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Beyond the Caricature: The Benefits and Challenges of Large-Firm Practice

Mary A. McLaughlin

I. INTRODUCTION

I am the arch-villain of Professor Schiltz's article—not just a partner at a big firm, but the Hiring Partner. Because I have spent part of my career in government service and teaching, I may be uniquely positioned to react to Professor Schiltz's article. After getting out of law school in 1976, I clerked for a federal judge for a year and then went to a big firm in Washington, D.C. In 1980, I became an Assistant United States Attorney, working as a criminal prosecutor for three-and-a-half years. I then went to Vanderbilt Law School where for two years I taught criminal law, criminal constitutional law, evidence, and antitrust. In 1986, I came to Dechert Price & Rhoads where I have been ever since, except for four months in the fall of 1995 during which I acted as Chief Counsel to the Senate Judiciary Subcommittee that conducted the Ruby Ridge hearings. While at Dechert, I have done a lot of high impact *pro bono* litigation. Because I have acted as co-counsel in these cases with various public interest organizations, I have first hand knowledge of how these organizations operate as well. Finally, for the last eight years, I have been on my firm's Hiring Committee and for the last two years the Chair of that committee.

I am concerned that, in an apparent effort to paint the darkest possible picture of life at a big firm, Professor Schiltz has overstated the minuses and understated the pluses of working for a big firm. Moreover, he has blamed the big firm for an imbalance between work and the rest of one's life when the real culprit (if there is one) is an individual's drives and needs—traits that are by no means restricted to large-firm lawyers. Professor Schiltz's position is especially dangerous because he may influence law students not to go to a big firm when a big firm may be the best place for them to start—if not to fin-

ish—their law careers. I firmly believe that a first rate big firm is the best place for a new lawyer to apprentice—to learn how to be a lawyer. Big firms also present the best opportunity to do sophisticated, cutting-edge, intellectually challenging work. You may have been following the Microsoft trial that has dominated the news over the last few months. The government is represented in that case by David Boies, who was up until 1997 a partner at Cravath, Swaine & Moore—a big firm—and now a partner in a small firm he started. Microsoft is represented by Sullivan & Cromwell—a big firm. If this case represents the kind of practice to which you aspire, go to a big firm. There are few other places that can give you the chance to do this kind of work.

Professor Schiltz has done a good job collecting the studies, surveys, reports, and books written over the last ten years on the state of law practice in the United States. It certainly paints a troublesome picture of our profession. Those materials show an increased dissatisfaction among lawyers with their careers. Mental health indicators are not good. All lawyers—not only partners at big firms—need to confront these statistics and surveys and ask themselves what changes we can make in the legal system or in the way we practice so that we can all lead happy, fulfilling lives as we practice our profession. To blame these problems on the alleged “greed” of big-firm partners, however, fails to recognize the complexity of the issues.

II. THE CARICATURE

Before discussing why I think a big firm is a good place for talented law students who want to do sophisticated legal work, I want to comment on several assertions of Professor Schiltz that do not comport with my experience. I will then end with some observations about the obstacles to lawyers living happy, healthy lives. But I see many of these obstacles as present for all lawyers—not just big-firm lawyers.

A. Hours

Professor Schiltz’s message to law students is that you will have to bill 2000 to 2500 hours per year if you go to a big firm.¹ This

1. See Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 892-93 (1999).

statistic is misleading because it includes New York City law firms. If you take out New York City law firms, the average and median for associate hours at big firms is 1800 to 1850 hours.² My experience is that lawyers in small- and medium-sized firms work just as hard. Government lawyers also work hard. I dare say that all the government lawyers who are backing up David Boies in the Microsoft trial are working very long hours, seven days a week. I worked six days a week as an Assistant United States Attorney and seven days a week when I was doing the Ruby Ridge hearings. I will have some further thoughts on hours worked at the end of this Response.

