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The Economic Downturn and the Legal Profession, Foreword: The Great Recession and the Legal Profession

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The Economic Downturn and the Legal Profession, Foreword: The Great Recession and the Legal Profession

Cover Page Footnote

Charles W. Delaney Jr. Associate Professor of Law and Hughes-Ruud Research Professor, University of Denver Sturm College of Law. The papers collected in this issue were presented at a conference entitled The Economic Downturn and the Legal Profession, hosted by Fordham Law School in October 2009, and co-sponsored by the Fordham Law Review, the Louis Stein Center for Law and Ethics at Fordham Law School, and the University of Denver Sturm College of Law. A special thanks to Bruce Green, Director of the Louis Stein Center, Jessi Tamayo, Associate Director of the Louis Stein Center, Diane Burkhardt, Faculty Services Liaison at the Westminster Law Library at the University of Denver Sturm College of Law, and the editors of the Fordham Law Review.

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SYMPOSIUM

THE ECONOMIC DOWNTURN AND THE LEGAL PROFESSION

FOREWORD: THE GREAT RECESSION AND THE LEGAL PROFESSION

*Eli Wald**

Although historians will surely devote much ink—or bytes—to the financial crisis, I believe that this time will be known as an inflection point in world history because of huge revolutions under way in the world—changes that make this an electrifying time to be in the legal profession.

– Martha L. Minow, Dean of the Harvard Law School, January 2010¹

Perhaps with historical hindsight, 2008–2009 will be remembered not for the Great Recession² that first rocked the U.S. residential mortgage credit market, then froze American and global financial markets and eventually led to a worldwide recession, but as an inflection point for world history, the U.S. economy, and the legal profession. But in the short run, at least, the impact of the economic meltdown on the legal profession has been quite devastating: unprecedented layoffs,³ salary decreases,⁴ hiring freezes

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1. *Q&A: Points of Inflection: A Conversation with a New Dean*, HARV. L. BULL., Winter 2010, at 14, 14 (Q&A with Dean Martha Minow).

2. See Richard A. Posner, *When Does a Depression or a Recession End?*, ATLANTIC, Aug. 1, 2009, <http://www.theatlantic.com/business/archive/2009/08/when-does-a-depression-or-a-recession-end/22544/> (noting that the economic downturn of 2008–2009 is being referred to by some commentators as the “Great Recession”).

3. Law Shucks, a blog dedicated to large law firms, reports that between January 1, 2008, and January 31, 2010, over 14,347 people have been laid off by major law firms alone (5632 lawyers/8715 staff). See Law Shucks, Layoff Tracker, <http://lawshucks.com/layoff-tracker/> (last visited Mar. 12, 2010).

resulting in an extraordinary number of unemployed law school graduates nationwide,⁵ even deaths.⁶

The long-term consequences of the economic downturn are less certain. While some believe that the Great Recession will have permanent adverse effects on the legal profession,⁷ it is important to bear in mind that points of significant distress are at the same time moments of great opportunity,⁸ and the legal profession, with its track record of adapting to changing practice realities while successfully maintaining its elite professional, financial, and cultural status atop U.S. society,⁹ may end up stronger than ever. The experience of the bar following the Great Depression is instructive in this regard, as lawyers eventually emerged from it not only as architects and leaders of the New Deal but also established themselves, over time, as principal actors in the administration of government and the (lucrative)

4. See, e.g., Martha Neil, *Some BigLaw Leaders Still Ponder: How Low Can Associate Salaries Go?*, A.B.A. J., Oct. 6, 2009, http://www.abajournal.com/weekly/some_biglaw_leaders_still_ponder_how_low_can_associate_salaries_go (analyzing trend of lower associate salaries at large law firms); Debra Cassens Weiss, *First-Year Associates Bear the Brunt of Lower Bonuses; Some See Cuts of 71%*, A.B.A. J., Dec. 21, 2009, http://www.abajournal.com/weekly/article/first-year_associates_bear_the_brunt_of_lower_bonuses_some_see_cuts_of_71 (reporting on decreases in lawyers' salaries and bonuses).

5. See, e.g., Matt Masich, *Law School Career Offices Seek Fix for More Lawyers, Fewer Jobs*, LAW WK. ONLINE, Oct. 21, 2009, <http://www.lawweekonline.com/2009/10/career-offices-seek-fix-for-more-lawyers-fewer-jobs/> (discussing the impact of the recession on recruitment of graduates at a top-fifty law school); Debra Cassens Weiss, *Downturn's Losers: BigLaw, 'Entitled' Associates, Top Schools*, A.B.A. J., May 7, 2009, http://www.abajournal.com/weekly/downturns_losers_biglaw_entitled_associates_top_schools (commenting on the impact of the recession on recruitment of graduates of elite law schools); see also William D. Henderson & Andrew P. Morriss, *What Law School Rankings Don't Say About Costly Choices*, NAT'L L.J., Apr. 16, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1207904889498&slreturn=1&hblogin=1>.

