PARTNER, SHMARTNER!
EEOC V. SIDLEY AUSTIN BROWN & WOOD

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What's in a name? For partners in today's mega law firms, apparently not much. Or at least that is what Judge Richard Posner held in a 2002 decision that continues to send shock waves through the plush corridors of America's elite law firms.[1] With characteristic rigor and wit, Judge Posner's opinion in *EEOC v. Sidley Austin Brown & Wood*[2] skewers one of the legal profession's most sacred cows: that law firm partners are Athenian democrats who enjoy all of the rights and privileges associated with ruling and being ruled. Refusing to rely on either formal titles or state partnership law, Judge Posner challenged law firms to prove that those who wear the partner label actually continue to function as such. In so doing, Judge Posner deftly exposed the biggest challenge facing the elite corporate bar: how to operate like a business without actually turning into one.

For the reasons set out below, firms that fail to untie this Gordian knot risk far more than simply having to defend themselves against a flood of discrimination lawsuits filed by aging baby boomers refusing to go gently into that good night of early retirement as soon as their billings fall below expectations. Instead, they risk nothing short of fulfilling Judge Posner's prediction — expressed almost a decade before his opinion in *Sidley Austin* — that law will soon become "largely an unregulated service like business management or retail selling" with the concomitant death of "the legal profession's flattering self-conception of what it means to do, to be, to live in, 'the law.'"[3]

I. FROM "ONE FOR ALL AND ALL FOR ONE" TO "SHOW ME THE MONEY!"

By most objective measures, in the late 1990s the Chicago law firm of Sidley & Austin was on top of the world. With over 900 lawyers,

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[1] *See* Julie Creswell & Karen Donovan, *Happy Birthday. Vacate Your Office*, N.Y. TIMES, Dec. 8, 2006, at C1.

[2] 315 F.3d 696 (7th Cir. 2002).

[3] RICHARD A. POSNER, OVERCOMING LAW 34 (1995).

the 134-year-old powerhouse was one of the nation's largest law firms.[4] It was also one of the most successful. Gross revenues ran into the hundreds of millions of dollars. Profits per partner, for the 400 lawyers fortunate enough to have achieved this traditionally coveted prize, exceeded $575,000 per year.[5]

Not everyone, however, was satisfied with these results. In 1998, a new leadership team took control of the firm with a mandate to drive Sidley to even greater heights. For this new cadre, the firm's overall increase in size and profitability was less important than its failure to match the even better performance of some of its peers. Sidley's 1998 revenues were sufficient to make it the eighth highest-grossing law firm in the country, but that was a relative decline from seventh highest the year before. Profits per partner, already below what one might have expected given the firm's gross revenues, had taken an even larger relative tumble, falling from forty-fourth best in 1997 to a mere forty-eighth place in 1998. In the words of Thomas Cole, the newly elected chair of Sidley's executive committee, these changes "could ultimately affect future retention and recruiting and possibly even the way prospective clients would assess the firm."[6]

To avert these dire consequences, Cole and his team developed a plan to improve the firm's financial performance and to assure its long-term competitiveness. Among various other measures, Cole's plan contained a simple and direct proposal that would immediately improve the firm's profits per partner: relieving thirty-two underperforming partners of their equity in the firm and designating them as "senior counsel" or "counsel."[7] The plan also called for changing the firm's retirement policy from one in which partners would not be required to retire until age sixty-five to a discretionary standard under which Sidley's executive committee would determine when partners between the ages of sixty and sixty-five would have to retire.[8]

The firm's proposal to change the status of nearly one-tenth of its partners apparently invoked little shock or indignation when it was first announced. Given developments in the management and structure of large law firms over the last few decades, it is not hard to see why. "De-equitization," as the practice has formally come to be called (or being "pushed off the edge of the iceberg," in the gallows humor employed by many law firm partners these days), had by the 1990s become an increasingly common, although rarely expressly acknowledged, reality in many law firms. Indeed, many of Sidley's competi-

[4] Amanda Ripley, *Seniority Complex*, AM. LAW., June 2000, at 82, 84.

[5] *Id.* at 84, 112.

[6] *Id.* at 84 (quoting Thomas Cole, chair of the Sidley & Austin executive committee).

