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Responses

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and not just of individual lawyers or particular law firms. But the large law firms, by reason of their tremendous resources and influence, have a responsibility to provide leadership.

It seems appropriate to say a last word to the students—to the lawyers of the future. During the era of the counter-culture and the Viet Nam War, younger lawyers pressed the nation's law firms to expand the scope of their pro bono activities. Young men and women who then came to the law firms were intensely interested in public service activities. When they would apply, they would ask: "What is the firm doing in the pro bono area? What are my opportunities going to be in the pro bono area if I join your firm?" They were interested, of course, in when they were going to be elected partners, as all new associates are, but they asked those other questions, too. Those young lawyers exercised an enormous influence on the law firms of the country.

Regrettably, the interest in public service legal work appears to have declined among both older and younger lawyers. Many of the law school graduates who apply to firms such as my own appear to be indifferent about pro bono work. There have been many theories advanced to explain this change in attitude. Whatever the explanation, the young lawyers are not prodding or challenging the law firms as they once did. I suggest that the large law firms, or at least a good number of them, will respond to requests and to urgings of the younger lawyers for an opportunity to engage in some public service legal work. That requires, however, some courage and initiative on the part of the young lawyers. There are exciting and challenging things for lawyers to do in many different areas of our society. Justice Holmes said that "one may live greatly in the law as elsewhere." He was right.

ETHICS AND THE MEGAFIRM — II

*Richard D. Lee**

I.

I would like to add an overlay to the remarks that Mr. Krash made with regard to the megafirm. Mr. Krash has described very carefully and very thoughtfully a number of the ethical problems that are faced by the megafirm. I think there is an additional set of

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complications when, instead of dealing simply with a large firm that has multiple offices in the United States, you add a foreign or international component. Let me give you examples of the kind of problem with which the international megafirm must deal.

First, who is the client? The problem of identifying the client is, to be sure, also a problem for the domestic law firm. As Mr. Krash has indicated, we no longer are so fortunate as to have a single unitary relationship between client and firm. Instead, most large clients parcel out their work to a number of firms. That process is multiplied as soon as you deal with international subsidiaries of the same firm. So it is quite possible for one American or non-American international subsidiary to be represented in Paris by one firm, in Tokyo by a second firm, and in South America by a third firm.

Assume that we are talking about a client called the *ABC* Corporation. The *ABC* Corporation has a wholly-owned subsidiary. The subsidiary then also has a sixty percent subsidiary. Now we have minority shareholders to worry about and must worry about the duty that we have in representing that client and how much of that duty is owed to those minority shareholders. Then we add a fifty percent ownership, a rather typical joint venture arrangement. By now it is clear that we have a situation where we are not at all sure who our client is.

We were perhaps originally retained because we did work for the parent. Now we are representing a joint venture in which the parent has fifty percent interest. Is there going to be a conflict between the representation of that joint venture and a representation of the parent? Of course, this problem is exacerbated where, because of national legislation, the American corporation is only a forty-nine percent, not a fifty-percent, contributor to the joint venture.

If we can identify the client, we still must answer such questions as what kind of a loyalty we have and what to do when our loyalty is tested by a conflict of concern between local management and the upstream corporate management, especially when we perceive that our bread and butter comes from the daily contact with the local manager. It becomes a serious problem when the manager suggests that his interests and those of the local subsidiary are at variance with that of the parent corporation. Who is our client under those circumstances? And what are our ethical responsibilities, first with regard to identifying the client, and second with regard to a conflict? To whom do we report? From whom do we

seek guidance? If we are distressed with activities at the local level, what obligation, if any, do we have to go up the corporate chain?

Second, with regard to the international firm, what standard of professional competence do we apply? We have assumed in the national firm that each lawyer involved in the main office and the branch offices is subject to the same basic set of ethical rules. But even in the United States that is not a fair assumption. Illinois, for example, was one of those states that chose to adopt from the Model Code only the Disciplinary Rules and not the Ethical Considerations. Other states have adopted both. So Illinois, in interpreting its rules of competence, will often come up with a different standard of care for the lawyer than New York, for example. If you have a partner in the Illinois office and a partner in the New York office, which standard should apply? You would probably decide to choose the higher standard. Unfortunately, however, this choice might be difficult to make, since ethical questions do not rank themselves neatly.