6. E.g., Richard B. Schmitt, *A Death in the Office*, A.B.A. J., Nov. 2009, at 30 (reporting on the suicide of prominent appellate litigator Mark Levy, who took his own life after being fired during the economic downturn).

7. A recent survey on the state of the legal profession conducted by LexisNexis reported that over half of the attorneys surveyed believed that the recession will permanently change legal practice. LEXISNEXIS, STATE OF THE LEGAL INDUSTRY SURVEY: COMPLETE SURVEY FINDINGS 10 (2009); see also Larry E. Ribstein, *The Death of Big Law* (Univ. of Ill. Law & Econ. Research Paper No. LE09-025, 2009), available at <http://ssrn.com/abstract=1467730>; Brian Leiter's Law School Reports, <http://leiterlawschool.typepad.com/leiter/2009/04/the-upheaval-in-the-market-for-new-lawYERS-at-the-big-law-firms-temporary-or-permanent.html> (Apr. 30, 2009, 13:57 EST).

8. See, e.g., Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010). See generally Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 919, 955 (1990) (exploring "anxiety-ridden moment[s] of suspense"). The great legal scholar Homer Simpson refers to such a moment in time as a "crisitivity," to capture both the notions of crisis and opportunity. *The Simpsons: Fear of Flying* (Fox television broadcast Dec. 18, 1994). "Yes! Crisitivity!" is Homer's response when Lisa informs him that "the Chinese use the same word for 'crisis' as they do for 'opportunity.'" *Id.*

9. See, e.g., Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001).

implementation of administrative law.¹⁰ Of course, the bar may experience the Great Recession quite differently; yet the possibility of long-term growth, innovation, and resurgence should not be discounted, and claims regarding the death of the profession and some of its leading institutions may be premature.¹¹

In this Symposium issue, leading scholars of the legal profession begin the process of exploring the impact of the Great Recession on various segments of the legal profession and on the bar as a whole, examining both the unique consequences of the economic downturn and their interplay with contemporary trends that were already underway before the recession hit. That the stratification of the bar¹² may lead to variation in how differently situated lawyers experience the economic downturn and, consequently, to variation in their response to change seems straightforward. For example, mergers and acquisitions as well as securities attorneys no doubt experienced the financial meltdown that brought their respective practices to a near halt much more severely than bankruptcy lawyers who saw a surge in demand for their services; large law firms and their lawyers likely experienced the downturn quite differently than solo practitioners and small-firm attorneys.

Yet stratification also leads to more nuanced and less obvious responses as demonstrated by the experience of the legal profession following the Great Depression, an experience that provides clues regarding the complex ways in which severe economic stress impacts the profession in the long run. The Great Depression exposed significant tensions between the majority of lawyers who struggled to survive and elite large law firm lawyers who worried not only about declining profits but also about maintaining their elevated professional status. As a result, solo practitioners and elite corporate lawyers pushed for different, indeed conflicting, strategies of response.¹³ The experience of the legal profession

10. Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119, 1120 (1997) ("By any standard it appears as if the administrative state, and the regulatory regimes that came with it, provided the legal profession with innumerable professional opportunities. The inevitable link between overregulation through administrative agencies and the economic welfare of lawyers has now become the dominant . . . account." (citing PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* 10–11, 22–29 (1994))). For a revealing contemporaneous account of how the growing New Deal administration was marshaled by lawyers and appropriated as a matter of administrative law, see Carl McFarland, *Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, 20 A.B.A. J. 612 (1934).

11. See, e.g., Ribstein, *supra* note 7.

12. See generally JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982) (coining the classic term "hemispheres" of lawyers to denote that the legal profession consists of two categories of lawyers whose practice settings, socioeconomic and ethnoreligious backgrounds, education, and clientele differ considerably).

13. See Ronen Shamir, *Professionalism and Monopoly of Expertise: Lawyers and Administrative Law, 1933–1937*, 27 LAW & SOC'Y REV. 361, 363, 378 (1993) [hereinafter Shamir, *Professionalism*]. Ronen Shamir explores the tension between the bar and its elite

in the aftermath of the Great Depression thus advises that it would be a mistake to assume a unified response by the bar and suggests the wisdom of exploring the diversity of experiences along different segments of the profession and the likelihood of a multitude of responses.

Moreover, the past experience of the profession also suggests that economic stress may cause intraprofessional competition and tension adding to increased external competition in the market for legal services.¹⁴ Intraprofessional strife caused by severe economic stress has the potential to bring about mobility within the profession, unsettle hierarchies, threaten established elites, and open the door for the rise of alternative elite structures:¹⁵ New Deal lawyers were mostly outsiders, a “coalition of minorities—social, ethnic, regional, and intellectual,”¹⁶ who flocked to Washington D.C. “with their hair ablaze”¹⁷ seeking social change for the people and professional change for themselves. The New Deal thus constituted an opportunity for the formation of a counterelite of lawyers capable of challenging the dominant position of large Wall Street law firms atop the profession.¹⁸ While the prospect for the rise of an alternative legal elite did not materialize as leading New Deal lawyers joined the existing power structure by starting and entering large law firms in Washington D.C. and New York City,¹⁹ it nonetheless demonstrated the opportunity for radical changes and reshaping of the legal elite inherent in extreme economic moments of instability. Consequently, studies of the fate of the profession in the aftermath of the Great Recession must be sensitive to the possibility that the struggles and even decline of some segments of the bar may open the door and allow other constituencies within the profession to rise.