[7] *See Sidley Austin*, 315 F.3d at 698.

[8] *See* Ripley, *supra* note 4, at 84.

tors had gone even further, creating a second tier of "income" or "non-equity" partners (or "artners" — for partners without the "p" for profit — in the vernacular) with little or no right to share in the firm's financial success or governance.[9] Judged by these standards, Sidley's decision to demote partners who the firm determined were no longer pulling their weight undoubtedly seemed to many in the firm like a small and inevitable price to pay to "adapt to the changes" in the marketplace.[10]

II. MAKING A FEDERAL CASE OUT OF IT

Not surprisingly, some of those being demoted did not see it that way. What is surprising is that the Equal Employment Opportunity Commission agreed. Acting on the basis of published news accounts, the EEOC opened a formal inquiry in 2000 to determine whether Sidley's actions violated the federal Age Discrimination in Employment Act[11] (ADEA). Pursuant to this investigation, the EEOC served the firm with a subpoena duces tecum requesting all information relevant to Sidley's decision to demote the thirty-two partners, all but two of whom were over forty years of age, with most in their late fifties or early sixties. In addition, the Commission demanded to see a broad array of information about Sidley's policies and practices regarding the compensation, evaluation, and termination of partners.[12]

Sidley responded by producing a limited number of documents demonstrating that the firm was a true partnership under Illinois law and that each of the thirty-two individuals in question were members of the partnership at the time of their demotion. Consequently, the firm argued that it had no legal obligation to comply with the rest of the EEOC's subpoena because the ADEA only applies to "employees," and as co-owners of the business, partners are employers, not employees.[13]

The district court disagreed, albeit reluctantly. After conceding that the weight of precedent supported the firm's position, Judge Lefkow nevertheless ordered Sidley to comply with the subpoena since she could not conclude "with utter confidence" that partners could not also be employees for antidiscrimination law purposes.[14]

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[9] *See* JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 288–95 (2005).

[10] Ripley, *supra* note 4, at 112.

[11] 29 U.S.C. §§ 621–634 (2000).

[12] *See* EEOC v. Sidley & Austin, No. 01-C-9635, 2002 WL 206485, at *4 (N.D. Ill. Feb. 11, 2002).

[13] *Id.* at *1.

[14] *Id.* at *3.

III. ENTER JUDGE POSNER

Writing for the Seventh Circuit on appeal,[15] Judge Posner affirmed the district court's determination that there was insufficient evidence in the record to conclude that Sidley was entitled to judgment as a matter of law. Given, however, that the firm had "respectable arguments on its side," Judge Posner allowed the firm to refrain from producing documents relating to the merits of the individual demotion decisions until after the district court reached a preliminary judgment about whether these individuals were indeed "employees" covered by the Act.[16]

Although Judge Posner's order was thus technically more limited than the district judge's, his opinion sent a strong signal that he found Sidley's arguments substantially less convincing than Judge Lefkow had. After discarding the ADEA's definition of "employee" as "unhelpful[],"[17] Judge Posner conceded that the cases interpreting the Act's application to partners and other similar individuals were unclear with respect to whether courts should follow a formalist approach, giving primacy to the affected individual's title, or a functionalist analysis, examining the person's actual status and power over the conduct of the firm.[18] But the better approach, Judge Posner asserted, rejects "the tyranny of labels."[19] And once one looked beyond formal labels, the Judge opined, Sidley was in trouble:

> The firm is controlled by a self-perpetuating executive committee. Partners who are not members of the committee have some powers delegated to them by it with respect to the hiring, firing, promotion, and compensation of their subordinates, but so far as their own status is concerned they are at the committee's mercy. It can fire them, promote them, demote them (as it did to the 32), raise their pay, lower their pay, and so forth. The only firm-wide issue on which all partners have voted in the last quarter century was the merger with Brown & Wood and that vote took place after the EEOC began its investigation.[20]

Given this reality, Judge Posner concluded, the firm's arguments for why the Sidley 32 were not just "partners" but "employers" were weak at best.

To be sure, Judge Posner conceded, Justice Powell in his concurring opinion in *Hishon v. King & Spalding*[21] cautioned lower courts not to

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15 The two other panel members were Judges Diane P. Wood and Frank Easterbrook, both of whom, like Judge Posner, teach at the University of Chicago Law School.