Now, compound that complexity. Ask yourself what standard is owed when Partner *A* in the United States is in partnership with Partner *B* somewhere else in the world. Both have a local code of conduct, and those ethical norms may differ substantially. Now, you say, we will solve that one by simply telling the partner he has to observe both. That solution was proposed by the Common Market, but it has not been a successful solution.

The Common Market, in trying to deal with lawyers practicing throughout the Common Market, came up with the following rule, which I am paraphrasing: The lawyer who is a citizen of a member state has the right to provide legal services in any other member state. The lawyer remains subject to the rules of professional conduct of his own state but must also comply with the ethical rules of the host state, especially as to "professional secrecy, relations with other lawyers, the prohibition of the same lawyer acting for parties with mutually conflicting interests, and publicity."

Now, take the lawyer in jurisdiction *A*, where advertising is permitted, and put him in partnership with the lawyer in jurisdiction *B*, where advertising is not merely frowned upon but is unethical, and you have a true international ethical question that, I submit, has some very difficult solutions. To take the problem one step further, go outside of the rules governing the lawyer, and look at the ethical norms of the whole community.

One of the great debates that has gone on with regard to the Foreign Corrupt Practices Act has been the perception on the part

of the business community in the United States that, whether or not you agree that the standards imposed by the Act are appropriate in conducting business in the United States, there are a number of parts of the world where activities which are not merely frowned upon but which are actually illegal under the Foreign Corrupt Practices Act are considered appropriate. It is quite appropriate to entertain very lavishly in some parts of the world someone with whom you are doing business, even if that person is a government official. That kind of conduct could easily be characterized under the Foreign Corrupt Practices Act as a bribe. And yet, under the local mores, that would not only be considered appropriate conduct, it would be considered necessary, and proper, and ethical conduct.

Similar problems exist in a number of other areas as well. We simply do not have one global ethical standard governing how lawyers should be judged, how business should be conducted, and how we interact with one another.

II. Practical Solutions

As a second part of my comments in reaction to the presentation today, I will turn to what I believe to be one of the most effective strategies for dealing with ethical problems in the large firm. Mr. Krash very ably described the fact that in a firm with 100 or more partners and 200 or more associates, it is very hard to keep track of all of them. It is hard enough to keep track of your partners. It is certainly much harder to keep track of associates with all of their assignments, especially with thirty of them traveling all over the world on any given day.

Having posed that problem, I do not think the solution is to suggest that we should come up with a different set of standards or a relaxed set of standards for the larger enterprise. I really think that at the point the firm gets big enough, it needs to worry more about the daily competence of the lawyers in its firm. I am not sure where that dividing line is, whether it is at 150 or 200 attorneys, but at some point the firm must begin systematically to go about guaranteeing a high level of competence on the part of all of those attorneys. I suggest that this can be attacked by a rather systematic program of in-house training.

As you begin to monitor work assignments, to emphasize regular evaluations, to organize the substantive knowledge that is passed on to individual associates, to plan the progression of experiences given the individual lawyer as he or she progresses through

the firm from first-day associate to junior partner, you have begun the process of enhancing the competence of the attorneys in the firm.

I therefore urge the megafirm to develop a very systematic approach to the training of its lawyers. I do not mean that training in the sense of an orientation program for the young attorney as he or she first arrives at the door of the firm, but a life-long training that involves a continual reexamination by the individual attorneys of their competence, of their specialties, of their knowledge of the current law with regard to all of the matters with which they are dealing.

We have, under either the Model Code or the new proposed Model Rules, a high duty of competence as lawyers. It seems to me the only way we can ensure that high degree of competence, not merely at the moment of graduation from law school, but throughout a productive fifty years, is by systematic, ongoing training within the firm.