Just as they did seventy years ago, large law firms sit atop the legal profession,²⁰ rendering the study of large law firms and the challenges they face in the aftermath of the economic downturn an integral part of any analysis of the legal elite, the legal profession, and its impact on the economy. Indeed, in some ways, the role of large law firms has expanded even further since the 1930s. By the early 2000s, before the recession hit,

in greater detail in RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995) [hereinafter SHAMIR, *MANAGING LEGAL UNCERTAINTY*].

14. See Shamir, *Professionalism*, *supra* note 13, at 371–74; see also Harry W. Arthurs & Robert Kreklewich, *Law, Legal Institutions, and the Legal Profession in the New Economy*, 34 *OSGOODE HALL L.J.* 1, 48 (1996) (stating that the legal profession continues to experience “growing internal political dissension at the very moment when it also confronts the profound and permanent external challenges of the new economy”).

15. Michael E. Parrish, *The Great Depression, The New Deal, and the American Legal Order*, 59 *WASH. L. REV.* 723, 746–50 (1984).

16. *Id.* at 747.

17. See PETER H. IRONS, *THE NEW DEAL LAWYERS* 3 (1982).

18. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 191–230 (1976).

19. See Parrish, *supra* note 15, at 748.

20. See, e.g., ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 231 (1988).

large law firms not only dominated the legal elite and served a disproportionate percentage of large corporate entities, but also were among the largest and fastest growing segment of the profession, accounting for approximately eleven percent of all U.S. lawyers²¹ and recruiting a staggering one in every four law school graduates nationwide.²² Moreover, the challenges facing large law firms have come to resemble the challenges facing the blue collar bar, with the former confronted with experiencing not only status anxiety but also, like the rest of the profession, survival anxiety.²³ Consequently, the majority of the papers in this Symposium issue, dedicated to the study of the economic downturn and the legal profession, investigate and explore the impact of the Great Recession on large law firms. The emphasis on the large firm stems from the central role it plays in shaping practice realities and professional ideologies for its own lawyers and for the entire legal profession.²⁴

Unlike the savings and loans crisis of the 1980s and the accounting meltdowns of the 1990s, in which large law firm attorneys were accused of playing significant roles in failing to prevent the financial calamities and even in helping to bring them about,²⁵ it appears that lawyers were not principal villains in the economic downturn of 2008–2009.²⁶ Lawyers did

21. ABA Lawyer Demographics, http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf (last visited Mar. 12, 2010) (illustrating that in 2000, 74% of U.S. lawyers worked in private practice and 14% of those were employed by law firms with more than 100 lawyers, accounting for more than 10% of all U.S. lawyers). The percentage rose between 2000 and 2007 as large law firms continued to grow and recruit a larger percentage of law graduates. The National Association of Law Placement (NALP) reports that between 2001 and 2006 law firms recruited over 55% of all law graduates. Large law firms with over 100 lawyers recruited approximately 40% of those graduates, accounting for an astonishing 22% of all graduates nationwide. See *Trends in Graduate Employment—1985–2006*, NALP BULL., July 2007, <http://www.nalp.org/2007julgraduateemployment/>.

22. In 2007, nearly 23% of all law graduates were hired by large law firms with over 100 lawyers, with a majority of those recruited by law firms with over 500 lawyers. NALP, CLASS OF 2007 NATIONAL SUMMARY REPORT #2 (2008), available at http://www.nalp.org/uploads/1229_natlsummary07revised.pdf.

23. See, e.g., John P. Heinz, *When Law Firms Fail*, 43 SUFFOLK U. L. REV. 67 (2009); Ribstein, *supra* note 7.

24. See, e.g., Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 112–13 (1988) (“[W]hat seems to be happening in the big firms is symptomatic of something more pervasive The big firms cast a giant shadow, in terms of public perceptions of the profession, parallels in other fields, and standards within the legal community. Their every uptick reverberates widely. [Next], the actual influence of the big firms and their alumni—many of them general counsels of major corporations—extends far beyond their numbers.”).

25. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1204 (2003) (exploring the role of lawyers in the corporate meltdown of the 1990s); William H. Simon, *Whom (or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003) (same); William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 280–82 (1998) (discussing the role of lawyers in the savings and loans crisis of the 1980s).

