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Speculation by a Customer About the Future of Large Law Firms

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Speculations by a Customer About the Future of Large Law Firms

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I have a definite interest in the topic of the growth of large law firms and its effect on our profession and legal education. I represent a large corporation that makes extensive use of large law firms throughout the country. I hire them from time to time because of their expertise on particular legal issues, their expertise about my company, their efficiency, flexibility, and cost. In a somewhat ironic twist of things, one of those law firms (a New York firm) calls on me on occasion to lecture its attorneys about how they can do a better job for clients like my employer. In fulfilling my obligation to them, I cannot help talking about their size and how they use it—how they package and deliver the unquestionable brilliance of their members.

Most of the authors have addressed the growth of large law firms from the perspective of economics or finance. The emergence in the past decade or two of mega-firms and of the high starting salaries of law school graduates naturally has become a topic of general public concern.[1] As I see it, the big law firms have mixed feelings about the attention they are getting. They like the "star" status that comes with the turf but are confused about what their accelerated growth means.

Until the recent shakeout of the legal industry, the market in which large urban law firms operated was an oligopoly. To be sure, there were plenty of law firms to go around, but for all intents and purposes, there was not a whole lot of competition. Each firm had a set of clients it held on to for decades.[2] Their lucrative market share was guaranteed via seats on the boards of directors of their clients and by the absence of viable in-house corporate legal staffs.[3]

As Bob Nelson pointed out, the world of the big law firms has been shaken in recent decades by the post-war nationalization and the interna-

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1. *See, e.g.*, Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151 (1987).

2. *See* Jensen, *Banking Clients More Willing to Shop for Firms*, Nat. L.J., Jan. 1, 1988, at 1, col. 3 ("A once common joke evokes the old status quo: 'Every bank has a captive law firm, except Milbank Tweed: It has a captive bank.'").

3. *See generally*, Larson, *On the Nostalgic View of Lawyer's Role*, 37 STAN. L. REV. 445 (1985); *see also* Gordon, *Introduction to Symposium on the Corporate Law Firm*, 37 STAN. L. REV. 271 (1985).

tionalization of our economy. It has also been affected dramatically by the Supreme Court's decision in *Bates v. Bar of Arizona*[4] by the civil rights movement, and by the legislation boom of the mid-60's, especially in the consumer, environment and safety areas. Everything since the 1940's has gotten bigger, more complex, and faster paced, with consequent effect on all players. In short, the shakeout of the law firm industry simply paralleled what was happening everywhere else.

Chief Justice Rehnquist, at his 1986 dedicatory address at the Indiana University Law School, asked us to ponder the meaning of all this growth.[5] Hence, we are assembled for this symposium. Certainly, what has happened in the legal sector comes as no surprise to me. I have worked in the financial services industry for eighteen years. When I started in 1970, I worked for a tightly regulated New York City bank. Today the term "bank," at least in the traditional sense of the word, is an anachronism. To survive, the banking industry had to become the "financial services industry." It had to adapt quickly to changes in legislation, customer demands, technology, and competition from a myriad of sources such as retailers like Sears, investment companies like Merrill Lynch, insurance carriers like Prudential, and so on. The outsiders who serve us, such as the great law firms, must likewise respond to these changes.

Having been part of these changes, I believe I can comment usefully on our topic, though time restraints dictate that I limit myself to a sketch. To give you some hint of my philosophy about law firms, let me respond to a comment of one of this symposium's speakers: I believe modern lawyering and law firms have always been conducted as a business enterprise. For some reason, many leaders of our profession seem to cringe at this thought. Lawyers are fond of telling themselves that they have a higher calling, like veterinarians and evangelists,[6] and maybe they do, but the fact remains that their calling always comes with a price tag.

In response to the call of Chief Justice Rehnquist, and to our authors, let me speculate on the future of America's big law firms. I do not think

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4. 433 U.S. 350 (1977). I think it is fair to say that the *Bates* decision has had a profound, perhaps radical, effect on our profession. Certainly, when we talk about the commercialization of lawyering in America, we must look to *Bates* as the key starting point. It acknowledged the obvious once and for all—that lawyering is a business and as such merits equal rights with other businesses, especially the right to advertise and solicit customers. *Bates* liberated lawyers to think about the possibilities of their profession as a business. In effect, it created a slippery slope that can be predicted to eventually cause law firms to diversify into other businesses, and allow non-lawyers to practice various aspects of law more freely and without regulation. In short, *Bates* represents the storming of the old order of things, the old protected caste system. Lawyer business-persons now have to fend for themselves. This transformation will not only change the way law is delivered in America, it will also lead to change in the law itself.