ETHICS AND THE MEGAFIRM — III

*John P. Heinz**

I. A THEORETICAL VIEW

At a recent conference on large law firms, held at Stanford University, one of the speakers asserted that corporate law firms do "a lot of dirty work." There was a collective gasp from members of the audience, and the speaker then said: "Well, let me revise that. They do a lot of mundane work, and some dirty."

I am not certain what he meant by "dirty work," but I suspect that his definition would not be limited to clear violations of law or clear violations of the Code of Professional Responsibility. One of the problems with defining what is dirty in a large law firm practice (and this has been hinted at by both of the previous speakers) is that relatively few disciplinary actions are brought against lawyers in large firms. A common criticism of the ethical system in the legal profession is that it tends to consist of rules that are made by corporate lawyers to be applied against solo practitioners—against people practicing personal injury law and so forth. It is unclear whether the relative lack of ethical decisions dealing with corpo-

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rate lawyers is attributable to a feeling that corporate law firms can be trusted, a feeling that they will clean up their own houses, or whether the attitude is that the market will take care of it. If the proposition is that the market will take care of it, I rather doubt it.

Let me talk, though, about the broader social roles of lawyers as those roles may relate to lawyers' ethical obligations. Such an approach is particularly appropriate because of the power of large law firms as institutions. Corporate law firms, after all, deal with the distribution of great wealth. They are purported to have significant influence in Washington and other centers of power.

I would like to contrast the view I cited earlier—the view that corporate lawyers do "dirty work"—with the theory about the role of the professions that was advanced by Talcott Parsons. Parsons' general view was that the growth of the professions over the past 150 years or so enchances social stability. He argued that society otherwise would have tended to spin apart through centrifugal force as the differentiation of labor and the specialization of function tended to create ever more narrow interest groups. Parsons also argued that the professions, particularly law, were able to bridge the conflicts among these economic interest groups because the profession's power was grounded in an "independent knowledge base." That is to say, the professionals have knowledge that other people in the society need, and that knowledge is relatively non-political. As a resource for power, knowledge differs in its nature from money or guns. It stands above the fray. The argument, then, was that this independent power base permits the professions, and particularly lawyers, to play a mediating role that will tend to bind the society together.

Some of the writing on lawyers has quite explicitly picked up this theme from Parsons. The first major book on corporate lawyers—to this day really the only serious scholarly book on corporate lawyers—is Erwin Smigel's *The Wall Street Lawyer*, published about twenty years ago. In that book, Smigel quoted Parsons' view characterizing the Wall Street lawyer as, "a kind of buffer between the illegitimate desires of clients and the social interest." So Smigel saw lawyers as moderating the views of their clients and moving the clients' position closer to something like the public interest.

At about the same time that Smigel wrote, Charles Horsky, who is still practicing law at Covington & Burling in Washington, D.C., published a series of lectures under the title, *The Washington Lawyer*. In those lectures, Horsky adopted a similar view and said that the role of the Washington lawyer "is that of principal interpreter

between government and private person, explaining to each the needs, desires and demands of the other" and "seeking to adjust the conflicts that inevitably arise."

How realistic are these views about the independence of the lawyer? Each of the views is premised upon the lawyer's possession of a quality that we might characterize as "autonomy," perhaps even "moral autonomy"—i.e., that they are able to be independent of the client and to redirect the private demands of their clients toward some conception of the public interest or the common good.

Now, there is an attack on the legal profession from the left that is quite different from this Parsons-Smigel-Horsky view, but has in common with it, somewhat ironically, the idea that lawyers are autonomous or independent of their clients—or at least the idea that it is possible for them to be independent. This critique from the left, however, refers to a different kind of autonomy. It is really talking about non-involvement. It says that lawyers seek to play the role of technicians in order to absolve themselves from moral responsibility. That is, if lawyers can characterize themselves as being mere instruments of their clients, then they may feel that they do not have to take responsibility for the consequences of their actions, particularly the consequences for distributive justice in the broader society. In somewhat cruder terms, this attack from the left is the view of the lawyer as whore, that is, the view that lawyers don't have any commitment. They just do it for the money.