26. See Posting of Andrew Perlman to Legal Ethics Forum Blog, <http://legaethicsforum.typepad.com/blog/2008/10/the-biggest-leg.html> (Oct. 5, 2008, 10:05

not play a leading role in the deregulation efforts of the 1980s and 1990s, did not influence the Federal Reserve's policy of not monitoring high-risk lending entities in the residential mortgage credit market, and were not the primary architects behind the aggressive and increasingly risk-taking behavior of financial institutions.²⁷ The Symposium therefore does not study whether lawyers caused the Great Recession or failed to prevent it.²⁸ Rather, it focuses on the range of changes it caused to, and accelerated in, the structure and business models of large firms and the legal services industry generally; the transformation of ideology and cultural identity of large firms; changes in the institutional and psychological infrastructure for ethical decision making within and outside law firms; and the impact the recession has had on the provision of pro bono services by large law firms and by traditional pro bono providers.

The Symposium consists of four parts and is organized as follows. Part I, *The Transformation of Large Law Firm Organization and Structure*, includes three contributions that explore the changing landscape of large law firm organization and structure, studying, respectively, the decline of the traditional agency-based attorney-client relationship and the rise of an alternative partnership model; the disaggregation of legal services offered by large firms and their growing reliance on outsourcing; and the prospect of law firms engaging in multidisciplinary practices.

Part II, *The Changing Professional Landscape of Large Law Firms*, moves past organization and structure to examine the changing ideology of large law firms and its impact on lawyers practicing within and outside these institutions. The two contributions complement each other in that the first takes a "top-to-bottom" approach exploring the new emerging ideology of large law firms and its impact on specific categories of lawyers employed by these firms. The second pursues an opposite perspective, inquiring into individual lawyers' self-understanding of firm culture and professional ideology and examining the future of the large firm and changes in the

EDT) (opining that the biggest legal ethics story of 2008 was that nobody was blaming unethical attorneys for the economic crisis).

27. See Carol A. Needham, *Listening to Cassandra: The Difficulty of Recognizing Risks and Taking Action*, 78 FORDHAM L. REV. 2329 (2010). Although, as David Wilkins notes in *Teams of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010), lawyers may have been involved in wrongdoing in the latter stages on the bailout. *Id.* at 2068 & n.5 ("[I]t is only a matter of time before the inside and outside lawyers who represent the banks and other financial institutions we are currently bailing out will be called upon to take their turn in the dock.").

28. Even if lawyers did not play a leading role in the economic downturn, some may have been complicit, advising financial institutions on the design of credit swap securitizations and complex derivatives and counseling regulatory agencies on their overseeing duties. We may, however, never find out the extent to which lawyers were actually involved in bringing about and failing to mitigate aspects of the Great Recession because, as Stephen Gillers has pointed out, the doctrines of confidentiality and privilege significantly curtail access to such information. See Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289 (1987) (exploring the impact of confidentiality and privilege on lawyers' ability to disclose wrongdoing inside and outside of an entity-client).

industry in which it operates from the point of view of its individual lawyers.

The concluding four contributions explore the large law firm and its transcending influence outside of its own borders. Part III, *The Evolving Institutional and Psychological Infrastructure for Ethical Decision Making at Large Law Firms*, studies important changes affecting ethical decision making within and outside of large law firms. A commentary examines the growth of risk management processes within large law firms, observing their impact on systems and structures as well as on culture, that could inhibit ethical decision making in everyday practice. Another contribution addresses the psychological factors that influence nonlawyers, lawyers, and organizations and cause them to deviate from informed and ethical decision making.

Finally, Part IV, *Large Law Firms and the Public Interest: Provision of Pro Bono Services by Large Law Firms*, consisting of a contribution and a reply, explores the provision of pro bono services by large firms, its overall impact on pro bono, and the challenge it represents to conventional thinking about private and public lawyering, and the provision of private and public legal services.

I. THE CHANGING LANDSCAPE OF LARGE LAW FIRM ORGANIZATION AND STRUCTURE

The conventional understanding of the attorney-client relationship is one of agency, in which lawyer-agents serve the interests of client-principals,²⁹ subject to the law and duties owed to the legal system and the public.³⁰ The agency model and the rules of professional conduct that breathe life into it

29. American Bar Association Model Rule of Professional Conduct 1.2(a) allocates authority in the attorney-client relationship pursuant to a basic agency model, granting client-principals authority over the goals of the representation and vesting agent-lawyers with primary authority over the means by which the objectives of the representation are to be pursued. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008). This rule adopts another essential feature of the agency model, holding client-principals alone responsible for the goals of the relationship and releasing lawyer-agents from legal liability and moral accountability for the objectives they help clients pursue. *Id.* R. 1.2(b); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, introductory n. (2000) ("The subject of this Chapter is, from one point of view, derived from the law of agency. It concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client."). See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (1986) ("Whatever may be the models that obtain in other legal cultures, the client-lawyer relationship in the United States is founded on the lawyer's virtually total loyalty to the client and the client's interests."); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 21 (1987) ("In the relationship with a client, the lawyer is required above all to demonstrate loyalty.").

