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THE LAW BUSINESS

*David W. Belin**

THE LAW BUSINESS: A TIRED MONOPOLY. By *Joseph W. Bartlett*. Littleton, Colo.: Fred B. Rothman & Co. 1982. Pp. vii, 198. \$17.50.

THE PARTNERS. By *James B. Stewart*. New York: Simon & Schuster. 1983. Pp. 395. \$16.95.

The 1,000 person law firm is nearly here. Can the 2,000 lawyer firm be far behind?

Legal clinics are appearing in shopping centers across the country. More and more lawyers are turning to newspaper, radio and television advertising to secure clients. Publishers are promoting books on "public relations for attorneys." Established law schools are offering continuing legal education seminars on the "marketing" of legal services.

Who, twenty years ago, would have predicted such dramatic changes in the legal profession? Yet, I believe that in the last two decades of this century we lawyers will see greater changes in the practice of law than have taken place in the previous hundred years. Unfortunately, most of these changes will ignore two of the areas of greatest concern to most Americans: the need for better and more efficient means of dispute resolution and the need for competent and affordable legal services for middle-income Americans.

The current national debate on the high cost of medical services is a harbinger of increasing national concern for the cost of legal services in general and litigation in particular. A physician may charge \$200 an hour for his time, including office overhead — if he sees a patient for fifteen minutes, he will make a \$50 charge. If, on the other hand, an individual has a legal problem that may involve a lawsuit, the problem could readily involve not just fifteen minutes but hundreds (and in some cases thousands) of hours of work. The lawyer's hourly rate, including overhead, may be less than half that of the physician's, but because of the large number of hours required, the total bill becomes financially unfeasible for the average American.

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Against this backdrop of escalating legal costs and the rapid changes that are taking place in the legal profession, it is very worthwhile to read two of the most interesting recent books about lawyers and their work: *The Partners* by James B. Stewart, a lawyer and former executive editor of the *American Lawyer*, and *The Law Business: A Tired Monopoly* by Joseph W. Bartlett, who formerly was on the faculty of Stanford Law School and who now practices law in Boston where he has served as President of the Boston Bar Association.

The Partners, with its cover caption "Inside America's Most Powerful Law Firms," is a very engaging, gossipy book that most lawyers — particularly trial lawyers — will find very enjoyable to read. *The Law Business: A Tired Monopoly* is half as long but takes much more time to digest because of the author's philosophical approach to areas of major concern to the legal profession.

It is always easy for one lawyer to find errors and inaccuracies in another lawyer's work, just as it is very easy to disagree with another attorney's conclusions. Accordingly, a review could concentrate on the errors and omissions in both books. For instance, the very title of Bartlett's work includes the phrase, "a tired monopoly," and in the second chapter of his book, which is entitled "Monopoly," Bartlett declares in the opening paragraph:

The law business is a monopoly in the sense that competitive access is limited by artificial entry barriers and its practitioners, enjoying monopoly profits, suffer from the monopolist's destructive self-satisfaction and a consequent tendency towards eventual hardening of the arteries. [P. 7].

By the end of the next decade there will be over 1,000,000 lawyers in the United States. It seems incongruous for anyone to consider that with hundreds of thousands of lawyers ready, willing, and able to serve clients, the profession is a "monopoly" in the generally understood sense of the word.

This misuse by Bartlett is indeed ironic because he devotes an entire chapter in his 183-page text to "Words and Phrases," where he says:

Perhaps no other commercial profession or business is as dependent on the felicitous [sic] use of language. With relatively rare exceptions, however, the law business has paid little attention to the ways in which lawyers, judges and rule makers use words. [P. 135].

Bartlett is right in this conclusion, but he commits the error he criticizes when he seeks to describe the law profession as a monopoly.

On the other hand, Bartlett is very accurate when he refers to the practice of law as a "business." Indeed, one of the tragedies of our times is that law practice is becoming more and more of a business and less and less of a profession in the traditional sense of the word. The current trend of books promoting "better marketing techniques"

and continuing legal education promotions for the "selling of legal services" for practicing lawyers may soon lead many law schools to include in their regular curriculum what in substance will be tools for soliciting business. The rationale will be that with more than a million lawyers seeking to make a living, the law schools have an obligation to insure that work is available for their huge number of graduates.

