? It seems to me that the focus on the gathering process must begin now in a systematic fashion if we are in any way to guarantee that a useful, vibrant legal history will be written and read in the future. I do not wish at this time to address myself to the very real and important practical problems associated with the gathering process: that is, concerns such as budget and space limitations, the criteria for selection of collections, and the possibilities of pooling resources in combination with other departments of a university, like the history department. It seems to me those are all fair questions, but they must be asked after a commitment has been established. I realize that in today's academic world what I have just said amounts to fiscal heresy. That type of heresy may be a small price to pay for history.

The question might fairly be asked: What responsibility do law librarians have for the future other than what meets their immediate requirements today? That is, doesn't simply insuring that all the reporter systems, statutory materials, treatises, books, periodicals, services and topical reports are kept up-to-date adequately satisfy whatever future needs one might construe a librarian's role to be? Can we plan for the future by merely satisfying current needs?

The answer to these questions depends in part on what one conceives the function and purposes of legal history to be. If one is willing to provide just the raw materials for lawyer's legal history, whether this ranges from brief writing or to scholarly doctrinal history, then it is fair to say that the usual services are clearly adequate. This is not to disparage the contributions of this form of legal history, it is only to point out its inevitably narrow focus. But other materials broader in scope exist, and we have a chance to capture them in the 20th century, both because of our increased consciousness and awareness of their availability, and the advantages provided us by modern technology. There has been some shift in the direction of studying the training and function of modern lawyers in this country, and not

just the spinning of the doctrinal web, seamless or otherwise, and it would be a good time for legal historians and law librarians to combine their roles to record as much of the 20th century experience as is possible for future study. How is this to be done?

It seems to me that law librarians ought to employ their leading natural resources, their own alumni, and the local bar, in combination with a leading technique of modern historical research—the oral history project. What would be ideal would be to have skilled and sensitive legal historians, be they trained only as lawyers or as historians is not in my view important for now, who are familiar with the time period, conduct interviews with a whole range of lawyers spread across the legal community. Up until now for some very obvious historical reasons, we have had a series of historical studies that focus on the elite bar and judges—who happened to be, and not by accident, the record gatherers and keepers. These have been very valuable studies about the most influential, and usually the most prosperous members of the bar. I would hope that these studies would continue, after all I am engaged in one now myself, and am suggesting in fact that they do continue with an additional documentary source—the text of an oral history interview that reveals a process that goes beyond mere autobiography. Autobiographies are often exercises in self-justification or apology or the fantasy, in the words of Richard Henry Dana, Jr., of “a quiet hatching of an egg in secret.” Obviously, it is important to have one person's version of events and opinions. What takes oral history beyond this, however, is the interviewer, a person with his finger on the pulse of the period who might be able to elicit from the subject opinions or views that go beyond his own occasionally confined insights into his life or career.

But I would hope that we could move beyond just the elite bar and spread the net wider. What we have never really adequately had in this country is a legal history from the bottom up—a view of the invisible bar toiling away underneath the more prominent and accessible elite bar. For the most part, we do not know how legal aid lawyers saw their lives or roles in this country for almost half a century—will we ever know what today's neighborhood law office lawyer or law commune lawyer thought? What about the most infamous cate-

gory of all—the ambulance chaser, as defined of course by others? How did they define themselves? How did they see themselves? If we can begin to build a series of records focusing on the multi-faceted nature of the profession, with the probing intervention of a skilled questioner, we will be taking a long step in guaranteeing that the future will find the past instructive and interesting. This ought obviously to be combined with the assembling of lawyer's papers (case files included) and correspondence that complement the oral source.

Even in an immediate sense, I would think that it would be important to tape materials (either audio or visual) to help construct the history of a school. Retired professors obviously should be talked to first, but so should active faculty members. Older alumni who can offer a portrait of the school as it was, as well as students today or recent graduates who have very fresh and first-hand reactions. Writing the history of legal education must encompass more

than evaluating merely the published writings and pronouncements of law professors on the subject. In addition to the faculty's unpublished papers, it seems to me, for instance, that student newspapers, and intra-faculty memos ought to be saved, although when I think of those I have read in the latter category I'm inclined to shudder. The variety of sources that need compilation and organization by archivists is limitless. This is not a plea to gather everything and discard nothing. But if we don't begin deciding and planning what we wish to save now, if we don't actively identify and engage our prime areas of interest today, it will very likely be lost forever. We no longer have to rely on the vagaries and randomness of individuals' egos, compulsive traits, or senses of history. The limits of the historical writing done in the future will in a very fundamental way depend on the limits of our imagination today. I hope we do not waste the opportunity.