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Should Lawyers Stick To Their Last?

JUSTIN A. STANLEY*

My own role in this Symposium is a limited one. As I understand it, I am to make some comments with respect to what has already been said. This is to be done briefly, and a wide-ranging discussion about professionalism and commercialism is to be avoided.

I will try to put the large law firm in perspective, while granting that its effect on the profession and on legal education may be disproportionate.

There are now upward of 655,000 people admitted to practice in the United States. Of these approximately 50 percent are members of the American Bar Association.

Figures compiled by Barbara Curran and published in 1985¹ by the American Bar Foundation indicate that in 1985 approximately 75 percent of private practitioners either practice alone or in firms having ten members or less.² If we assume that no significant shift has occurred since 1985 and that 650,000 lawyers are now in practice, it follows that some 490,000 practice either alone or with firms of ten members or less.

As we go up the scale, the results are consistent. Eighty-nine percent of all lawyers in private practice either practice alone or are in firms of 50 members or less.³ Conversely, only eleven percent are in firms of over 50.⁴ Today, in large urban centers such as New York, Chicago, or Los Angeles, a firm of 50 members probably would not be considered large. Certainly one of ten or less would not be so considered.

According to Curran's 1980 study, if we move to firms of 100 or more, it is estimated that they account for perhaps 0.2 percent of all the firms, with a very small number of lawyers in the aggregate.⁵

Yet they are powerful and the effect of what they do goes far beyond their numerical strength. Even so, we should know that they are not the whole Bar and that what they say or do is not automatically the final word on any matter.

One thing they clearly set in motion was the high salaries now being paid to associates just out of law school. Although, so far as I know, there was never any agreement among large firms in any city, actual payments have

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1. B. CURRAN, THE LAWYER STATISTICAL REPORT 4 (1985).

2. *Id.*

3. *Id.*

4. *Id.*

5. B. CURRAN, THE LAWYER STATISTICAL REPORT 51 (1980).

generally been pretty uniform for a number of years, while differing somewhat from city to city. My information is that because one firm in New York had a major case which required a substantial number of associates who would have to work on nothing else but that case for a long period of time, and who were to office in a suburban area, that firm offered extremely high salaries. The results could have been predicted. Their competition followed suit and matched or even exceeded those offers. That had and continues to have a widespread effect, not just as to starting salaries in that city but across the country. Further, it had an effect on salaries of older associates and on a demand from the firms to increase billable hours. In turn this affected charges to clients. It may have affected the way in which some firms treated the matter of pro bono work by associates and partners.

Even some law school students are questioning how sensible or how silly present starting salaries are.

Although I am heartily in favor of paying fair and reasonable compensation, I think that what has happened is, over all, not a good thing for the profession.

The big firms are, in fact, getting bigger, and it is true that they have achieved unprecedented size. Clearly, if the current trend continues, the practice may consist of big firms and small firms—with nothing in between.

However, a word of caution would not be misplaced. I think there is a rule of evidence to the effect that a state of facts, once shown to exist, will be presumed to continue.

But there is a rule of life that says nothing is forever, except the certainty of change.

I am not wise enough to say how long the current trend will continue; but I am experienced enough to say it will not last and will be subject to change.

In the expansionist role of the large law firms, they have branched out into other activities, such as those described so well by Mr. Fitzpatrick. Two newspaper articles on this subject—one of which appeared in the *National Law Journal* on October 21, 1985 and the other in the *Washington Post* on March 13, 1986—will give you a more detailed description of what is going on.

In some instances, you will observe that some of the firms have formed interdisciplinary partnerships; in others they have acquired businesses; in others they have formed business entities and, through partners in their firms, actually operate those businesses.

Now this may be fun and exciting for the participating lawyers, at least so long as the economic enterprises prosper; but I think there is a serious question as to whether or not it is good for our profession.

I assume we would all agree that every lawyer has at least one basic duty: to serve his or her client with the utmost fidelity and competence, letting

nothing interfere with that save only the overriding obligation to the system of justice. That means, at the least, that no personal interest of the lawyer may stand in the way of serving a client.

When law firms engage in the kinds of business activities that have been described, two fundamental problems must be considered. One is the obvious one of conflict of interest. If a business entity controlled by a law firm gives a client of that firm bad advice and the client suffers, where do the loyalties of the law firm belong and where, as a practical matter, will they go? It seems to me that it is not enough to say the client is free to choose his or her own lawyer. Neither is so-called "full disclosure" enough.⁶

I am acutely aware of a situation where a law firm regularly invests in equities in real estate development projects of a client. Full disclosure has been made. But the law firm and the client are obviously in positions of potential conflict, and if a deal craters the conflicts will be shockingly real. What becomes of the duty of the law firm to its client under these circumstances?

The second fundamental problem is whether or not lawyers should engage in these business activities at all.