Although Bartlett does not touch upon the ramifications of this trend, he does explore a number of other important areas. He develops ideas through a hypothetical businessman called "Sloan," whose perspective is uninfluenced by traditional precedent and who focuses his interest on disciplinary rules ("ethics") to determine whether or not they "achieve their objective in an efficient way" (p. 3). Sloan's goal is to consider how the law business as a private practice (rather than as a nationalized practice) can keep pace with the changing demands of our society. He is not a lawyer. He is concerned with the delivery of legal goods and services and wants to know how to meet the needs of consumers most efficiently.

Within this frame of reference, Bartlett arrives at a number of conclusions. For instance, he believes that people are often incompetently advised because lawyers take on tasks they are not trained to do and that this in part results from the lawyer's Code of Ethics, which discourages referral fees. If the hypothetical Sloan were making the rules, referral fees would be promoted in an effort to get the most competent advice for clients. Whether one agrees or disagrees with Bartlett, his argument is indeed intriguing.

The author makes a very compelling case on the need for better vehicles for dispute resolution — particularly in the no-fault area. He devotes an entire chapter to the court system which the author says is, in many jurisdictions, "tottering under loads which threaten to crush the administration of civil and criminal justice" (p. 73). The answer is not just more courts and more courthouses, but rather better vehicles for dispute resolution. This is one of the best chapters in Bartlett's book. He points out the need to understand the reasons for delay, including the motives of the participants and delay as a cultural phenomenon. Other chapters are devoted to the expense and inefficiency of the legal system, legal ethics, judges (including the selection process and problems of judicial elitism), the cumbersome aspects of law and regulation (including the need for more specificity in remedies), and the debate on clinical aspects of legal education.

The author draws on many apropos quotations. One of the best is in the chapter on Law and Regulation, where Bartlett refers to the "five truths" of Dean Manning:

- (1) "[t]o declare a law is very cheap; to administer or enforce a law is very expensive;
- (2) [t]he secondary costs of a law are often greater than the direct costs;
- (3) [t]he capacity of law to change human behavior is

limited; (4) even where a law may effectively achieve its primary purpose, the side effects may be too great and too negative to warrant its adoption; (5) many problems are not amenable to legal solution at all. [P. 124, footnote omitted].

As I read Bartlett's book, I found myself agreeing with many of his observations, disagreeing with many others, questioning why he omitted other areas of concern, and appreciating the great amount of thought that went into this relatively concise work. Perhaps the best reason for reading *The Law Business: A Tired Monopoly* is given in Bartlett's one page conclusion, where he writes:

[T]he attempt has been to illuminate selected themes, grouped around the almost too simple proposition that the law business is heading in uncharted directions without the benefit of clear-eyed self analysis. . . . Costs are skyrocketing, the machinery is creaking, public outrage is rising sharply. . . . We cling to ancient practices, ignoring changes in the underlying facts which render the existing ways of doing business obsolete. . . . The principal thrust of these remarks has to do with attitude, with our ways of looking at problems. The hope is that we can be induced to approach the issues with an eye to the fact that (i) the law business is a service business; (ii) the players are motivated to maximize their outcomes within the structure of the rules, regardless of the perceived requirements of the public interest; and (iii) the legitimate expectations of the public are that the business perform efficiently, competitively and with some sense of enlightenment. If those points are persuasive, then the methodology of inducing change should become clearer and this exposition successful. [P. 183].

The Partners is an entirely different sort of book. The jacket says that it "is the product of more than two years of investigative reporting by James B. Stewart, Jr., a journalist and lawyer who once practiced at a major corporate law firm in New York City." The firm was Cravath, Swaine & Moore, where Stewart worked as an associate.