30. Lawyers' agency on behalf of clients is subject to their duties as officers of the court and as public citizens. See MODEL RULES OF PROF'L CONDUCT pmb. (2008) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."). Conceptually, the attorney-client relationship may thus be more accurately characterized not as an "ordinary agency" but rather as a "limited agency." See Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 952-54 (2009).

have traditionally assumed lawyers to be powerful vis-à-vis their clients, who needed protection and guarantees against lawyer abuse. While the agency model may apply to the relationship of solo and small-firm lawyers with their individual and small-business clients,³¹ it never quite fit the relationship between large law firms and their large corporate clients, both because the former were never docile subservient agents deferring to their clients' objectives, and because the latter were never vulnerable and in need of regulatory protection against their lawyers.

Current market conditions, argues David B. Wilkins in *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, have largely turned the traditional agency model on its head.³² The dominant theme over the last thirty years, accentuated by the economic downturn, has been corporate clients' ability to significantly reduce the "information asymmetries" that used to characterize their relationship with large law firms.³³ In this new climate, corporate clients may use their enhanced powers to co-opt law firms into facilitating wrongdoing,³⁴ while the agency model will give lawyers a pass on the ground that as agents they are not responsible for the ends of the representation.³⁵ Against this background, Wilkins asserts provocatively that the time has come to abandon the conventional agency-based understanding of the attorney-client relationship between large corporate law firms and their entity clients. Instead, "the relationship between these large and sophisticated clients and their increasingly large and sophisticated outside counsel is better conceptualized as a new kind of strategic alliance or partnership."³⁶

Teams of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship explores this new model at three levels. First, it develops a descriptive account of this new understanding of the attorney-client relationship based on cutting edge practice realities taking place in both the global legal market and in other competitive markets, including the automobile industry in Japan, from which Wilkins borrows the term *keiretsu* to denote this partnership relationship. Next, the paper lays out a normative defense of the new model, arguing that it may reintroduce lawyers as significant strategic advisors for their corporate clients and allow them the opportunity to act as gatekeepers, promoting and guarding the public interest as they pursue their clients' private interests.³⁷ Finally, Wilkins offers initial thoughts about ethical and regulatory changes necessary under this new emerging model, simultaneously making

31. Of course, even individual lawyers do not quite fit within the agency model because rather than act as agents, they tend to exercise authority vis-à-vis their individual clients, but that is exactly why the Rules of Professional Conduct extend protection to clients and attempt to keep lawyers at bay.

32. See Wilkins, *supra* note 27.

33. *Id.* at 2105.

34. *Id.* at 2113-14.

35. See MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2008).

36. Wilkins, *supra* note 27, at 2070.

37. *Id.* at 2125-26.

corporate clients and their lawyers more responsible by making the former more accountable to their lawyer-partners and making the lawyer-partners more accountable to third parties and the public. Thus, while the new partnership model offers large law firms an opportunity to reassert their strategic importance, reestablish their elite professional standing, and continue to generate high profits, it also entails new and significant risks of malpractice and general tort liability and economic instability.

The erosion of the traditional understanding of the attorney-client relationship, argue Milton C. Regan, Jr., and Palmer T. Heenan, may be just the tip of the iceberg in terms of the structural changes large law firms might be forced to contend with. *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services* argues that client pressure to become more productive and cost-effective will force law firms to consider disaggregating their services and outsourcing some legal work to providers who can perform it at a lower cost. Applying relevant economic theory and empirical research, Regan and Heenan suggest that law firms will have to confront the “make or buy” decision, that is, to decide whether to offer certain legal services themselves (“make it”) or to outsource them to others (“buy it”).³⁸ Specific decisions will be based on whether the legal services in question can be decomposed (broken up into discrete units), whether value can be created for clients (and law firms), and whether the risks associated with disaggregation and outsourcing, such as maintaining confidentiality and avoiding conflicts of interest, can be effectively managed.³⁹

Law firms are likely to find disaggregating legal services quite challenging. They will have to become experts in process integration, i.e., the ability not only to decompose their products but also to put them back together efficiently; learn to take advantage of networks outside of the firm, i.e., outsourcing companies and even law firm alliances; develop effective methods of knowledge sharing with their network partners subject to the rules of professional conduct; and become skilled at using and managing contingent workers, such as contract lawyers and remote attorneys. While the profitability upside for law firms that master disaggregation is likely to be high, Regan and Heenan point out that the new landscape of legal services is at the same time going to be significantly more risky. By outsourcing, large law firms will lose routine work for which they used to be able to extract value (by billing clients for the work of junior associates and paralegals at a premium), and by disaggregating, law firms will face increased competition from other professional firms who might turn out to be better at integrating legal services. Moreover, disaggregation will significantly impact not only large law firms but also the lawyers who work for them. Regan and Heenan posit that as large law firms begin to employ more workers outside of the firm, their demand for associates will diminish,

38. Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137, 2142–48 (2010).