16 *Sidley Austin*, 315 F.3d at 707.

17 *Id.* at 705. The ADEA's definition of employee, "an individual employed by any employer," 29 U.S.C. § 630(f) (2000), provides little clarity.

18 *See Sidley Austin*, 315 F.3d at 705–06.

19 *Id.* at 705.

20 *Id.* at 699.

21 467 U.S. 69 (1984).

interpret the Court's decision in that case, which allowed associates turned down for partnership to sue under antidiscrimination laws, as "extending Title VII to the management of a law firm by its partners."[22] But this injunction, Judge Posner emphasized, was premised on Justice Powell's characterization of law firm partners as participants in a "shared enterprise" in which "decisions important to the partnership normally will be made by common agreement or consent among the partners" — hardly the case with respect to the Sidley 32.[23] Nor could Sidley get any mileage out of the fact that the partnership agreement required the firm's executive committee to exercise its absolute power for the good of the firm. To hold otherwise, the Judge quipped, "would be like saying that if the people elect a person to be dictator for life, the government is a democracy rather than a dictatorship."[24]

Finally, Judge Posner made short shrift of what he acknowledged to be the most "partneresque" aspect of the relationship between the thirty-two deposed partners and Sidley: their personal liability for the firm's debts.[25] If, Judge Posner reasoned, Congress believed that "partners" should be treated like "employers" because partnership law and other perquisites of their status provide them with sufficient power to protect themselves without the assistance of federal antidiscrimination law, then "exposure to liability can hardly be decisive."[26] Turning the knife one final time, Judge Posner exclaimed: "These 32 partners were not empowered by virtue of bearing large potential liabilities!"[27] To the contrary, they were "defenseless" with "no power over their fate."[28]

In the end, Judge Posner asserted that the best (and perhaps the only real) argument for Sidley's position was a prudential one. Picking up on a theme articulated in a sharply worded concurring opinion by his long-time friend and collaborator Judge Frank Easterbrook,[29] Judge Posner allowed that the "functional test" of examining whether a given partner is in fact just an employee with a fancy title may be "too uncertain to enable law firms and other partnerships to determine in advance their exposure to discrimination suits."[30] But in the absence of such a policy determination — a determination that, unlike Judge Easterbrook, Judge Posner did not find embedded in the relevant

[22] *Sidley Austin*, 315 F.3d at 705–06 (quoting *Hishon*, 467 U.S. at 79 (Powell, J., concurring)).
[23] *Id.* at 706 (quoting *Hishon*, 467 U.S. at 80 (Powell, J., concurring)).
[24] *Id.* at 703.
[25] *Id.*
[26] *Id.* at 704.
[27] *Id.*
[28] *Id.*
[29] *See id.* at 708 (Easterbrook, J., concurring in part and concurring in the judgment).
[30] *Id.* at 707 (majority opinion).

precedents — Judge Posner left little doubt that, as far as he was concerned, when a law firm transforms itself into a "de facto corporation," it may very well also transform many of the firm's "partners" into "employees."[31]

IV. Opening the Floodgates

In the months following Judge Posner's 2002 decision, many commentators predicted that the case would generate a flood of lawsuits by disgruntled partners. As one employment lawyer put it: "Plaintiffs lawyers will have a feast on [Posner's opinion]. It's like ringing the dinner bell."[32] Both subsequent legal developments and broader demographic and organizational trends in the legal profession appear to support this prediction.

Legal developments since 2002, both in the Sidley case and more generally, certainly have made it easier for disgruntled partners to sue. After months of unsuccessful conciliation talks, the EEOC formally sued Sidley under the ADEA in 2005.[33] Although the district court has yet to rule on whether the deposed partners are in fact mere employees, any hope that Sidley might have had that it could escape Judge Posner's functional approach to this question was dashed by the Supreme Court's 2003 decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*.[34] In *Clackamas*, the Court held that "the master's control over the servant" must be the touchstone for determining when a given individual should be considered an employee.[35] Courts can decide this question, the majority concluded, only by conducting a searching inquiry into actual working conditions and responsibilities.[36] Given this standard, firms will have a hard time convincing courts to dismiss these cases prior to discovery.[37]

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[31] *Id.* at 705.