I disagree with both of these views. I think that most corporate lawyers are enthusiastic about being in bed with their clients. The trouble with the Parsons-Smigel-Horsky view in my opinion is that, though legal knowledge may be arcane so far as the clients are concerned, there are a great many sellers of that knowledge. No one lawyer or law firm has sufficient power in the market to be able to secure independence by withholding access to knowledge or skills. If the client does not like what this lawyer is giving him, he can hire another. So I do not think that their knowledge gives lawyers the kind of autonomy that Parsons and the others following him would suggest.

The trouble with the left wing critique is that it assumes that lawyers see some sort of moral dilemma in the service of corporate clients. I doubt that is true. Most corporate lawyers probably feel quite comfortable in the service of their clients. Let me give you just a little bit of data that will tend to back that up.

My colleague at the American Bar Foundation, Robert Nelson,

recently completed a major study of large law firms in Chicago. As a part of that research, he took a random sample of lawyers in the firms and asked them this question: "Have you ever refused an assignment or potential work because it was contrary to your personal values?" He asked that of 222 lawyers. Of those, only thirty-six, or sixteen percent, said that they had ever refused an assignment or potential work because it was contrary to their personal values. Of the thirty-six who had refused work at some time during the course of their careers, only a dozen had done so more than once.

Nelson then further inquired about the reasons for the refusals. Half of them said that they had been based on reasonably clear violations of the Code of Professional Responsibility—for example, cases of continuing criminal activity by the client. Most of the other half were based on the lawyer's disagreement with the client's position on a point of principle—that is, for example, unwillingness to defend racial discrimination or serious environmental pollution. But the vast majority of the lawyers Nelson interviewed had not perceived any moral issues in the work presented to them. Of the eighty-four percent of all the respondents who had never found it necessary to refuse work, almost all said that they had never been asked to take on any assignment that raised a moral question.

Were there really no moral questions that came up in their work, or did they just not perceive them? I think it is quite likely that lawyers come to identify with their clients over time. When you work with people closely over a period of several years, and indeed serve as advocate for their positions, you may come to share their views and values—even if you did not share them in the first place, when you entered that line of work.

II. Ethics And Recruitment

Let me briefly touch on one other issue. It is quite different from the issues that have been discussed so far today, but it is something that is of particular interest to law students and should be of interest to all of us in the profession—the pattern of recruitment by large law firms. Specifically, the issue is the extent to which the socio-economic backgrounds of job applicants affect hiring by large firms.

We all like to think of the legal profession as a meritocracy. Ed Laumann and I did some research on Chicago lawyers that examined the relationship between their careers and their social

origins. Our data are, unfortunately, now getting out of date. They were collected in 1975, and I point that out to you because it raises the question of whether our findings are still valid.

One of the things we looked at was the distribution of lawyers across different kinds of practice settings—i.e., small firms, large firms, solo practice, and so on—by their ethno-religious backgrounds. We found a great deal of ethnic stratification of lawyers. That is, their ethno-religious backgrounds appeared to influence the kind of work that they did. Let me give you a specific example. The most extreme findings were for lawyers who are Jewish. Overall, about one-third of the lawyers in Chicago are Jewish, we found. But in large firms (defined as firms with thirty or more lawyers) only about seventeen percent were Jewish. So, in other words, the percent of Jews in large firms was about half the percentage in the profession as a whole. The other side of that same coin is the percentage of Jewish lawyers in solo practice or in small firms,—i.e. firms with fewer than ten lawyers. There, about forty-five percent of the lawyers were Jewish. So we found that in the large firms the percentage of Jews was only about half the overall percentage, while among solo practitioners and in small firms the percentage was about half again above the base percentage of a third of the whole profession.

Maybe that has changed with time. Maybe what we saw in 1975 was the effect of anti-Semitism in the 1930's and 1940's when the older lawyers entered practice. To test that, we divided our sample of lawyers into three age groups. We took those that were forty-six and older, those that were thirty-four to forty-five, and those that were thirty-three and younger. We then looked again at the distribution in large firms. What we found was that Jewish lawyers were under-represented in large law firms in the oldest age group by seventeen percentage points, in the middle age group by fifteen percentage points, and in the youngest age group, by ten percentage points.

