The turn of phrase “glass half full” is commonly understood as being synonymous with optimism. Because that hopeful idiomatic expression is in the title of Benjamin H. Barton’s statistics-laden and densely written book, Glass Half Full: The Decline and Rebirth of the Legal Profession (Oxford University Press, 2015), one would suppose that the overall tenor of his work would be encouraging. But for many lawyers, reading Glass Half Full will be as disturbing as reading one’s own autopsy report. Like a forensic pathologist, Barton—a University of Tennessee College of Law professor—expertly examines the corpse of the legal profession and precisely describes his findings on the cause of death—and that’s not hyperbole; Barton’s book is structured around the theme of death from all possible angles: (1) death from above; (2) death from below; (3) death from the state; and (4) death from the side.

“Death from above” means that Big Law, at the top of the profession’s hierarchy, is now having to adjust to a new reality. While the bread and butter of Big Law is still hourly, “bespoke” legal services, corporate clients are demanding fixed billing, and an increasingly larger percentage of work is being done by in-house counsel or outsourced to smaller and less expensive firms. But there is some good news for Big Law. Corporations are immune from sticker shock when it comes to “bet-the-company” transactions and litigation that seem to require the most expensive talent. According to Barton, “[t]his is consistent with the winner-take-all economy: the most profitable firms and most in-demand lawyers get richer doing the truly specialized work and everyone else falls backward toward the pack.”

“Death from below” means that low-level, customized legal services, such as wills and incorporation documents, which have traditionally been done by solo practitioners and small firms, are now increasingly being done by LegalZoom, Rocket Lawyer, and other online services. In the brave new world of technology, even litigators are not safe. Barton points out that TurboTax-like programs allow pro se litigants seeking an uncontested divorce to generate the required pleadings, which can then be filed with the district clerk’s office. And there is a movement to do an end run around the judicial system entirely and have disputes resolved through online dispute resolution systems such as Modria.

“Death from the state” comes primarily from the various tort reforms enacted through state and federal legislation. The “first wave” dates back to the 1970s, when states began enacting medical malpractice reforms aimed at capping damages on pain and suffering and limiting attorneys’ fees for plaintiff lawyers. As examples of federal tort reform, Barton cites the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998, which “placed limits on shareholder securities-fraud lawsuits.” In addition, federally funded legal aid programs have been reduced significantly since President Reagan cut funding by 25 percent in 1982.

Finally, “death from the side” results from friendly fire—an oversupply of lawyers for the available legal work that is driving down salaries in low- and mid-range law jobs. Barton cites a disturbing statistic that “since 2010 more than 20 percent of all law graduates have been unable to get full-time work as a lawyer.” However, the good news for Big Law attorneys is that salaries in the high end of the market remain unaffected.

Barton partially blames popular entertainment—including hit television shows like L.A. Law, Boston Legal, and The Good Wife—for creating a false impression of lawyers doing exciting work, making lots of money, and leading glamorous lives—thus fueling excessive law school matriculation.

He also blames prospective students for a lack of awareness of law school realities as well as many graduates’ belief in the unlikely notion that they will all get Big Law jobs. Barton maintains that students generally do not think that it will be difficult to get the top grades needed for these positions, primarily because they earned strong grades as undergraduates. He expresses frustration that “[m]any of these same students went to law school because they were bad at math, so the harsh reality of a mandatory curve and class ranking only dawns on them after the first semester....” He laments that law school, as the old saying goes, is the last refuge of the undeclared, and he is especially critical of the traditional influx of social science and humanities majors to law school, which is a natural home for them for at least two reasons: (1) Jobs for these majors do not pay as well as jobs for more valuable and marketable majors; and (2) because law school emphasizes their skills in “analysis, reading and writing.”

Surprisingly, after completing his autopsy determining the causes of death of the legal profession, Barton does not put away his scalpel, pull a sheet over the cadaver, and walk out the door. Instead, he maintains that there is still reason to be optimistic about the “rebirth” of the legal profession, though it will look much different from how we know it today.

Acknowledging that lawyers are naturally conservative and resistant to change, Barton states:
In most areas of the economy it is not acceptable to answer the question, “Why is it done this way?” with “We’ve always done it that way.” In law that is not only an acceptable answer—it is the best and most basic answer. A lifetime of training in stare decisis, precedent, and the common law system actually dictates that answer. [As a result,] change has been very slow and frequently dictated by outside forces.

One of those Borg-like, irresistible “outside forces” pressuring the legal profession to change is technology. Rather than resist the inevitable, which Barton sees as futile, he embraces a future where much of the profession is assimilated into a computerized regime of legal services. He dismisses objections made by some attorneys that online legal service providers pose a danger to consumers. He believes that the Internet will expose such companies if they do shoddy work, much like websites such as Yelp do for restaurants and car repair shops. “Clients have been complaining about licensed lawyers for years, with very limited results.”

Barton believes that the oversupply of lawyers will work itself out as college graduates begin to see that pursuing a law degree is not always worth the time and expense and opt to pursue non-legal careers more suited to their talents and interests. The end result will be that “…only students who really want to be a lawyer will come to law school. These will be the students who always wanted to be a lawyer.…” The upshot is that, going forward, lawyers will be happy for any work that they can get, which is a sea change from the halcyon days of the post-WWII era when attorney jobs were bountiful. Using a colorful analogy, Barton compares this change in perspective to bronze and silver medalists:

Bronze medalists are happy to have made it into the medal round. They compare themselves to all of the competitors below them. Silver medalists fixate on the gold medalist above them and dwell on their failure. The current market has made all employed law students bronze medalists, just happy to have made it.

In sum, Glass Half Full is a bracing dose of reality, much like being doused by a cooler full of icy Gatorade, but it is worthwhile reading for Texas lawyers who want to understand the historical development of our profession and what the future could hold for us all. TBJ