

Symposium Introduction

Almost all lawyers perform services that involve small businesses.¹ The pervasive nature of the small business in the economy,² coupled with strong governmental policies promoting the small business,³ virtually dictate this conclusion. This would be unexceptional but for the fact that small businesses present many legal problems that are both novel and unique. For example, the creation of a new business will generally involve selecting an appropriate business format, arranging financing, drafting intra-venture agreements and complying with complicated and possibly conflicting governmental regulation. Moreover, as Professor Haynsworth points out in the symposium's lead article, all of these tasks involve special ethical considerations for the attorney. To at least partially meet this challenge, this symposium is intended to further⁴ inform and assist both small business practitioners and scholars of the particular problems of small businesses.

The starting point for any such attempt is the definition of "small business." Given the ubiquitous mention of the small

¹ See e.g., Haynsworth, *Competent Counseling of Small Business Clients*, this issue at 399.

² See e.g., Brooks, *Small Business Financing Alternatives Under the Securities Act of 1933*, this issue at 543.

³ It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.

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Congress, in passing the antitrust laws, sought to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

United States v. Aluminum Co. of America, 148 F.2d 416, 427, 429 (2d Cir. 1945) (per Learned Hand, J.) (discussing antitrust policy towards monopolization forbidden by the Sherman Act, 15 U.S.C. § 2 (1976)).

See also 15 U.S.C. §§ 661-696 (1976 & Supp. II 1978); 13 C.F.R. §§ 101-131 (1980) (Small Business Investment Act and implementing regulations); I.R.C. §§ 1371-1379 (15 shareholders for a Subchapter C corporation).

⁴ Several good bibliographies already have appeared in print. See, e.g., Walthall, Rheuban, Rollinson & Talley, *Partnership Law: A Selected Bibliography*, 35 BUS. LAW. 659 (1980). In the area of close corporations, Professor O'Neal's work is never a disappointment. F. O'NEAL, *CLOSE CORPORATIONS* (2d ed. 1971).

business in governmental policies and programs,⁵ there is a surprising lack of consistent and uniform definition. Perhaps this is because any attempt at uniformity is bound to run into perplexing problems. Should yeoman farmers be treated the same as corporations with 1000 employees?⁶ At what point does the expanding business leave behind the problems of "smallness" only to greet the headaches of "bigness"? The point of these questions is to show that any attempt to carve out from the set of all businesses an all-purpose subset of "small businesses," each possessing special problems and needs, is futile. Any purported definition involves subjective and arbitrary distinctions. One person's small business is another's impersonal corporation. In spite of these perhaps insoluble problems, the Small Business Administration recently decided to re-evaluate its small business definition strictly in terms of the number of employees.⁷ For purposes of this symposium, however, we rejected any attempt at objective size limitations in favor of an organizational definition: we include any business entity not a public corporation, with an emphasis on close corporations, franchises, joint ventures, general partnerships and limited partnerships.

While we recognize that this definition is both over and under inclusive, we feel that it is sufficiently flexible to fashion a symposium geared to the needs of both practitioners and scholars.⁸ We include, for example, articles addressed to the formation, planning, counseling and eventual dissolution of the small business. Of immediate interest to attorneys involved in the capitalization of small business is Professor Brooks' article on the myriad financing alternatives available under the Securities Act of 1933. Shifting the focus to the small business counselor, we include Professor Haynsworth's article on the particularized ethical problems faced by small business attorneys. Finally, as food

⁵ See note 3 *supra*.

⁶ Under proposed Small Business Administration definitions, many corporations with 1000 employees would qualify as a "small business." See, e.g., 45 Fed. Reg. 15,442, 15,445 (dredging concerns), 15,446 (manufacturers of knit underwear), 15,448 (manufacturers of scales and balances) (1980).

⁷ *Id.*

⁸ In a very real sense, one knows a small business when one sees one. See *Jacobellis v. Ohio*, 378 U.S. 684, 697 (1964)(with apologies to Justice Stewart). See also Weinstein, *Litigation Seeking Changes in Public Behavior and Institutions—Some Views on Participation*, 13 U.C. DAVIS L. REV. 231, 242 (1980) (standing under Article III also is known when it is seen).

for future thought and discussion, we include Professor Fessler's article on the wisdom of incorporating the small entity.

This symposium does not, of course, purport to solve all of the problems faced by small business. As editors of this volume, however, we hope that it will help to answer some questions of major importance to small businesspersons and their advisors. In addition, we hope that this symposium will provide a fertile basis for future debate and innovation, hopefully leading to both judicial and legislative change. Finally, we hope that our contribution will aid the small business in some small way, thus benefiting all of us who depend daily on small businesses for essential products and services.

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