39. *Id.* at 2148–59.

and alternative positions may be created, such as permanent non-partner-track lawyers.

Another consequence of the Great Recession and its acceleration of already underway trends leading to increased competitive conditions in the market for legal services, argues Paul D. Paton, is that the legal profession is likely to reverse its current stand on multidisciplinary practices (MDP)—disallowing business structures that entail fee sharing with nonlawyers and nonlawyer ownership and even control of law firms. In *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, Paton asserts that powerful demand and supply forces in the global market for legal services—consumer welfare and the economic interest of the American legal profession competing with overseas law firms who are able to establish MDP—both lead to the conclusion that “the question of *whether* alternative business structures ought to be permitted is settled and a new reality. Rather, the focus needs to be on *when* and *how* the market should be opened.”⁴⁰ To that end, Paton offers a critical analysis of prior MDP debates, which took place in the United States in the 1990s, in the context of the new economic realities facing the profession in the aftermath of the economic downturn and reviews developments in common-law jurisdictions allowing MDP for lessons about how MDP ought to be engaged and eventually implemented in the United States.

Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America concludes that the rhetoric of defending “the ‘core values’ of the legal profession,” often invoked by the bar as a justification for rejecting MDP,⁴¹ served as a proxy for anticompetitive efforts to limit domestic competition by nonlawyers,⁴² a position the profession can no longer afford to take in an increasingly global competitive market for legal services. Furthermore, Paton argues, allowing MDP is not only in the economic self-interest of the bar (and its clients) but also may be unavoidable: overseas experiences suggest that refusal to open up the domestic market for legal services to nonlawyers might cost the legal profession its ability to self-regulate.⁴³

Read together, the three contributions contained in Part I suggest that in order to survive, let alone maintain their dominant position atop the legal profession, large law firms will have to radically change their structure and organization. Some will have to adopt new models of interaction with clients, others will rethink their business plans and structure, and yet others will collaborate with nonlawyers to offer new kinds of services. In the

40. Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 *FORDHAM L. REV.* 2193, 2196 (2010) (citing LEGAL SERVS. BD., *WIDER ACCESS, BETTER VALUE, STRONG PROTECTION: DISCUSSION PAPER ON DEVELOPING A REGULATORY REGIME FOR ALTERNATIVE BUSINESS STRUCTURES* 4 (2009)).

41. *Id.* at 2198–99.

42. *Id.* at 2210.

43. *Id.* at 2197, 2222.

process, these firms may end up redefining not only their own practices, but the meaning and scope of law practice generally.

II. THE CHANGING PROFESSIONAL LANDSCAPE OF LARGE LAW FIRMS

Increasingly competitive practice conditions in the market for corporate legal services, accentuated by the economic downturn, are transforming not only the practice realities, the organization, and the structure of large law firms, but also their professional ideologies. In *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, I argue that competitive meritocracy, the prevailing large-firm professional ideology over the last fifty years, is in decline.⁴⁴ Competitive meritocracy is being replaced by a hypercompetitive ideology that, compared with its predecessor, puts more emphasis on 24/7 client-centered representation, complete loyalty and devotion to the firm and its clients, and maximizing profit per partner, and less emphasis on meritocracy, the exercise of professional judgment, and cultivation of professional culture and maintaining a sustainable work-life balance.⁴⁵

This transformation is bad news for large law firms because unlike competitive meritocracy, hypercompetitiveness compromises their claim to be doing elite work, their ability to recruit and keep elite lawyers, and, ultimately, the credibility of their claim for elite status. The ideological shift is particularly devastating for previously excluded minorities at large law firms seeking equality. *Glass Ceilings and Dead Ends* studies the impact of hypercompetitiveness on the career path of women lawyers at large firms in the context of persisting gender stereotypes and concludes that the new ideology is likely to magnify the negative consequences of these stereotypes and further hinder the quest of women lawyers for equality at large law firms and in the legal profession.

The *After the JD* (AJD) study is a comprehensive national empirical study designed to explore the careers of lawyers admitted to the bar in 2000 over the course of their professional lives.⁴⁶ The first wave of the study was conducted in 2002–2003 examining early career trajectories, and the second wave was conducted in 2007–2008 studying lawyers' careers at seven years in practice.⁴⁷ *So, You Want To Be a Lawyer? The Quest for Professional Status in a Changing Legal World* reports for the first time qualitative data from interviews with AJD lawyers practicing with large law

44. Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 *FORDHAM L. REV.* 2245 (2010).

45. *Id.*

46. RONIT DINOVTZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., *AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* (2009).