Appendix I in the book lists what the author calls "the elite corporate law firms" (p. 366): The New York City law firms of Cravath, Swaine & Moore; Davis, Polk & Wardwell; Debevoise & Plimpton; Donovan, Leisure, Newton & Irvine; Milbank, Tweed, Hadley & McCloy; Shearman & Sterling; Simpson, Thacher & Bartlett; and Sullivan & Cromwell; Kirkland & Ellis of Chicago; and Pillsbury, Madison & Sutro of San Francisco.

Most lawyers who have had contact with these firms as well as other firms in these and other major metropolitan areas would agree that the firms discussed by Stewart are indeed very capable. However, they would disagree with the categorization of "elite" which implies that these are the best and have more "power" than some of the law firms that are not listed. For instance, lawyers with whom I have discussed Stewart's book generally disagree with Stewart's characterization that "Pillsbury, Madison & Sutro is the only law

firm west of the Mississippi which rises truly into the rank of the country's most eminent and powerful law firms" (p. 115). To be sure, Pillsbury, Madison & Sutro is a very fine firm, but there are other firms with an equal (and some West Coast lawyers assert perhaps a greater) degree of "power."

The vehicle that Stewart uses in writing about his group of nine law firms is most intriguing. He takes major litigation or other projects as his center of source material. For instance, Cravath is discussed in the context of the IBM litigation; Donovan, Leisure in the context of the Kodak-Berkey litigation; Debevoise, Plimpton in the context of the financial restructuring of the Chrysler Corporation; and Milbank, Tweed in the context of their representation of the Rockefeller family.

Many practicing attorneys will have had some personal contact with the characters in Stewart's vignettes, and naturally those sections will prove most interesting. For me, personally, the Milbank, Tweed chapter stands out. In 1964, while serving as counsel to the Warren Commission, I worked with John J. McCloy, a member of the Commission whom Stewart calls Milbank's "most illustrious partner" (p. 287). And in 1975, when I served as Executive Director of the Rockefeller Commission on CIA activities, I had daily contact with the Vice President and also contact with a number of people close to the Rockefeller family.

One of the major revelations in Stewart's book is that Nelson Rockefeller's widow — his second wife, Happy — was not represented by her own legal counsel in the probate of Nelson Rockefeller's estate. There were problems of valuation and allocation of properties to the marital trust under the will in a situation where there were children from two different wives of Nelson Rockefeller, with Happy's own children probably being preferred beneficiaries out of the marital trust on Happy's death. Stewart writes with particular reference to the valuation of assets, such as art work, and the allocation of assets to the marital and the residuary trust: "In short, the situation gave rise to a classic conflict of interest. . . . 'Who's to know what these things are really worth,' the Milbank source continues. 'I can tell you that some of the decisions were adverse to Happy'" (p. 322). Of course, there is always the question: Is Stewart's "Milbank source" accurate? One of the inherent problems in Stewart's book, like so many other recent books such as the best seller *The Brethren*, is the failure to identify specific source material to verify accuracy. As a matter of fact, in an author's note in the beginning of his work, Stewart says:

Many of my initial interviews for each chapter were conducted on a not-for-attribution basis. Lawyers were concerned that their identification as sources for my book would adversely affect their careers, even if their quoted comments reflected favorably on their firms. The infor-

mation I gathered from these interviews was used primarily to persuade others to discuss their work with me on an on-the-record basis. My policy was not to use information in the book unless it was confirmed on the record by someone directly involved in the matter. [P. 11].

I can appreciate Stewart's problem, because in getting background material for this review I contacted partners with whom I was personally acquainted in a number of law firms, including several on Stewart's list of nine. Most of these people did not want to talk about Stewart's book on an attribution basis. When I went "off-the-record," the repeated statement was that Stewart was often inaccurate in what he portrayed as facts. This view was also expressed by partners in firms that received relatively "favorable" treatment in Stewart's book.