B. Ethics

Perhaps the most unfair and inaccurate assertion made by Professor Schiltz is that big-firm lawyers regularly act unethically. I, too, have heard the stories about lawyers billing twenty-five hours in a day. I, too, abhor such conduct. I do not believe that a significant number of big-firm lawyers pad their hours. In fact, I know that many lawyers do not bill all the time they have worked either because they feel they have been inefficient or because they have not kept as good a record of their time as they should.³ I especially take exception to the statement that a young lawyer will be tempted very quickly to throw away a document harmful to her client. I know that there are situations where lawyers—even big-firm lawyers—have either destroyed or not produced non-privileged documents responsive to a discovery request. I have no doubt that such are rare occasions. The standard practice in finding a bad document is to call the client immediately, toll her about it, and discuss the significance of the document to the case. Destroying the document is not an option that the vast majority of big-firm lawyers would even consider. The kind of blatant, unethical conduct that Professor Schiltz talks about would

2. See *By the Numbers*, ASSOCIATE, Winter 1999, at 20. The chart lists average hours worked (including billable and nonbillable hours) at various legal employers around the country. Although several New York firms are at 3000 hours, law firms in other cities are not close to that. Interestingly, government and public interest lawyers average hours comparable to the non-New York big firms: Atlanta Legal Aid—2000; Bronx County District Attorney—2000; Exxon Company, Houston—2500; Federal Judicial Clerk, Washington, D.C.—2100; Housing Advocates, Cleveland—1850; U.S. Department of Justice, Washington, D.C.—1980; U.S. Department of Interior, Boise—2000. See *id.*

3. There is some internal inconsistency with Professor Schiltz's saying that big-firm lawyers routinely pad their hours, see Schiltz, *supra* note 1, at 918-19, and then using those hours to say lawyers at big firms work too hard.

not be countenanced at any firm at which or with which I have worked.

That is not to say that there are not ethical issues that lawyers have to struggle with in the practice of law. Most big firms have an ethics or professional responsibility committee whose mission is to discuss with lawyers any ethical issues that arise and help them resolve them. I believe that most members of such committees would advise lawyers in a way that keeps them from going close to the line when dealing with ethical issues.

C. Leveraging

Partners at all law firms—small, medium, or big—make money off of the hours worked by associates. Professor Schiltz acts as if he has found some deep dark secret when he refers to leveraging. Using inflammatory words like “skimming” and “exploitation” covers up the reality that this is not a big-firm phenomenon. Law firms are set up this way. Young lawyers graduate from law school and go to big firms that pay them large salaries and invest large amounts of money in their training. Partners take the risks, put up capital, spend non-billable time running their firms, bring in cases, take responsibility for those cases, take responsibility for the clients, supervise the young associates and, yes, make money that way. Is Professor Schiltz suggesting that someone could get out of law school, put their name on the door, and have someone pay them \$100 or \$115 an hour for their services, all of which they could keep?

Although big-firm lawyers make a lot of money under any definition, the vast majority of partners at big firms do not make anywhere near \$1,000,000 a year. Professor Schiltz again, in an effort to support his greed theory, uses a New York firm as an example of what the average big-firm partner throughout the United States makes. The latest *Am Law 100* list of profits per partner shows only ten firms with profits per partner of over \$1,000,000.⁴ The other ninety firms go from profits per partner of \$975,000 to \$250,000 per year. The 49th-ranked firms (four are tied) had profits per partner of \$505,000. I dare say that you will find that lawyers in some small firms make much more astronomical sums. Some of the plaintiffs'

4. Profits per partner is net operating income, minus aggregate compensation for all nonequity partners, if any, divided by the number of equity partners. See generally *Profits Per Partner: Bigger Pie, Bigger Slices*, AM. LAW., July-Aug. 1998, at 79-86.

lawyers who brought cases against the tobacco industry on behalf of several states are seeking billions of dollars from that settlement.

D. Atmosphere

I laughed at the description of the party at the "senior partner's" house. I suppose there may be some senior partners at law firms that fit this caricature. I do not know any. I think Professor Schiltz is a little behind the times in terms of the realities of the atmosphere at big firms. Associates at big firms are just as likely to go to a party at the home of someone like me. I had a firm party at my house last year. My house is not in the suburbs but in Center City, Philadelphia. It is not large. In fact, some of the people at my party had to sit on the stairs going up to the third floor. I do not have a thin wife nor a thin husband. I do not have a suntan, real or otherwise. I will admit that I did not serve hot dogs but I also did not serve caviar. The most recent firm event I attended was at another one of my partners' homes. Her house happens to be much larger than mine but it too is in the city. She does not have a thin wife, although her husband is in pretty good shape. He is, however, not young. She did have her two young children helping to serve hors d'oeuvre. I think Professor Schiltz has read too many John Grisham novels.

III. THE BENEFITS OF BIG FIRMS

Professor Schiltz lists four reasons routinely given why law students should go to big firms: training; interesting or challenging work; collegiality; and keeping doors open (mobility). He then proceeds to argue the illegitimacy of each of these reasons. I disagree with much of what Professor Schiltz says in this section.