47. Joyce S. Sterling & Nancy Reichman, *So, You Want To Be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 *FORDHAM L. REV.* 2289, 2298–99 (2010).

firms now almost a full decade into their practice. The paper investigates the experiences of these lawyers over the first decade of their careers, paying close attention to their understandings and perceptions of their professional identities and the impact of the economic downturn on their career trajectories. In particular, the paper situates its findings in the context of changes transforming large law firm practices over the last two decades: the exponential growth of large law firms, increased competition among law firms and lawyers, a shift from “lockstep” to “eat-what-you-kill” compensation structures, proliferation and prolonged partnership tracks, increased billable hour requirements, and a shift of power from large law firms to their clients.⁴⁸ Indeed, many of the contributions to this Symposium explore consequences of these ongoing changes to large law firm practice realities.

Joyce S. Sterling and Nancy Reichman report these changes, which are accentuated by massive layoffs and delayed promotions in the wake of the economic downturn. For those lawyers of the class of 2000 who are caught in a holding pattern, demoted, laid off, or have fled the large firm, becoming a partner is elusive and the quest for professional status is difficult. Amidst these changes, these lawyers seek to define themselves professionally. While some law graduates joined large law firms without much thought of professional identity,⁴⁹ others joined seeking training (human capital), connections (social capital), and professional prestige and standing.⁵⁰ As large law firms struggle to deliver these professional dividends in an increasingly competitive business environment while continuing to demand grueling hours, some of their young lawyers opt out in search of professional identity and purpose.

III. THE EVOLVING INSTITUTIONAL AND PSYCHOLOGICAL INFRASTRUCTURE FOR ETHICAL DECISION MAKING AT LARGE LAW FIRMS

Risk management practices and mechanisms are spreading among large law firms, and, in the aftermath of the economic downturn, the trend may gather additional steam because as large law firms struggle to cut costs and minimize their exposure to liabilities, the language and culture of risk management and avoidance seem like an obvious step in the right direction. In *The Risk of Risk Management*, Stephan Landsman cautions about the danger in making strategic organizational decisions in times of great economic instability and uncertainty: while, on the one hand, risk management policies might enhance thoughtful ethical deliberation within large law firms, they might, on the other hand, compromise it. Increased large law firm reliance on risk management procedures before their relationship with ethical compliance and lawyer integrity is further delineated might, ironically, turn out to be a risky move. Exploring the

48. *Id.* at 2293–96.

49. *Id.* at 2302.

50. *Id.* at 2302–09.

implications of the rise of legal risk management by viewing it through the lens of risk management's impact on the practice of medicine, Landsman advises that lawyers ought to embrace risk management slowly and cautiously. Insights from the medical context suggest that because risk management inherently attempts to protect the law firm from its clients, it drives a wedge into the attorney-client relationship, in particular, fostering a "wall of silence" environment between attorney and client inconsistent with the full and frank communications that are essential for an effective attorney-client relationship. Moreover, as they grow in scope and importance, risk management processes might overshadow or even crowd out sound ethical decision making by individual lawyers representing clients. Next, risk management might inhibit innovation, creative lawyering, and new styles of law firm management and organization, which other authors in this Symposium have argued will be crucial for large law firm survival.⁵¹

Based on the medical industry's experience with risk management, Landsman offers several cautionary notes, as law firms proceed with the implementation of risk prevention and management procedures. First, as risk management becomes institutionalized, risk managers are hired, and loss prevention departments become commonplace,⁵² law firms ought to be mindful of the tension between their overall client-centered orientation and the firm-based perspective of the risk management unit. Second, such intrafirm tension, even power struggles, might shift firms' focus and allegiance from clients to itself. Finally, to the extent that error reduction comes through the improvement of systems rather than the chastisement of individuals, risk management's emphasis on individuals might not be ultimately conducive toward the goal of better service of clients.

In *Listening to Cassandra: The Difficulty of Recognizing Risks and Taking Action*, Carol A. Needham studies the reasons for the collapse of the residential mortgage credit market, which led to the freezing of other credit markets and eventually to the economic downturn of 2008–2009. Needham argues that deregulation allowed the creation of high-risk lending entities and that the Federal Reserve, responsible for supervising these new entities, refused to exercise its supervisory powers notwithstanding increased risk taking and numerous warning signs throughout the 1990s and in the years leading to the economic meltdown. This regulatory failure to identify the growing risks and to respond to them in time, claims Needham, was the result of ineffective and mistaken leadership in top positions, "groupthink" mentality at the Federal Reserve, dismissal of dissent by "naysayers," and cognitive failures.⁵³ The psychological factors and institutional reasons that led to the Federal Reserve's failure to recognize the growing risk in the

51. Stephan Landsman, *The Risk of Risk Management*, 78 *FORDHAM L. REV.* 2315 (2010).

52. This is akin, perhaps, to the professionalization and institutionalization of pro bono and the creation of pro bono counsel. See Cummings & Rhode, *supra* note 8.

53. Needham, *supra* note 27.

residential mortgage credit market and to take appropriate timely action illustrate how reasonable and ethical decision making, by nonlawyers, lawyers, and organizations alike, may be frustrated by the powerful interplay of ineffective and rigid organizational infrastructure and dominant entity culture.