5. Rehnquist, *supra* note 1, at 152-53.

6. *See* Postema, *Moral Responsibility in Professional Ethics,* 55 N.Y.U. L. REV. 63, 63 (1980).

large law firms can continue to sustain the kind of growth they have experienced in recent years within the traditional law firm partnership structure. The bigger they get and the more they diversify on the basis of skills and market location, the more they will need to adopt the common styles of other successful businesses. Bigness requires having people with managerial, financial, and marketing skills, none of which are taught by today's law schools or found in great abundance in most law firms. In time, the law schools will have to change their curricula to provide courses on these subjects. Until then, the big law firms will have to adapt to newer business structures via trial and error, via emulation.

I suspect that many, perhaps most, of the nation's mega law firms will evolve as hospitals have recently and will have to turn over the management of their business to business people. Those people may be "laterals" with MBAs from industry or even members of the firm itself, but their key role in any case will not be to engage in lawyering. It will be to manage high-strung, extremely bright, very sensitive professionals, to raise and spend capital, to find new customers and markets, to create and market new products and services, to develop efficient and inexpensive delivery systems—in short, to run a business.[7]

To a certain extent, as Jim Fitzpatrick mentions, this process is already well under way at firms like Arnold & Porter and other big law firms around the United States. They are beginning to diversify into other businesses like accounting, management consulting, investment banking, advertising, and the like. Jim Fitzpatrick naturally calls these "new arrangements 'one stop' shopping," perhaps because this form is referred to as A&P in some circles.[8] Arnold & Porter itself owns and manages several subsidiary consulting companies engaged in general, real estate, and banking management.

I see nothing wrong with this. In fact, I think it is a natural evolution within the free enterprise system. Why should law firms forever stay the same? It seems almost naive to think that they can escape the relentless pull of competition, customer demand, technology, and the like. It is no secret that other businesses already are slowly encroaching on their traditional turf. And why shouldn't outsiders be attracted to lawyering, a forty billion dollar industry according to the Chief Justice?[9] That is the way

7. For the sake of survival, the big firms will have to recognize their business shortcomings. Running a large, complex, diversified business simply is not their forte; it is not in their members' roots or conditioning from law school or the firm. Big law firms have spent so many decades cultivating the idea that they are not old-fashioned, down-in-the-dirt businesses that they probably still believe it. They need outside help to rescue them from their rigid conditioning.

8. *See* Fitzpatrick, *Legal Future Shock: The Rise of Large Law Firms by the End of the Century*, 64 IND. L.J. 461 (1989).

9. Rehnquist, *supra* note 1, at 151.

competition works in a free economy. It is why in other industries, despite tradition and many similar legal barriers, Sears could decide to own a bank and ITT to own a baking company. It should and will also be the reason why, in time, some corporate executives will decide to test the next logical step in this evolutionary process: acquisition of a big law firm—lock, stock, and barristers. Let's face it, if Arnold & Porter can own diverse businesses like APCO, The Secura Group, and MPL,[10] it follows that somebody else ought to have the right to own A&P—the legal supermarket chain.

As a result of these inevitable changes, the big law firms, as owners or subsidiaries of another business, will be pressured to shed their traditional partnership skin and to seek the more flexible benefits of a corporate structure.[11] When this happens, of course, the law and our codes of professional responsibility will have some catching up to do.[12] That does not mean, however, that either will have to be rewritten to tolerate conflicts of interest, incompetence, etc. Other businesses have faced the same moral challenges that vex lawyers, and they have managed the experience exceedingly well.[13] In short, I am sure ethics will survive a slight structural change in the way big law firms deliver their products and services.

I am not so sure, however, that Chief Justice Rehnquist would agree. In his speech, he worried that:

> Size alone can lead to ethical problems. A partner in one branch of the firm may be representing one client while another partner in another branch of the firm represents another client; if it turns out that these two clients have "conflicting interests," there may be an ethical violation even though neither partner actually knew that someone else in the firm was representing the conflicting interest . . . . [I]t again suggests that a law firm cannot treat the question of expansion precisely the way a business organization does.[14]

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10. *See* Fitzpatrick, *supra* note 8.