In an opinion written in 1955, Justice Jacobs of the Supreme Court of New Jersey observed, "Perhaps society would be better served if practicing attorneys were to remain full-time lawyers rather than become part-time business men."⁷

There is much to be said for this. Certainly there is challenge enough in the law to suit any person. Lawyers perform functions which are vital to the proper functioning of our democracy, and we are given a monopoly to do so. There is fun in the law too. And if a lawyer's work is done well, there is not only intellectual satisfaction, but a comfortable livelihood. There is most likely, however, not a fortune.

England is now wrestling with the problem of whether or not to permit lawyers to participate in interdisciplinary partnerships. My understanding is that the barristers have said no but the solicitors have not decided.⁸

I agree that, with the possible exception of the conduct of litigation, lawyers are problem solvers; but that is not new. Perhaps the problems are

6. See CODE OF PROFESSIONAL RESPONSIBILITY, ILL. REV. STAT. ch. 110A, Rule 5-104(a) (1985).

A lawyer shall not enter into a business transaction with a client if they have conflicting interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, *unless the client has consented after full disclosure.*

Id. (emphasis added).

7. In *Re Carlsen*, 17 N.J. 338, 346, 111 A.2d 393, 397 (1955).

8. Letter from John Mottram, Chief Executive, General Council of the Bar, to Justin A. Stanley, Esq. (Sept. 29, 1987) (enclosing Comments on Behalf of the London Common Law and Commercial Bar Association on the Law Society's Paper on Multi-Disciplinary Partnerships (draft copy)).

more complex now and often require the contribution of more disciplines. However, they can be resolved in different ways. One is to call in the other disciplines as needed. Another is to involve law firms in business activities—where potential conflicts are rife and where the principal aim of the lawyer's conduct may be to make money for the firm. This, of course, is a far cry from a primary dedication to maintain and improve the system of justice under which we live.

In an article in the Northern Illinois University Law Review,⁹ I addressed the question posed by Justice Jacobs and I considered how the business activities of law firms might be controlled. With your permission, I would like to quote from that article:

The governing courts in the several states and in the District of Columbia would have to adopt rules of professional conduct dealing with the problem. Three possible alternatives seem to be available.

First, the rules could proscribe the engagement by practicing lawyers in all business activity, with such exceptions as the courts might permit. This would be similar to the regulations now governing the English barrister.¹⁰

Second, the rules could prohibit entering into business transactions with clients. This would be similar to the rules now governing Certified Public Accountants and would largely eliminate the relevance of "full disclosure" of conflicts.¹¹

Third, the rules could create a supervisory body or could delegate to disciplinary commissions authority to pass upon, in advance, all intended business activities of lawyers and law firms. This would be administratively more difficult and more expensive than either of the other alternatives. Among other things, it would require the creation of guidelines by the courts and building up of its own case law.

Constitutional challenges could be expected to all three suggestions, with the greatest being directed toward the first. Presumably, the claim would be asserted that the right to practice law, like any other occupation, is a

9. 8 N. ILL. U.L. REV. 17, 29-30.

10. CODE OF CONDUCT FOR THE BAR OF ENGLAND AND WALES; ¶¶ 35, 57-58 and Annexes 4, 7 (1985). Permitted supplementary occupations include:

1. part-time public appointments such as judicial or quasi-judicial offices, arbitrators, membership in parole boards, Royal Commissions, Press Councils or local authorities;
2. part-time legal services such as advising producers of plays on legal matters concerning their productions, reviewing Parliamentary Bills, coaching students, lecturing and writing, editing and reviewing books and periodicals;
3. part-time commercial activities (which include only the following activities) non-executive directorships of companies, chairmanship or membership on boards of cooperative societies, names at Lloyds, and activities as landlords or rented accommodations.

Id.

11. AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, CODE OF PROFESSIONAL ETHICS, RULES OF CONDUCT, Rule 101 (1975).

liberty or property interest protected by the federal Constitution and by many state constitutions, and that to prevent one who is engaged in business activities from practicing law improperly interferes with that constitutional right and violates the dueprocess and equal protection clauses. Such an argument might seriously misconstrue the law. The federal Constitution does not create property or liberty interests; they are created and defined by independent sources such as state law. Thus, while a right to practice law could not be arbitrarily denied by a state, a state may impose conditions on the practice of law which are rationally related to the "fitness or capacity to practice law" and not illegally discriminatory.

What will happen in the future, none of us knows. What is clear is that the present business activities of some large law firms should be carefully and objectively studied to see whether or not the ends of justice would be better served were such activities either more closely controlled or proscribed.¹² There are, for example, obvious differences between having economists on the staff of a law firm and having an "affiliate" of the firm give advice in other disciplines to the clients of the firm. There are also differences between having economists on the staff of the firm and having the economists as partners. The examples could be multiplied; but they illustrate the kinds of questions that should be addressed. The ultimate aim should be to see what best serves the interest of the system of justice.

12. See REPORT OF THE COMMISSION ON PROFESSIONALISM TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, 112, F.R.D. 243, 280-281.

