

# INTRODUCTION TO THE SYMPOSIUM

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This Symposium on Organizing and Advising Small Business Enterprises might be viewed by some as the "Black Capitalism" issue of *The Black Law Journal*. Black Capitalism is a concept which provokes strong reactions among blacks. Many extol its potential benefits; others are apprehensive. The apprehension has its genesis in the negative image associated with capitalism which was the black man's enslaver and in many cases is his present exploiter. This traditional apprehension has been fueled by President Nixon's espousal of the concept, for his motives have long been viewed with suspicion by black people. The merits of Black Capitalism will not be debated here, however. The negative implications of the term have the effect of concealing the underlying problem which is the paucity of black business ownership. It is to this underlying problem that this Symposium is addressed.

It is fundamental that with business ownership and its attendant control goes the exercise of power. The direct relationship between business ownership and power manifested itself most clearly in this country's master-slave society, the residual effects of which black people suffer under today. Probably the greatest disparity between blacks and whites is in the ownership of business enterprises. Given the direct relationship between business ownership and the exercise of power, it is apparent that if blacks are to attain parity with whites they must seek their proportionate share of business ownership. Of course, to say that a proportionate share of business ownership is necessary to attain parity does not mean that such ownership is both the necessary and sufficient condition to parity; it is to say only that proportionate business ownership is one of the many necessary conditions to the attainment of parity. One way of possibly eliminating the disparity in business ownership is the nationalization of all business enterprises, but this alternative, although theoretically appealing in some circles, is not presently a viable one. Given the realities of economic affairs, blacks must seek proportionate business ownership within the present economic system, notwithstanding the frailties in that system. Indeed, the power generated by greater black business ownership might pave the way for fundamental changes in the economic structure.

Black business ownership must extend much further than the small business arena. It must extend as well to the traditional corporate giants, such as General Motors, United States Steel and IBM. Parity in business ownership would require that black people, in addition to owning their proportionate share of small business enterprises, also own their proportionate share of the stock and securities of the traditional corporate giants. Admittedly, this goal is one that, if ever attained, will not be attained in our lifetime. But, if the residual effects of the master-slave society are to be completely eliminated for black progeny, the disparity in business ownership of

both large publicly held corporations as well as small business enterprises must be narrowed and finally eliminated.

Some may challenge the proposition that the mass of black people will benefit from the increased power which will naturally flow from black business ownership. Some argue cogently that black business ownership will only benefit the particular black owner who will be substituted for the white exploiter and that dollars earned by black entrepreneurs and shareholders will not pay dividends for the mass of black people. It cannot be denied that business owners operate in their own self interest. The question becomes, then, what is the distinction between the black and white business owner with respect to the mass of black people?

The benefits to be derived by the mass of black people from parity in black business ownership are both direct and indirect. For instance, there is a higher probability that a black business owner by reason of his frame of reference (especially since the Black Revolution in the 1960s) will have more of a concern for his brothers and sisters than a white business owner. A black business owner is probably more likely to hire black employees or help a black political candidate than is a white business owner. If black people owned a proportionate share of the stock of large corporations like General Motors, they would be in a position to affect the business policies of such corporations. Such proportionate ownership would help to eliminate employment discrimination against black people and would increase the possibility of blacks affecting the policies of U.S. corporations operating in racist South Africa. Moreover, since blacks purchase the goods of corporations, should they not also reap part of the profits from such purchases. The absence of black proportionate ownership of business enterprises is a clear example of the poor subsidizing the wealthy by transferring dollars to the wealthy through the medium of consumer purchases. This has the effect of keeping the black community analogous to a poor colony which exports its labor in exchange for wages, and then exports the wages in exchange for consumer goods, with the profits from such consumer purchases lodging permanently outside the black community.

Given the goal of black parity in the ownership of both small business enterprises and large corporations, how can this goal be attained, and, in particular, how can the black lawyer aid in the development of black ownership of business enterprises? First, with respect to the development of proportionate black ownership of large corporations, there is probably not much the black lawyer can do to immediately facilitate such ownership. Such ownership is directly related to the aggregate income and wealth levels of black people. As the income levels of black people rise, so too will black ownership of the stock and securities of large corporations. Certainly, employment discrimination suits have an impact on income levels of black people, and this is an area in which the black lawyer has played a particularly vital role. On the other hand, with respect to small business enterprises, the black lawyer can have a direct and immediate impact.

There are in essence three human factors which are necessary for the development of small business enterprises. First, there is a need for the entrepreneurial spirit. Second, there is a need for competent managerial

abilities. Third, there is a need for sound legal advice. Without these three human factors, it is virtually impossible for a business to succeed. These human factors are inextricably interwoven. The entrepreneur is the risk-taker, the individual who comes up with a new idea and is willing to strike out on his own. In addition, the entrepreneur must be a competent manager for only through managerial competence can a business be developed into a viable enterprise. In operating the firm the manager will need sound legal advice on the many legal problems which the firm will encounter, for without such advice an enterprise is doomed to fail, and the competent manager knows this. Because the black community does not have a substantial heritage of involvement in entrepreneurial and managerial endeavors, the role of the black lawyer is particularly crucial. The black lawyer cannot be concerned with simply servicing the legal needs of the black firm; he must also be concerned with nurturing the entrepreneurial spirit and encouraging managerial competence. It is incumbent on the black lawyer to seize the initiative and operate as a catalytic agent in the development of black business enterprises. Because of the complicated nature of our society and the complexity of the business world, the black lawyer competent in the intricacies of the legal aspects of doing business is in a particularly desirable position to act as such a catalytic agent, and in doing so, the black lawyer is serving as a legal entrepreneur.