11. It will be argued that the "Big Eight" accounting firms, some with thousands of partners, have survived nicely without reorganizing under a corporate umbrella, but the fact is that they are organized as corporations. Most of the so-called partners are akin to vice presidents in other large corporations.

12. The author states:

> One alternative is a "deprofessionalization" of legal practice so as to eliminate the distance between private and professional morality. Deprofessionalization, however, would involve a radical restructuring of the entire legal system, reducing the complexity of the law as it currently exists so that individuals could exercise their rights without the assistance of highly specialized legal technicians.

See Postema, *supra* note 6, at 81-82.

13. *See* Ehrlich, *Common Issues of Professional Responsibility*, 1 GEO. J. LEGAL ETHICS 3 (1988). Ehrlich points out that "the professional responsibilities of lawyers are also troublesome problems for professionals in other fields" and that it makes sense for lawyers to "draw on insights from other professions." He says, "[L]awyers have no monopoly on the dilemmas involved and can gain from comparative analysis." *Id.*

14. Rehnquist, *supra* note 1, at 155.

Why not? Many businesses face exactly the same questions anticipated by Chief Justice Rehnquist.[15] The financial services industry faces them everyday. It is not uncommon, for example, for a large investment company to fund the takeover of one of its customers. In fact, both the target and acquiring company may be long-standing customers about which the investment company knows a great deal. There is nothing illegal or unethical about this, so long as certain rules of the trade are observed such as maintaining a so-called "Chinese wall" within the investment institution between the people who service the target company and those who fund the acquiring company.

Insurance companies deal handily with a myriad of similar events. Consider the case of an auto insurer. It writes policies that bind it to prosecute the rights of a car owner involved in a collision. The insurer knows, of course, that the statistical probability is high that the other party in a certain number of auto collisions will be another one of its customers. The insurance industry has long since learned to live with this quasi-conflict of interest without at the same time engaging in unethical conduct or harming its customers.

In the case of the financial services and the insurance companies, I think it is fair to say that marketplace evolution solved the dilemma of how to serve conflicting customers at the same time. Both industries operate under a "common carrier" principle that is well-anchored in American law. Their experience over decades of trial and error in the marketplace has produced results that tell us what we can expect if large law firms start doing the same thing. In short, they, too, will adapt, and the world will be none the worse for it.[16]

The structure of law firms will change, and that change will in turn change the way the law is delivered. In the process, the law itself—how it is drafted by legislative bodies, how it is interpreted and applied—probably also will change somewhat.[17] In fact, this very point is the one I would have most expected in Chief Justice Rehnquist's probing speech. Rehnquist pondered what the new law firms were doing to our legal delivery system and encouraged our law schools to study the phenomenon. I expected him

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15. Ehrlich, *supra* note 13, at 13.

16. *See Firms, GCs Divided on Prospective Conflict Waiver Letters,* OF COUNSEL, July 4, 1988, at 6. This article discusses how law firms are dealing with the problem of representing past adversaries or current competitors of their traditional clients. Some law firms are simply biting the bullet, viewing the problem more as a management responsibility than a potential conflict of interest. Others ask for approval before going forward, and whenever possible, cement the approval via a written "conflict waiver" agreement. The Attorney's Liability Assurance Society, Ltd. has even created a sample conflict waiver form, which is reproduced in the article. *Id.* at 8.

17. *See* Fried, *The Trouble With Lawyers,* N.Y. Times, Feb. 12, 1984, § 6 (Magazine), at 56, col. 1.

to go a step further and recognize that if the delivery system changes, then the product itself—the law—probably will also change over time.

Our law schools ought to study this possibility, and they can start by looking outside our profession. Other industries have gone through rapid changes. What happened to them? Did their products change? How did they adapt? In the relative scheme of things, did change lead to a diminution of ethical standards? Why did some industries succeed and others fail? Is it possible that a wide-open commercialization of our profession will evolve to eliminate the need for lawyers? Will we discover that smart business people will deliver the law more efficiently, economically, and perhaps ethically than we do today—and to more people? If so, what will happen to our law schools? Will they be reduced to sub-departments in our business schools or simply become another topic of study in a liberal arts program like philosophy and political science? Will the world suffer if this happens?