[32] Nathan Koppel, *Sidley's Hired Help*, AM. LAW., Dec. 2002, at 18, 18 (alteration in original) (quoting Dallas employment lawyer Michael Maslanka).

[33] *See* EEOC v. Sidley Austin Brown & Wood LLP, 406 F. Supp. 2d 991, 992 (N.D. Ill. 2005).

[34] 538 U.S. 440 (2003).

[35] *Id.* at 448.

[36] *See id.* at 449–50 (instructing courts to examine six factors, including whether the organization can hire or fire the individual, whether the organization supervises the individual's work, and how much influence the individual has over the organization). The Court emphasized that even these six factors are not exhaustive, stressing that "[t]he answer to whether a shareholder-director is an employee . . . cannot be decided in every case by a 'shorthand formula or magic phrase.'" *Id.* at 450 n.10 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)).

[37] Two reported decisions after *Sidley Austin* involving law firms illustrate the point. In *Panepucci v. Honigman Miller Schwartz & Cohn, LLP*, 408 F. Supp. 2d 374 (E.D. Mich. 2005), the trial court refused to grant Honigman's motion to dismiss a sex discrimination claim by one of the firm's partners even though the plaintiff had some equity in the firm, could participate in firm decisionmaking, and could be terminated only by a vote of the other partners. *Id.* at 376–77. The facts were even clearer in *Solon v. Kaplan*, 398 F.3d 629 (7th Cir. 2005). There, the plaintiff was

At the same time, the legal profession's changing demographics ensure a rapidly expanding pool of partners eligible to take advantage of the opening created by *Clackamas*'s functional standard and Judge Posner's opinion in *Sidley Austin*. It is no accident that *Sidley Austin* involves allegations of age discrimination. The legal profession roughly doubled in size from 1960 to 1985 and again from 1985 to 2000.[38] This large cohort of aging boomers is increasingly finding itself, in Professor Marc Galanter's evocative phrase, "old and in the way" in today's large law firms.[39] Notwithstanding their growing share of the profession as a whole, those over fifty-five are actually *decreasing* as a percentage of lawyers in large law firms. Although the reasons for this trend are undoubtedly complex, few would disagree with Professor Galanter that a major cause is that older lawyers are being eased — or pushed — out of firms at an ever increasing rate. It should not be surprising if many of those who find themselves unceremoniously dumped in this fashion take advantage of the opening created by Judge Posner's opinion to challenge their demotion or termination under the ADEA.

Nor are aging baby boomers the only ones who are likely to make use of Judge Posner's invitation. Notwithstanding the substantial progress that has been made in integrating female lawyers into large law firms since the 1970s, study after study continues to find that women face significant obstacles that make it more difficult for them to succeed in these institutions — obstacles that persist once they become partners.[40] Consequently, women who are partners are more likely to face "de-equitization" or other similar adverse employment actions at the hands of managers anxious to boost the firm's standing in the *American Lawyer*'s profits-per-partner ratings. And when they do, some will undoubtedly claim gender discrimination.[41] One can tell a similar story with regard to the smaller, but nevertheless significant,

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the former managing partner of a four-lawyer law firm, who "by virtue of his voting rights, substantially controlled the direction of the firm, his employment and compensation, and the hiring, firing, and compensation of others." *Id.* at 634. Yet even this case, as the *Panepucci* court noted, was decided in the defendant's favor on summary judgment only after the plaintiff had been given the opportunity to conduct discovery. *See Panepucci*, 408 F. Supp. 2d at 377.

[38] *See* CLAIRE N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 1 (2004).

[39] Marc Galanter, Address, *"Old and In the Way": The Coming Demographic Transformation of the Legal Profession and its Implication for the Provision of Legal Services*, 1999 WIS. L. REV. 1081.

[40] *See, e.g.*, Fiona M. Kay & John Hagan, *Building Trust: Social Capital, Distributive Justice, and Loyalty to the Firm*, 28 LAW & SOC. INQUIRY 483 (2003); Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923 (2002).