A. The Work

The reason why I returned to a big firm and the first reason I give to law students to come to a big firm is "the work." If you want to do sophisticated, cutting-edge work, a first-rate big firm is your best chance to do it.

What are the realistic opportunities for a student graduating from law school? I have not done a scientific study but I am sure that the largest number of job opportunities are with big firms. We hire

forty-five to fifty lawyers every year who are coming directly from law school or a clerkship. Small- or medium-sized firms routinely do not hire large numbers of students, but rather hire on an as-needed basis. If David Boies is hiring, it might be great fun to go to his firm, but no small firm will hire more than a few lawyers in a given year. The state or federal government might hire some lawyers right out of law school, but not many. By and large, the work in a government agency will not be as interesting or diverse as at a big firm. One cannot get some of the best government jobs right out of law school. For example, I know of no United States Attorney's Office that hires lawyers directly out of law school. Most in-house legal departments prefer to hire lawyers who have had some experience and training—usually at big firms. There are very few teaching positions and these are limited to people with very high academic achievement from the best law schools and the best clerkships. Teaching is not a realistic opportunity for most law school graduates—even those who otherwise qualify for big firms.

I was amused by Professor Schiltz's statement that he would rather follow around for a day the General Counsel of Time Warner, a United States Attorney, the Chief Counsel to the Senate Judiciary Committee, or a solo labor practitioner than a big-firm partner. How does he think people get to be the General Counsel of a major corporation? Most have spent time at a big firm, and very often have been a partner at a big firm. You do not become the general counsel of a major corporation right out of law school. You might not even be able to get a job at a corporation right out of law school. Many United States Attorneys also come from big firms. You cannot get a job as an Assistant United States Attorney right out of law school. I was amused that Professor Schiltz refers to the Chief Counsel to the Senate Judiciary Committee. I was the Chief Counsel to a Senate Subcommittee for very exciting hearings on Ruby Ridge while a partner in a big firm.

I am sorry that Professor Schiltz got pigeonholed in his own big-firm practice. He mentions that he worked on hundreds of cases defending religious organizations in clergy sexual misconduct cases. I agree that this sounds pretty boring and not challenging. You do not have to end up like that at many big firms. I do and have always done a variety of cases. At many big firms, you do not have to specialize; you do not get pigeonholed. I agree completely that you need to ask a lot of questions of the firm you are considering and be sure you know exactly what you are getting into. There are big firms where you can maintain a diverse practice.

Professor Schiltz points to small firms as a kind of utopia. It's like the advocates for small town living versus the big city. But for all the problems of Gotham there is the "Winesburg, Ohio" underbelly of small-town or small-firm life. Large firms are closer to meritocracies than small firms, have greater tolerance for differences and diversity, and involve less dominance by one personality.

Professor Schiltz talks at various points in his article about public interest work. As someone who has worked with public interest organizations throughout my career, I concur in his view that there are many superb lawyers working in the public interest area doing exciting work. If this is something that appeals to and gratifies young lawyers, I think it is an excellent area of practice. I disagree with Professor Schiltz, however, on whether a public interest law firm is the best place to go right out of law school. My experience with public interest organizations is that there are so few lawyers doing so much work that there may be very little supervision of new lawyers. Apart from the issue of training and supervision, however, there are not that many public interest jobs available.

B. Training

I disagree with Professor Schiltz's assertion that the training received by new lawyers at big firms is "illusory." That was not my experience when I started as an associate, and I do not believe it is the experience of our associates. I have always been glad that I went to a big firm before going to the United States Attorney's Office. To this day, I advise young lawyers not to go right into a prosecutor's office—even if they could get the job—but instead to apprentice at a big firm. One does not know how to be a lawyer when one gets out of law school. I believe that an apprenticeship of approximately three years is necessary. For me, the best training was observing excellent lawyers practice their craft. I am talking about the opportunity: (1) to observe a brilliant lawyer conduct a negotiation for the acquisition of a company; (2) to sit in a room with a team of lawyers at different levels of experience discussing the strategy of how to deal with a major class action; or (3) to observe how seasoned lawyers deal with the often complicated ethical issues that arise in the practice of law. Although you can get this kind of experience at other places, it is my strong view that the best place to get it is at a first-rate big firm.