Sometimes the disagreements with Stewart might arise because of the natural tendency of people, most assuredly including lawyers, to overplay their importance in the course of events. For instance, Stewart's initial chapter is entitled "Iran," and it describes the roles that Shearman & Sterling and Davis, Polk played in representing United States banks that were involved in the final arrangements for the transfer of funds to gain the release of the American hostages in Iran. In a flourish at the end of chapter I, Stewart writes:

Six hours later, the plane carrying the American hostages took off from the Teheran airport. The \$3.7 billion in assets were electronically credited to the accounts of the twelve American banks whose lawyers, in a sense, had just bought the hostages' release. [P. 52].

When I discussed this with one of the principal government officials involved in the hostage crisis, he said that this was, indeed, hyperbole and that although the lawyers played a role, it was inaccurate to claim that they had "bought the hostages' release." That may be factually correct, but I would wager that some of the lawyers involved would adopt Stewart's version of what took place.

Stewart believes that only approximately 3,000 lawyers in the United States "practice in the elite blue chip corporate firms which occupy the pinnacle of the profession. From their plush offices high in skyscrapers in the nation's financial centers, these lawyers survey the rest of the profession with at least a touch of arrogance and disdain" (p. 14).

I have been in many of these offices. Some are plush; some are not so plush. And there are many offices that I have been in that are plusher. I have found some lawyers in these firms to have "a touch of arrogance and disdain," but I believe that this is a small minority — and certainly touches of arrogance are not limited to lawyers in the particular nine law firms that Stewart includes on his list.

To be sure, there are people of outstanding ability in each of these firms. And as a matter of fact, up and down the line, the quali-

ty is generally very high. But there are also many other firms where the quality of personnel is very high. Moreover, from my personal observation, the ultimate factor that determines the pinnacle of the profession is the overall judgment of a lawyer, including areas beyond strictly legal analysis, such as "street smarts" and business acumen. I have seen a lot of very good judgment, and also some very bad judgment, come from partners included in the firms of Stewart's elite group — sometimes costing clients millions or hundreds of millions of dollars. Neither the good nor the bad is limited to the nine law firms on Stewart's list.

On the other hand, for those considering the practice of law in any large firm in a major city, the book does offer a great deal of insight into the nature of the practice, ranging from the treatment of associates and partners to the way that a large corporate client with a huge war chest can overwhelm the opposition through sheer manpower and monetary resources. It is not necessarily that the people are smarter. Rather, it is a question of the relative weight of available resources. "Justice" is a seven letter word. "Victory" is a seven letter word. Where there are tremendous differences in availability of resources, the two often have little else in common.

As we look toward the future and the direction in which the legal profession is headed, Bartlett's book is particularly helpful in covering a wide range of problems that affect our ability to provide justice at an economical price to most Americans. For the person considering whether or not to go to law school, and for the person in law school considering where to locate, Stewart's book is particularly compelling. He vividly shows the internal politics and intense pressures that affect lawyers within the firms. The sacrifices are many on behalf of clients. Rewards can be great, in terms of dollars. But in many respects, money is the cheapest commodity of all, and the price that one pays to rise to what Stewart calls the pinnacle of the profession is very, very high.

Indeed, it is ironic that today when there is more and more talk about the importance of the quality of life, there seems to be a decline in the quality of life in many large city law firms. Yet, they seem to attract people who on the basis of their undergraduate and law school careers are among the most intellectually gifted in the United States. This situation has great ramifications for the individuals involved, as well as for the country's allocation of intellectual resources.

I would recommend both books for thoughtful readers who have an interest in the future of our country in general and the future of the legal profession in particular. And as one reads both books, it may be helpful to keep in mind the public's increasing concerns about the legal profession and the stranglehold of regulation, as il-

illustrated by the concluding paragraph of a lead editorial in the *Wall Street Journal* captioned "Terminal Proceduritis":

As a society we are strangling ourselves in procedural debates. Partly this results from people not wanting to take responsibility for tough decisions. Partly it results from people wanting to obtain certain substantive decisions by procedural subterfuge. Partly it results from the habits and class interests of lawyers, both in private practice and in Congress. What is to be done about all of this we do not know, but maybe we should start by closing the law schools.¹

1. *Wall St. J.*, Sept. 21, 1983, at 30, col. 1 (midwest ed.).