[41] *See, e.g.*, *Panepucci*, 408 F. Supp. 2d. at 375.

number of minority partners who may find themselves facing the same fate.[42]

All of this, of course, only applies to those "partners" who retain traditional trappings of ownership such as unlimited liability and a share of the profits. But senior lawyers who satisfy even these formal criteria are rapidly becoming a scarce breed in many law firms. In the last ten years, there has been a dramatic shift toward "two-tier" partnerships among the nation's largest law firms.[43] Although courts have yet to rule on the question directly, "artners" are unlikely to be considered "employers" under *Clackamas*.[44] Similarly, a growing number of elite firms have recently switched from being "partnerships" to being "professional corporations" or other similar organizational forms that shield senior lawyers from unlimited liability for the mistakes of other partners.[45] *Clackamas* makes clear that courts must examine these new organizational forms functionally to see whether partners remain employers. When doing so, however, one of the six factors the *Clackamas* Court expressly identified (and the one Judge Posner cited as the most "partneresque"[46]) — namely, whether the partner shares in the profits, losses, and liabilities of the organization — will, with respect to losses and liabilities, largely be absent. If one takes note of reforms currently being proposed in England that would allow law firms to incorporate and to have their shares publicly traded,[47] it is hard to escape the conclusion that most senior lawyers in large law firms (whether or not they carry the title "partner") will be covered by antidiscrimination law before too long.

Whether this coverage will produce the flood of litigation some have predicted, however, depends upon how firms react to this new reality. As an initial matter, many firms are likely to respond by requiring partners to submit any potential discrimination claims to manda-

42 *See* David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15 (1999).

43 *See* William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691, 1706–09 (2006) (documenting the growth in the number of firms with two-tier partnerships); *see also* Ryon Lancaster & Brian Uzzi, *From Colleague to Employee: Determinants of Changing Career Governance Structures in Elite Law Firms*, *in* CORPORATE GOVERNANCE AND FIRM ORGANIZATION 349, 354 (Anna Grandori ed., 2004) (documenting the growth in the number of senior counsel in large U.S. law firms).

44 *See* Lauren Winters, *Partners Without Power: Protecting Law Firm Partners from Discrimination*, 39 U.S.F. L. REV. 413, 439–40 (2005) (arguing that non-equity partners can sue under the control test).

45 *See* Kimberly D. Krawiec, *Organizational Form as Status and Signal*, 40 WAKE FOREST L. REV. 977, 979–80 (2005) (documenting the expansion of organizational forms for professional service firms).

46 *Sidley Austin*, 315 F.3d at 703.

47 *See* DEP'T FOR CONSTITUTIONAL AFFAIRS, THE FUTURE OF LEGAL SERVICES: PUTTING CONSUMERS FIRST 39–41 (2005), *available at* http://www.dca.gov.uk/legalsys/folwp.pdf.

tory arbitration. For better or worse, courts have now made clear that employers can require employees to arbitrate discrimination claims as a condition of employment.[48] Given the sophistication of law firm partners, courts will likely have little problem enforcing compulsory arbitration in this context.[49]

Relying on an arbitration agreement, of course, will only get a firm so far. It will still have to convince an arbitrator that it did not discriminate on the basis of gender, age, or any other statutorily protected category. Moreover, as the Seventh Circuit held in the latest round of the *Sidley Austin* case,[50] the fact that an individual partner is precluded from suing will often not prevent the EEOC from bringing its own independent action.[51] Consequently, in order to fully protect itself, a firm will have to develop clear and objective standards for determining when it is permissible to de-equitize a partner on the basis of his or her performance.

And therein lies the rub. Any effort by firms to create clearer and more objective performance standards would be welcome news, especially to women and minority lawyers who often find themselves disadvantaged by the unwritten rules that still govern most firms. But the standards that will be easiest to articulate and verify will all be about money: How much revenue has a partner brought in? How many hours has he or she billed? How many clients is the partner responsible for? To be sure, firms will continue to pay lip service to factors such as institutional citizenship and public service. At the end of the day, however, rigorously holding partners to rigid standards on billing and revenue generation is likely to seem the best way both to protect the firm from discrimination claims and to ensure its continued survival in today's cutthroat global marketplace. But the more firms like Sidley ruthlessly pursue the bottom line, the more likely they will be viewed, in Judge Posner's prescient words, as "de facto corporations" undeserving of the special deference that law firms have traditionally received on the basis of their putative status as professional entities. Finding themselves subject to antidiscrimination law is just one of the many adverse consequences that firms will invite by sliding headfirst into this conundrum.