Big firms also offer formal training programs where new lawyers learn the nuts and bolts of practicing law. Litigators will have sessions on taking a deposition, doing document production,

answering interrogatories, dealing with attorney-client privilege issues, etc. They will also have trial advocacy courses. Business lawyers will learn how to do due diligence, draft documents, and negotiate.

Professor Schiltz argues that one-on-one mentoring is disappearing in the big firms because of the pressure to bill hours, etc. I think that the Professor may be a couple of years behind on this issue. Big firms have become acutely aware of the need to retain associates. There are many law firm consultants that specialize in advising law firms on how to retain associates. I believe that many law firms are increasing rather than decreasing the one-on-one mentoring. Two years ago, I organized a partners' retreat at my firm dealing with the question of associate retention and morale. We retained a consultant who talked to our associates on a confidential basis and then reported to us generally about our associates' views. As a result of that effort, we started an associates' committee and a more intense one-on-one mentoring program. Our efforts are being repeated at other big firms.⁵

C. Mobility

I strongly disagree with Professor Schiltz's statement that practicing law at a big firm does not make you more mobile. As the hiring partner for a large firm with seven United States offices, I can assure you that having been at another big firm will make you more attractive to us. We hire many laterals a year, as do most big firms. If someone has already practiced and done well at a first-rate big firm, that will be a plus to that person's candidacy. Although having been at a small firm is not a disqualifier, it is our experience that those who have been at small firms (other than highly specialized boutiques) often have not done the sophisticated work done at many big firms.⁶

5. See, e.g., Richard B. Schmitt, *From Cash to Travel, New Lures for Burned-Out Lawyers*, WALL ST. J., Feb. 2, 1999, at B1; Steven Wilmsen, *Building a Case for Caring*, BOSTON GLOBE, Nov. 29, 1998, at F1 (describing what some Boston law firms are doing to enhance the quality of life of new associates).

6. I think that Professor Schiltz's use of the example of the two Stanford Law Review editors who clerked for the Ninth Circuit is misleading. See Schiltz, *supra* note 1, at 932. These two individuals would be at the high end of lawyers interviewing at big firms. Although both of them might be able to go to the small firm in San Jose and then move to a big firm in San Francisco, many other law students, who may have gotten into the big San Francisco firm right out of law school, may not be able to do so after practicing at a small firm for a few years. It is a risk.

IV. THE CHALLENGES OF BIG FIRM PRACTICE

Although I think that Professor Schiltz fails to see the complexities of the problems confronting the legal profession today, and unfairly places the blame for those problems at the feet of the big firms, it is probably true that lawyers are not as happy or as healthy as we should be. I wish the solution were as simple as giving up some amount of compensation. I will touch on some of the issues that I see facing all of us lawyers—especially those in big firms.

The pressure of practicing law is more burdensome than the actual number of hours worked. Professor Schiltz cites a book by Walt Bachman, *Law v. Life*.⁷ In it, Mr. Bachman describes some experiments that he learned about in his college psychology class. Two monkeys were strapped side by side in chairs with a control lever placed in front of each. In the first experiment, electric shocks were delivered to both monkeys for eight hours a day after the flashing of a warning light. If one of them pressed the lever in response to the warning light, both avoided any shock. Only one monkey's lever was actually connected to the electrical circuit; he was the executive or responsible monkey. In this variant of the experiment, neither monkey suffered any physical ill effects because the executive or responsible monkey mastered the simple lever pulling.

The monkeys' experimental routine was then altered and the shocks began to be administered at unpredictable times regardless of the warning light. The responsible monkey could only reduce the number of shocks but could not guarantee a totally pain-free existence for either monkey.

All of the executive monkeys died from inflamed ulcers within weeks, while the powerless monkeys showed no signs of physical maladies. Since both monkeys received the same electrical shocks, neither the fear of harm nor the actual harm experienced could account for the death of the monkey burdened with control of the shock-avoidance lever.⁸

As Mr. Bachman states, "the executive monkeys all died from the stress of professional responsibility."⁹

Mr. Bachman's story resonated with me. He believes that private practice is more stressful than government practice because of

7. See Schiltz, *supra* note 1, at 889 n.127 (citing WALT BACHMAN, *LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION* (1995)).