I have no doubt that profound changes are on the way. It is their timing that escapes me. Numerous obstacles could slow, and perhaps even reverse, the process. Economic collapse and environmental disaster increasingly seem like real possibilities. Another possibility is the revival of a nineteenth century brand of federalism.[18] The Reagan administration made no secret of its philosophy about the strong role states should play in governing local matters. It has named scores of judges to our federal courts who, presumably, will show more deference to the decisions of state legislatures than did the generation or two of judges who came before them. It is possible, therefore, that many states will do to large law firms what they have done to the banking industry: enact legislation to protect the markets of their local firms, in effect balkanizing the industry. The Baker & McKenzies and Shearman & Sterlings might be grandfathered to stay in, but newcomers would be told to stay out. However, like most legislation of this type, it will prove of no effect over time; the relentless forces of the marketplace and our democracy will eventually break it down.

An equally important change that will alter the big law firms will be the continuing effects of the feminist movement. In his speech, Chief Justice Rehnquist told us that our law schools should look at size, income, structure, work roles, and institutional loyalty, among other things, to predict and prepare for the future, but did not talk about women. I point this out only to remind my colleagues that no study of our profession will be complete, much less relevant, if it ignores the changes that will come when half or more of the lawyers in the United States are women.[19]

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18. *See* R. BERGER, FEDERALISM, THE FOUNDERS' DESIGN (1987).

19. I think it is safe to assume that larger numbers of women lawyers will eventually lead to a corresponding increase in the number of women legislators, regulators, prosecutors, and judges. It is inconceivable that things will stay the same when this happens.

It amazes me that we can hold a symposium at a leading law school, my alma mater, on the topic of large law firms and totally disregard feminist issues and perspectives. Not one of our authors is a woman, and not one of the topics is about women and the law. No one in this collection has even mentioned women—ignoring them as though they were not a growing, significant force in our profession. Dare we ignore them?

I think I know one of the reasons, and if I am right, it, too, is more than a proper topic of study for our law schools. We ignore women in our profession because ours is essentially a male-oriented, male-dominated profession like truck driving, tackle football, and war. Ignoring women is the natural, ingrained thing to do. It has been that way since day one in our law schools, our courts, our legislatures, and our law firms. I am convinced that the total domination of our profession for centuries by men has profoundly shaped the way we look at and think about the law. American law is male-dominated to its bones, from the way it is written to the way it is interpreted, priced, and delivered. That also applies to our so-called code of professional ethics, which we debate in the extreme on issues like conflicts of interest and adequate representation, but which failed us for decades on the fair and equal treatment of half our population.

The effect of feminism on our profession will be dramatic, and for that reason it, too, must be studied in depth by our law schools. The presence of large numbers of women in our nation's law firms will not just focus on obvious media-political issues like maternity and paternity leaves, child care, work stress, partnership tracking, compensation, promotions, and the like. I believe it will also force us to rethink the style and substance of the law—the way it is priced and delivered. In short, equal numbers of women in our profession at all levels presumably will cause a reordering of our legal system.

The commercialization of our profession may accelerate the effects of feminism because open marketplaces tend to be equalitarian. Competition on a level playing field tends to favor merit and thus is more fair to all the players. Ironically, while exactly this is one of the highest, most deeply held tenets of our antitrust jurisprudence, it frightens many of our own when it is advocated for the legal profession. They fear that commercialization and competition will erode our professional standards, our devotion to high ethics. I do not know why. As I said, I work in a large business enterprise. My business colleagues and superiors are just as bright as any of the partners in the great American law firms. They are also as professional and collegial. On a daily basis, they face ethical dilemmas as complex and with ramifications as profound as any that come across the desks of attorneys. They grapple with these issues with the same deep concern for high values. And they succeed, if the marketplace satisfaction of their customers is any evidence. By and large, the American people hold their

business system in high regard; they believe they are getting a fair shake. Can the same be said about our profession?

As I see it, some of us have already arrived at where the legal profession is heading. The commercialization of the legal profession by large law firms is not a brave new world. It is one we are intimately familiar with, one that works. We should not be fearful of it.