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[48] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (holding that ADEA claims are subject to binding arbitration under a valid agreement); *see also* Steven S. Poindexter, *Pre-Dispute Mandatory Arbitration Agreements and Title VII: Promoting Efficiency While Protecting Employee Rights*, 2003 J. DISP. RESOL. 301, 310 (reporting that most courts have held that Title VII claims are subject to mandatory arbitration agreements).

[49] *See, e.g.*, Panepucci v. Honigman Miller Schwartz & Cohn, LLP, 408 F. Supp. 2d 374, 378–80 (E.D. Mich. 2005).

[50] EEOC v. Sidley Austin LLP, 437 F.3d 695 (7th Cir. 2006).

[51] *See id.* at 696.

V. THE PARADOX OF PROFESSIONAL DISTINCTIVENESS

Since the founding of the republic, lawyers have sought to persuade legislators, administrative officials, and even clients that they should defer any and all questions regarding the standards of professional conduct to the profession itself.[52] For more than a century, bar leaders carved out a wide zone of formal (and in many ways de facto) independence from public regulation and private oversight by successfully deploying a now-familiar argument: law is an autonomous discipline, and its practitioners must be "independent" to fulfill their role as defenders of liberty and justice in a democratic society.

In recent years, however, this autonomy argument has taken a significant hit. Although the legal profession has largely been able to fend off regulation by the state (with Sarbanes-Oxley being the most notable exception), private clients — especially corporations — are increasingly demanding greater control over lawyer conduct.

Paradoxically, firms have responded to this challenge to their autonomy by desperately trying to shed their traditional distinctiveness from business. The prevailing wisdom is that only "business-like" firms that successfully organize themselves in ways that parallel their business clients will survive in today's competitive marketplace. But the more closely large law firms resemble in structure and conduct the other targets of federal and state regulatory jurisdiction, the less credible any claim of professional distinctiveness will be. Without such a claim, it is difficult to see how the profession will be able to maintain many of the perquisites that have traditionally given lawyers their special place in the world.

Ironically, this effect may be just what Judge Posner intended. After all, the legal result in *Sidley Austin* — a messy case-by-case test that is almost certain to produce at least some costly litigation — hardly seems like the kind of result that Judge Posner would favor. While functionalism has been a cornerstone of Judge Posner's thinking throughout his quarter century on the bench, he has also been a champion of predictability and efficiency.[53] The rule he propounded in *Sidley Austin*, as Judge Easterbrook caustically noted in his concurrence,

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[52] *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 802 & n.10 (1992).

[53] Indeed, in a case involving yet another spin on the "when is a partner not a partner" theme decided two years after *Sidley Austin*, Judge Posner rejected a functional test of whether a professional corporation should be treated like a partnership for purposes of determining its citizenship in a suit under federal diversity jurisdiction. He instead opted for a formal bright-line test, treating the corporate form as determinative to "avoid[] the need for judges to entangle themselves in functional inquiries into the differences among corporations." Hogland v. Sandberg, Phoenix & Von Gontard, P.C., 385 F.3d 737, 743 (7th Cir. 2004). To further compound the irony, Judge Easterbrook also wrote a concurring opinion in *Hogland* — this time ridiculing Judge Posner for adopting a formal rule without principled support. *See id.* at 747 (Easterbrook, J., concurring).

is certain to frustrate both goals. Although one can chalk up this inconsistency to Judge Posner's University of Chicago–instilled felicity to precedent — he was, after all, right about which way the doctrine was headed — it is hard not to see a more satisfying explanation in another part of Judge Posner's prolific corpus.

In 1995, Judge Posner — this time with his scholarly hat on — published a book with the provocative title *Overcoming Law*.[54] In a chapter entitled "The Material Basis of Jurisprudence," Judge Posner analogized the legal profession to a medieval guild whose members seek, through a deft combination of market control and "mystique" about the screening and indoctrination of new members and the maintenance of high standards of quality, to inflate the price of their services.[55] But like its medieval counterpart, whose cartel was eventually destroyed by the onset of mass production, the legal profession's ability to maintain its autonomy is rapidly being undermined by competition, specialization, and bureaucratization.