8. BACHMAN, *supra* note 7, at 17.

9. *Id.*

the pressure of having to succeed for a client. That has also been my experience. What clients want from their lawyers is for the lawyer to win—to get them what they want. That could be not going to jail for a criminal defendant, or winning a lot of money or not having to pay a lot of money for a civil litigant. It is within that context that the hours can at times seem overwhelming. We want to do excellent legal work—both because we believe that it will help our clients “win” and also because we are professionals. We take pride in that excellence. The striving for excellence defines the stress of practicing at a big firm. Lawyers who go to big firms are likely to have done well at a good law school. They probably have always been at the top of the class—from grade school through high school, college, and law school. They may have excelled at sports or other leadership activities. The attempt to continue that “winning streak” can bring much stress. I think that the stress of practicing law informs one’s view of the number of hours worked. It is the combination that may have caused a lot of the dissatisfaction expressed by lawyers in the 90s.

The hours, of course, can be overwhelming at times. Although I believe that a junior associate without any significant administrative responsibility can work 2000 hours a year and still have a thriving personal life, there may be times during the year when the number of hours one has to work in a day or a month leaves little time for anything else. I do not think that we can do much to change this under the current system. I do a lot of takeover litigation that is always fast-paced and of major importance to a client. When involved in one of these major pieces of litigation, usually in an injunction setting, my team and I will work nonstop for several months. This will include nights and weekends. It pains me to see my team working as hard as they do. When I finish one of these matters, I often look back and ask myself if I had managed things differently, could we have worked less. I usually conclude that we could not have worked much less, no matter how well I managed the case. It was moving quickly and our clients are entitled to our very best.

Trial work poses this same issue. Teams of lawyers from big firms often live in another part of the country during a trial. We currently have three teams of lawyers working in other parts of the country for months at a time. They come home only on the weekends, if then, and, because they are in trial mode, their hours are very high. In view of our system of litigation, there really is not anything to be done about the number of hours worked during these high-pressure times. The hope is that when the injunction hearing or the trial is over, those lawyers will be able to work at a much slower pace to re-

cuperate from their hard work. Sometimes, this does not happen because another matter comes along that the lawyer accepts.

Internal drives and needs (in some cases, perhaps, neurotic needs) play a much larger role in the number of hours worked by attorneys than "greed." I am absolutely positive that in neither the emergency injunction situation nor the trial situation are people working as many hours as they are "for the money" or to bill a certain number of hours. It just is not so. People are working to do an excellent job for their client. They are working so hard to try to win for their clients.

Another challenge to lawyers, whether in firms or the government, is the adversarial nature of the process. Litigation is characterized by adversariness. But so is transactional work. I think that it has gotten worse over the last ten years. It takes a big toll on lawyers' mental health. Even when a lawyer is not clinically depressed or suffering from alcoholism, her personal and work life may suffer from the demands of working within such a system. It is probably fair to say that the legal environment does not promote emotional growth and fulfillment. Indeed, it may undermine it.¹⁰

V. CONCLUSION

Having just pointed out some serious drawbacks of practicing law in a big firm, how can I encourage law students to go to big firms? First, much of what I have just said applies in general to the practice of law. We have an adversarial process, for better or worse.

Second, many big firms recognize some of these issues and are trying to accommodate the desires of lawyers for more time to devote themselves to their personal life. Many firms allow their lawyers to work part-time. We have twenty-one associates working part-time and four partners. Part-time is becoming more and more a part of big-firm life, although some big firms do still resist the notion of being able to practice law on a part-time basis. Big firms are becoming more receptive to new ideas from every quarter—associates, partners,

10. For instance, Dr. Susan Shively wrote a series of four articles exploring the interplay between lawyering skills and relationships. See generally Susan Shively, *Exploring the Interplay Between Lawyering Skills and Relationships*, LEGAL INTELLIGENCER, June 2, 1998, at 6; Susan Shively, *How to Separate the Lawyer Role from the Person You Truly Are*, LEGAL INTELLIGENCER, Aug. 25, 1998, at 6; Susan Shively, *Relationships After the Holidays*, LEGAL INTELLIGENCER, Feb. 16, 1999, at 9; Susan Shively, *What an Unchecked 'Legalese' Virus Can Do to You and Your Relationships*, LEGAL INTELLIGENCER, Nov. 3, 1998, at 9.

consultants—about how to improve life at the firm. They are doing this not because those who manage big firms are more humane than they used to be; it is because it affects the bottom line. In order for a firm to continue thriving, it needs a constant inflow of very smart, very able, very energetic lawyers.

Third, if you are excited by being involved in some of the most important issues facing our society today and in some of the most important cases, and if you get excited by writing a great brief, negotiating a transaction for a client, or standing up before the United States Court of Appeals, then the practice of law in a big firm is your best chance of having an exciting legal practice.