The expertise of the black lawyer, however, is generally in areas other than business and tax law. Traditionally the black lawyer has not often been required to provide legal advice to business enterprises, because his principal clients, members of the black community, have not presented him with such problems. This can present a problem for the black lawyer, and a dilemma for the black business owner. The problem for the black lawyer is a lack of prior exposure to the types of problems that budding enterprises are likely to encounter. The dilemma for the black business owner is that he knows this. The black business owner may, therefore, be given a choice between hiring a black lawyer who is inexperienced in dealing with business and tax law problems or alternatively hiring a white lawyer who has had such experience. Returning to the basic motivations of a business owner, it is obvious that as between the two alternatives the black business owner, because of his entrepreneurial orientation, may indeed opt for a white lawyer who can give him sound advice, for he understands and appreciates the fact that without such advice his enterprise cannot succeed.

The problem can become circular for if the black attorney is excluded from the white law firms which have business expertise and is also excluded from advising the black entrepreneur, how is it possible for him to obtain the expertise in business and tax law matters that black enterprises require and need? This problem must be approached on two levels. First, there is the problem of the black law student who may not have the opportunity to go to a white law firm to acquire business law experience. Second, there is the problem of the practicing attorney who has not been exposed to business and tax law problems. For both of these groups definitive steps can be taken to obtain the requisite skills needed to deal with business and tax law problems.

The black law student can immerse himself in business and tax law courses, such as Corporations, Corporate Finance, Corporate Taxation, Anti-trust, Labor Law, Commercial Paper, and Sales. Indeed, it is probably more compelling for the black law student to enroll in these "hard" courses than it is for the white law student, because the black law student does not have equal access to the major white law firms which practice in these areas and, therefore, is less likely to have the luxury of learning these subjects under the guidance of an experienced practitioner. Instead, he may have to learn in the "school of hard knocks", doing it himself, reviewing it himself and putting it into effect himself. In such a case, a theoretical grounding in business law subjects in law school is an invaluable anchor on which he can rely.

The black practitioner who is inexperienced in handling business legal problems must approach such problems the same way he approaches any other legal problem. Business and tax law for the practitioner who has specialized in other areas of the law is just a new problem which should add an extra modicum of excitement as well as financial remuneration to the practice of the law. As a new problem the attorney must educate himself on the topic. There is nothing mystical about corporate law, corporate finance, taxation, securities regulations or business planning; there are no insurmountable barriers to the education of black practicing attorneys in these areas. Certainly, the process of education in any new area is difficult and time-consuming, but it can be done.

The black attorney and black law student must not succumb to the pernicious circumstances which would strangle their efforts to seize the initiative to operate as catalytic agents in the development of black business enterprises. The black attorney and black law student must not by default leave the legal representation of black firms to the white legal community. Although white attorneys can certainly render competent legal advice on a particular problem facing a black firm, they, in general, cannot and will not operate as catalytic agents for the development and growth of black business enterprises. Only the black bar can serve in that higher capacity.

This Symposium is designed to address the need of the black lawyer for expertise in the business and tax law problems of developing black business enterprises. Presented here is a collection of articles which deal with areas of the law which the attorney who represents small business enterprises is likely to encounter. The legal concepts discussed are not unique to black businesses, but are the legal building blocks for all small business enterprises. The legal environments which operate on white business also operate on black business enterprises. The Internal Revenue Code applies equally to MoTown Industries as well as CBS. Of course, black-owned enterprises are likely to encounter certain peculiar problems stemming from racism which will present additional barriers to successful business operations. But it is certain that black-owned enterprises will face the same basic legal problems that white-owned enterprises face. Moreover, because of the added barriers resulting from racism, competent legal advice on the rudimentary legal problems is even more important. With a view to the rudiments, the topics presented here address some of the most recurring business and tax law problems encountered by small business enter-

prises; however, the articles are by no means exhaustive of the panoply of legal problems of such firms. The articles present first approaches to the topics and take a balanced position between a scholarly and practical approach. It is hoped that each article will give the reader a basic understanding of the particular area discussed. Each article contains references to more thorough sources for development of advanced concepts in the various areas.

The first article, *The Federal Income Tax Impact of the Operating Function on the Choice of Business Form: Partnership, Subchapter C Corporation or Subchapter S Corporation*, discusses the tax stakes of operating a business enterprise in the three basic forms. The tax results may vary considerably depending on the form chosen. The second article, *Legal Considerations in the Incorporation Process*, is an introduction to the many and varied factors which the attorney must take into consideration once the decision has been made to incorporate the enterprise. The third article, *Federal and State Securities Laws Problems and the Closely Held Corporation*, discusses the exemptions from the registration requirements of the federal securities laws which are available to closely held corporations. The state securities laws, commonly called the blue sky laws, are also discussed. The fourth article, *Federal Income Tax Consequences of Incorporating the Firm*, is a practical guide to the tax ramifications of the act of incorporation; major tax problems can arise on the formation of a corporation. The fifth article, *The Use of Buy-Sell Agreements for the Disposition of an Ownership Interest in a Small Business*, discusses the various ways owners of a business can retain control. Also the article gives a comprehensive view of the federal income tax and federal estate tax implications of the use of life insurance for funding the redemption of a decedent's interest in either a partnership or corporation. The sixth article, *An Introduction to Deferred Compensation Arrangements*, deals with a very complicated topic in the tax law which is presently under review by Congress; major changes are expected shortly. The article discusses the potential tax benefits that can accrue to an owner of a business through the use of a deferred compensation plan. Some of the likely changes in the law are also discussed. The seventh article, *An Introduction to Financial Statements for the Practicing Lawyer*, is designed to acquaint the attorney with some of the fundamental principles of accounting, a critical subject for the business lawyer.

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