Moreover, *Listening to Cassandra* raises important questions about the roles (and lack thereof) of private and public lawyers in financial markets, regulatory design, and regulatory oversight and sets the stage for assessing the role of the legal profession in dealing with the aftermath of the economic downturn. The economic downturn of 2008–2009 might in this sense illustrate the concern that the problem with attorneys in recent scandals is not so much that they were at the scene of the crime and looked the other way, but rather that they were absent from the scene of the crime and could not have played a role in preventing it.⁵⁴

IV. LARGE LAW FIRMS AND THE PUBLIC INTEREST: PROVISION OF PRO BONO SERVICES BY LARGE LAW FIRMS

In *Managing Pro Bono: Doing Well by Doing Good*, Scott Cummings and Deborah Rhode explore the increased institutionalization and professionalization of pro bono programs at large law firms. Their empirical study examines the reasons for and consequences of the changing institutional status of pro bono done by large firms and details the various programs, designs, and institutional infrastructures by which large law firms implement their commitment to pro bono, such as the expanding role of pro bono counsel. The paper situates these developments within the general trend of professionalizing pro bono outside of large firms, contributes to the quantitative understanding of pro bono work done by these for-profit entities, and argues that the current focus on quantity (driven by rankings) and training (driven by the large law firms' professional development needs) may have eclipsed the public function of lawyers' public service.⁵⁵

Cummings and Rhode argue that the professionalization of pro bono programs is, and is going to be in the future, an important factor in promoting public service in good times and protecting it in bad times. They make their case by examining the effects of the increased professionalization on the provision of pro bono during the recent economic downturn, explaining both its short-term consequences⁵⁶ and long-term implications.⁵⁷ Moreover, and perhaps most provocatively, *Managing Pro Bono* asserts that the increased institutionalization and professionalization

54. See JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 231 (2006); see also ANTHONY T. KRONMAN, THE LOST LAWYER (1993) (arguing that increased competition and specialization have limited the ability of attorneys to exercise "practical wisdom" and act as "Lawyer-statesmen" on behalf of their clients and the public interest); Wilkins, *supra* note 27, at 2125.

55. Cummings & Rhode, *supra* note 8, at 2394–408, 2430–34.

56. *Id.* at 2409–13.

57. *Id.* at 2413–19.

of pro bono in large law firms may transform the meaning of pro bono generally and redirect its purposes. The growing assimilation of pro bono to large firms blurs the line between paid and nonpaid work and collapses the traditional distinction between private interests and the public good.⁵⁸ Indeed, the paper embodies the new and complex practice realities it identifies: it is a study of pro bono, the public interest, and the public sphere while at the same time an examination of the large law firm, the so-called bastion of paid work, the pursuit of private interests, and the locus of increased commercialization and profit maximization.

In a reply titled *The Paradoxes of Pro Bono*, Richard Abel acknowledges the important role large law firms' pro bono has played in realizing the promise of equal justice under the law, especially given the limited funding available to the traditional providers of pro bono services, while vividly pointing out the oddity in "having privileged lawyers—who earn huge incomes by acting for large corporations and wealthy individuals—constitute a major source of legal representation for the poor and subordinated"⁵⁹ The odd marriage between pro bono and large firms necessitates further inquiry, and Abel joins the call by Cummings and Rhode for additional research on the impact and consequences of large law firms' provision of pro bono services.

Abel's reply highlights certain aspects of large law firms' pro bono as worthy of attention. First, pro bono practices at large firms are heavily influenced by rankings, awards, and a prestige hierarchy, which in turn impacts, and arguably distorts, the selection of cases handled and allocation of resources. Second, pro bono services are a function, and often a by-product, of the firm's economics. What partners support as pro bono, why they do so, and what associates they assign to such projects are questions that get decided based on perceptions of paying clients' responses and associates' training needs as much as they do by the merits of the pro bono cases. Third, the pro bono services provided by large firms reflect an individualistic approach in the selection of cases (based on the subjective preferences of individual pro bono counsel, partners, and associates), the selection of recipients (mostly individual matters to avoid conflicts with paying clients), and in the identity of and work product of the lawyers who provide them (primarily individual associates practically working alone).

The economic downturn demonstrates some of these oddities and highlights the need for further research. Abel points out, for example, that in an attempt to save costs, large law firms paid law graduates to work in public interest for a year on a reduced first-year-associate salary. These newly minted graduates, still earning more than more experienced career lawyers at public interest entities, left at the end of the year to double their salaries, likely leaving behind the career public interest attorneys somewhat disgruntled. Moreover, at the same time that they possibly destabilized the

58. *Id.* at 2364–65, 2426.

59. Richard Abel, *The Paradoxes of Pro Bono*, 78 *FORDHAM L. REV.* 2443, 2443 (2010).

pro bono entities, large firms have become increasingly reluctant to commit significant resources to large in-house pro bono projects, further compromising the pro bono agenda. Large law firms are likely to persist as major pro bono actors, but their growing presence in the public interest sphere creates paradoxes in need of attention.