Judge Posner makes no bones about how he feels about this transition. Although he concedes that guild-like restrictions can improve quality (primarily by boosting the income of cartel members and therefore attracting better entrants), the damage caused by the legal profession's rejection of the fundamental "commercial values of competition, innovation, consumer sovereignty, and the deliberate pursuit of profit" are ultimately far more harmful to the general welfare.[56] He therefore looks forward to the day when "the legal profession opens up to diverse viewpoints and backgrounds" — such as those of "bankers, accountants, statisticians, economists, computer engineers, and management consultants"[57] — and the "traditional preoccupations that go by the name of jurisprudence will seem and be increasingly irrelevant."[58] Tellingly, one of the primary factors Judge Posner points to as leading us to this land of deprofessionalized milk and honey is the increasing specialization in, and competition among, large law firms. The fact that along the way there will be more cases of "firms firing associates and even partners" and a general reduction in job satisfaction as "lawyers feel like hucksters rather than the proud professionals they once were" is simply part of the necessary price that society must pay to rid itself of the inefficiencies caused by the current legal cartel.[59]

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[54] POSNER, *supra* note 3.

[55] *Id.* at 39–44.

[56] *Id.* at 56.

[57] *Id.* at 79. As an aside, we can get some sense of Judge Posner's view of the more typical meaning of "diversity" by his offhand — and, for a self-proclaimed man of science, completely unsupported — remark earlier in this chapter that "[t]he *Harvard Law Review*, with its epicycles of affirmative action, is on the way to becoming a laughing stock." *Id.* at 77.

[58] *Id.* at 79.

[59] *Id.* at 67.

I must confess to having some sympathy for Judge Posner's view. Far too many trees have been killed in defense of an understanding of professionalism that treats the well-being of lawyers as the primary good to be protected.[60] And, as Professor Richard Abel has so ably demonstrated, many if not most of the restrictions that the profession has erected against the unauthorized practice of law in the name of the public interest are far more protective of lawyers' income and status than they are of the public.[61]

Nevertheless, in reducing the connection between lawyers as "proud professionals" and law firms as the producers of high-quality services for clients and the public to nothing more than a byproduct of a market inefficiency, Judge Posner underplays the dangers posed by the market norms he celebrates. Regardless of one's views about whether lawyers should be covered by generally applicable regulatory norms, it is indisputable that lawyers play a central role in many important regulatory schemes. As Professor Reinier Kraakman argued two decades ago, lawyers are important "gatekeepers" who, by refusing to provide necessary assistance, can detect and deter wrongdoing far more efficiently than ex post enforcement.[62] But as Professor Ronald Gilson demonstrates, the ability of lawyers in large law firms to play this role is threatened by the growing competitiveness of the market for corporate legal services and the resulting reduction in information asymmetry between corporations and their outside counsel.[63] Although Professor Gilson rightly concludes that much of this "devolution" in the independence of lawyers is inevitable — and arguably even desirable[64] — this fact simply reinforces the need to find alternative ways of persuading lawyers to continue to perform their gatekeeping function. It is hard to see why lawyers will continue to play this role, however, if they are not encouraged to cultivate a sense of professional identity that stands apart from their economic self-interest.[65] Anyone who doubts this conclusion need only consult the laundry list of once respectable professional service firms whose whole-hearted embrace of

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[60] Professor Anthony Kronman's otherwise brilliant and provocative book *The Lost Lawyer* is perhaps the most prominent recent example. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993). For my criticism of Kronman on this ground, see David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 472 (1994) (book review).

[61] *See* RICHARD L. ABEL, AMERICAN LAWYERS 112–26 (1989) (discussing efforts by the American bar in response to encroachments by nonlawyers on lawyers' practice monopolies).

[62] *See* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 868–71 (1984).

[63] *See* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 901–03 (1990).