Well, it is an improvement. But the under-representation in even the youngest age group is still significant. And I would suggest to you that it is significant not only in the statistical sense but in the substantive sense. Maybe that is 1975. Maybe everything is even better by 1984. Maybe. Maybe it is just Chicago. Maybe everything is better in other cities. Maybe. I doubt the latter. I doubt the latter even more than I doubt the former, and I doubt the former a lot. But I suggest to you that if anti-Semitism, whether of the lawyers themselves or of their clients, is still influ-

encing hiring by large firms, then that presents an important ethical issue of another kind that the profession badly needs to address.

I sometimes think that codes of professional responsibility are a little like morals legislation—legislation against gambling and drunkenness and marijuana and so forth. One of Mr. Krash's mentors was Thurman Arnold—the Arnold of Arnold & Porter. In "Symbols of Government," back in the mid-1930's, Thurman Arnold said something to this effect: We have these morals laws on the books because we want to preserve our moral standards, and we decline to enforce them because we want to preserve our conduct. Well, perhaps the same is true of codes of professional ethics.

QUESTIONS & ANSWERS*

QUESTION: I present this question to Mr. Krash as a representative of a megafirm. I see a need for separate rules pertaining to the megafirm, in part because functionally the megafirm is organized in a fashion different than the private practitioner or the smaller firm.

MR. KRASH: First, any high-quality large firm seeks to develop and train its lawyers to assure that they have high professional standards. And the way in which that is done is by example, by young lawyers working with older lawyers. I think that most law firms do a pretty good job of maintaining standards of competence and professional excellence.

The more difficult question is whether there should be separate standards for the large law firms. I do not think so. I think that there has to be one set of standards. In the large law firms, for example, with the conflict rules, there may be some practical, day-to-day modifications which reflect the large firm's unique pressures. Similarly, the rules of advertising are modified to the extent that they are not particularly applicable to the large firms.

We do not have a unitary bar. And it may be that what is an appropriate set of standards for one group may not be fair and legitimate for another group. For example, it may be that the fee relationships for lawyers operating in a ghetto area may require quite different standards than those needed for lawyers operating in large law firms who do not have those kind of pressures and problems. It is possible, however, with a single set of standards,

* The following questions and answers are merely representative of the discussion that followed the lecture.

for well-trained young lawyers to learn to handle each unique problem as it arises. So the real tough question is, how do you train or educate younger men and women to take affirmative steps to do other things, like public service.

The best training is by example. The young lawyers should look to the older lawyers for role models. Hopefully, they see that the role models are doing public service, and they will follow suit. If those older lawyers are not doing public service, then the young lawyer will say, well, you don't have to do that to get ahead so why should I do it.

Unfortunately, a lot of the older lawyers are not doing some of these things. One of the reasons they're not doing them, is that the economic pressures on the partners, especially senior partners, are simply too great. Also, management responsibility is another factor which enters into this. In a large law firm, you have tremendous managerial duties which divert your energies. They are just swallowed up by day-to-day things.

Of course, there are some problems that cannot be dealt with or prevented by formal education or training. During the Watergate event, for example, there were people saying, why didn't they have courses in law schools to teach them not to do certain things? And my answer to that would be, do you really think you need a course in law school to teach people that they are not supposed to cheat or steal or lie? If you have not learned that by the time you attend law school, do you really believe that the law school is going to inculcate those virtues? The law school inculcates intellectual virtues, but if you do not have those moral virtues, let me assure you that no course in legal ethics is going to make you be truthful or not cheat. That is not what is taught in the law school. It may teach you what to do in case you have a client who you find is engaging in a fraud. Then the questions are whom do I tell, how can I tell, when, and so forth.

In the law firms you can be taught, for example such things as the proper way to behave to an adversary, the duties toward a tribunal in terms of being candid and truthful, or the proper ways of responding to discovery requests.