[64] *See id.*

[65] *See* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1210–16 (2003).

their role as self-interested market actors led them to turn a blind eye to the outlandish misdeeds of Enron, WorldCom, and other corporate miscreants.[66]

Nor are these issues unrelated to the question of the ability of large law firms to continue to attract talented young people to join these institutions — and to encourage them to stay once they have arrived. If junior lawyers become convinced that partners are nothing more than glorified associates dressed up in Paul Stuart suits, then why should they slog through the eight to ten years of grueling work that it now takes to reach this once-exalted status? The obvious answer, of course, is money, but recent history makes clear that this can only be a temporary fix. Like it or not — and they clearly do not — law firms have largely been unable to escape the strictures of hourly billing, except in the direction of being forced to discount their standard hourly rates. As a result, no matter how high they raise starting salaries, or for that matter, drive up profits-per-partner, firms will never be able to compete on compensation with investment banks — let alone hedge funds — which set their fees as a percentage of the size of each deal.

Moreover, even if firms could compete on compensation, they still risk losing something vital by reducing partnership to nothing more than a smart return on investment. In a clever article analyzing Judge Posner's opinion in *Sidley Austin*, Professors Leonard Bierman and Rafael Gely argue that ordinary partners should be covered by the ADEA as a means of enforcing the implicit promise of long-term financial rewards that firms make to junior lawyers to induce them to invest in firm-specific skills at below-market wages.[67] But this formulation begs the question of what constitutes a fair return on that investment. Most of the Sidley 32 had been partners for more than twenty years. During that time, their incomes had risen to heights that none of them had ever dreamed of while they toiled as associates. Although few would go as far as one law firm consultant did in stating that partners who do not generate significant new business are "not doing anything for the firm,"[68] framing the issue of partner status solely in terms of an economic quid pro quo invites just this kind of analysis.

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[66] *See* JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 15–47 (2006) (detailing the roles of professionals, the would-be gatekeepers, in the Enron and WorldCom scandals).

[67] *See* Leonard Bierman & Rafael Gely, *So, You Want To Be a Partner at Sidley & Austin?*, 40 HOUS. L. REV. 969, 986–93 (2003). Professors Bierman and Gely expressly build their thesis on the pioneering work of my former colleague — and Judge Posner's occasional collaborator — Professor Christine Jolls. *See* Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813 (1996).

[68] Jeff Blumenthal, *On the Distasteful Medicine of De-Equitization*, LEGAL INTELLIGENCER, Dec. 3, 2002, at 1 (quoting Tom Clay of the consulting firm Altman Weil).

To move beyond this trap, it is necessary to articulate a vision of what it means to be a partner in a major law firm that acknowledges, but ultimately transcends, both partner self-interest and the economic value that these senior lawyers must bring to their firms. Articulating this kind of vision is particularly crucial if firms hope to continue to attract and retain top talent. In the not-so-distant past, elite firms had a message that was both credible and attractive as to why the best and the brightest young people entering the practice of law should want to spend their careers in these institutions. In addition to a satisfying (although by no means princely) income, law firms credibly promised those who joined them a set of professional rewards, including interesting work, good training, increasing responsibility, opportunities for public service, and the respect of their peers. Today, this basket of goods has been largely reduced to a single reward: money. And, as evidenced by firms' growing anxiety over associate attrition — particularly over those who leave for the perceived greater satisfaction of public service, greater stability of in-house legal departments, or greater financial rewards of investment banks and hedge funds — money is proving inadequate to the task.[69]

Formulating a credible and attractive professional vision for the future of large law firms (and for the legal profession as a whole) is obviously a large and difficult task — and one that the word limit on this tribute thankfully allows me to defer. With characteristic brilliance, Judge Posner has effectively challenged those of us who continue to believe in the value of law as an autonomous profession — albeit one that must respond far better than it has in the past to the demands of an increasingly competitive marketplace — to come up with the goods. Law firms and legal academics alike ignore his trenchant critique at their peril.

[69] *See* Marie Beaudette, *Associates Giving Up on Partnership*, LEGAL TIMES, Sept. 29, 2003, at 1 (reporting that associates often take firm jobs after law school to pay off debt and then leave before making partner to pursue other interests); Leigh Jones, *Law Firms Mull the "Gen Y" Equation*, NAT'L L.J., Feb. 28, 2005, at 1 (noting that young associates seek more time for their personal lives than previous generations of attorneys did).