MR. LEE: I would like to take issue with the mentor model that Abe has recommended as the way of educating. I think the pressures on the partners and the firm as a whole that Abe mentioned will make the senior partners less able to be role models. Young associates' starting salaries will continue to rise and the hours billed in order to justify whose salaries will also increase. This,

coupled with the efficiencies that are demanded by ever more sophisticated clients will reduce the hours that can be passed off as training. In this climate, I do not think the mentor model is going to work.

Rather than arguing that they have a different set of standards, large law firms should instead internalize procedures that will guarantee the kind of quality control that will ensure the equal competence of the young lawyer and the not-so-young lawyer.

DEAN APPEL: Mr. Krash, you've given the faculty a good job. What you are suggesting is a very interesting challenge for law schools. I think that as educators we must strengthen the resolve of people coming out of law school to define bono work in the context of choosing their life's work. I think it is something for us as a faculty to really begin to wrestle with.

MR. KRASH: Certainly we cannot ask the law schools to assume an unreasonable burden here. And I don't think the law schools are to be blamed or are responsible either.

Twenty-five years ago or twenty years ago, what did we mean when we talked about pro bono work? Usually, we were talking about representing individual defendants when the forum was a courtroom, the protagonist was the government, and the issues dealt with freedom of speech and civil liberties. Then it shifted so that pro bono work was representing classes or a cause rather than an individual client, and the forum was often the legislature. Of course, in talking about representing causes in a large law firm, there are problems with conflicts. The conflicts problem does not really occur when representing individuals.

I think a lot of people have begun to feel that nothing they could do would make a difference. That has spread through a lot of the law schools and the community in general. We lost our confidence in our ability to make a difference.

Any change is going to come from the younger people who come into the firms. I look around and see a tremendous agenda of unfinished business in American society where young lawyers could make tremendous contributions, and those things are not getting done. Current administration has, for example, cut down the whole legal services programs, cut the budget, cut back the people. Whatever foolish things may be said in Washington, the fact remains that there are tremendous needs for legal services to large segments of the American community. Those needs are not being met. From everything I hear or know, there are tremendous problems in the administration of criminal justice. But a lot of the

young people do not want to work at it. This is a problem we need to look at carefully.

QUESTION: I think Mr. Heinz implied earlier that members of large law firms were less challenged in disciplinary complaints than other lawyers simply because they were with large law firms. I tend to follow the literature pretty carefully, and I am not aware of any studies that indicate this.

Most disciplinary complaints are brought against lawyers for stealing from their clients in one form or another, or for neglecting their clients' matters. Now I think it is likely that less stealing and neglect goes on in big firms.

I do not think that fewer complaints are made against lawyers because of a fear of taking a swing at large law firms. The examples that Mr. Krash gave when he was talking about conflicts all involve large law firms. Most of the recent conflicts cases involve big law firms. Certainly the latest conflicts cases in this circuit all involve firms of substance, not little guys.

So I do not think big law firms get a pass. If anything, from my experience practicing in a big firm, I would say that the standards used in big law firms are at least as good as the model ethical standards. I see no evidence to the contrary at all.

MR. HEINZ: I don't doubt the latter part for a moment. I think it is also true, as you said, that there is very little stealing in large law firms. It is indisputable that the disciplinary cases brought against large firms are relatively rare exceptions, as your own observation points out. The vast majority of all disciplinary cases are brought against solo practicioners and lawyers in very small firms. Only a very few disciplinary proceedings are brought against lawyers in larger law firms.

Why is that? I think it's plausible that there may be a higher standard of ethical conduct in large law firms. But I think there are other very important structural reasons that may explain that result as well.

The work that goes on in large law firm practice is a good deal less visible to other people "outside the family" than is the work that's done by solo practitioners. A large percent of the work that solo practitioners do—for example, personal injury lawyers—is work in court, and litigation is more likely to lead to disciplinary proceedings than the work that goes on in the office practice in large firms. Problems that do arise in a large firm may be handled within the family by various kinds of sanctions—sanctions that are

handled informally. I also would not leave out the possibility that large law firms have more influence in the organized bar than do solo practitioners, and thus perhaps also have greater ability to influence the way in which disciplinary decisions are made than do solo practitioners.