Chapter 6

Marks and Feinberg's Struggle to Survive

The partners of Marks and Feinberg, a four-person firm specializing in criminal defense and civil rights plaintiff's litigation, are worried. They look over the prospects of fees due during the next few months and agree that things will be “tight.” For the first time, they might have to use the twenty-five thousand dollar line of credit they took out with a local bank a few months ago. Morale at Marks and Feinberg “tends to vary with the size of the current bank balance.” Although the Marks and Feinberg lawyers are deeply concerned about the economic future of the firm, money has played a backstage role in the development of their practice. The tradition at the firm has been to take on work oblivious, indeed “in defiance” (as Alan Marks puts it with a combination of ruefulness and pride), of the economic impact on the firm.

Background on the Firm

Alan Marks graduated from University of Michigan Law School in the late 1960s and clerked for a judge on the United States Court of Appeals for the Sixth Circuit. He then went to work for the NAACP Legal Defense Fund in New York City, doing prisoner-rights litigation. After moving to Detroit, he continued the prisoner-rights work in association with the Legal Defense Fund, financed by the Michigan Law Reform Institute and the Ford Foundation.

Joel Feinberg graduated from the University of Chicago Law School in 1964 and began work with a small, eight-lawyer Cleveland firm that represented a number of labor unions and specialized in low- and middle-income housing. Although he enjoyed his colleagues, he disliked his day-to-day diet of commercial litigation, tax law, and
estates and trusts, and he asked for leave from the firm to spend the summer of 1966 in Jackson, Mississippi, as a volunteer for the Lawyers Committee for Civil Rights under the Law. He found the work in Mississippi so challenging and satisfying that he resigned from the firm and practiced civil rights legal work full-time in Mississippi. Two years later, he moved to New York City to become a staff attorney at the Legal Defense Fund, where he met Alice McKenzie. After Alan and Alice were married in Detroit, he and Alan decided to form their own firm, which they opened in Detroit in 1973 as Marks and Feinberg.

Alan and Joel started their firm on a shoestring, with a half-time secretary from the Michigan Law Reform Institute and a small office adjacent to the institute in a building occupied by other small firms that were part of the liberal public-interest law community—including the Michigan Advocacy Center and the Lawyers Committee for Civil Rights. Much of their caseload was a continuation of their Legal Defense Fund work, for which they were paid as cooperating attorneys. Alice, who had been working as a public defender, joined the firm a year later, and left in 1977 when she became a judge on the Recorder's Court (principal state trial court) in Detroit. In 1976, Alan and Joel took on their first associate. Their caseload consisted of matters related to school busing and desegregation, employment discrimination, a voting rights case, some criminal-defense work, and other civil rights cases generated either from the Legal Defense Fund or from referrals from other public-interest lawyers.

Marks and Feinberg's practice has expanded since the early days. They now have a third partner, Ruth Fried, an associate, Ann Burch, and their secretary and office manager, Carol McHugh, who has moved to full-time status. But the nature of their practice has changed relatively little since its founding. Thirty-five to 40 percent of their work is criminal defense, mostly referrals from other community-based lawyers. Little of this is lucrative white-collar criminal-defense work. Perhaps as much as a third of the practice is devoted to employment discrimination, particularly in the area of academic employment problems, including revocation of professional licenses. In addition to miscellaneous civil rights cases, including prisoner rights, they have recently begun to handle some personal injury, medical malpractice, and products-liability work, but it is a comparatively small part of the practice compared to the employment and criminal matters.

Both Joel and Alan enjoy their representation of criminal defendants. They cannot recall any irreconcilable differences, or head-to-head conflict, with their clients, whom they describe as people who trust the lawyer and rely on the lawyer's opinion. They also take considerable pride in the professional and scholarly aspects of their careers in law. Joel has regularly taught a course or clinic in prisoner's rights at Wayne State University and is working on a treatise on attorney's fees, an important subject for civil rights lawyers who are subject to a variety of court and statutory rules for fees and costs reimbursement. He continues to take a few court-appointed first-degree murder cases in the Michigan system because he enjoys the diversity this work offers and believes he has an obligation to deal with such important issues. Alan teaches a course on the Legal Profession at the University of Michigan in which he focuses on ethical problems in clinical practice. He is a leader of the National Network for the Right to Counsel. Both have strong ACLU ties and allegiances: Alan was the recipient of an ACLU award in 1989 for his work organizing against the death penalty in Michigan and for other public-interest work in which (the plaque reads), "He never shrunk from taking the unpopular case on behalf of those most vulnerable to the inequities of our criminal justice system."

The other lawyers in the office are also cause oriented. Ruth Fried had been a schoolteacher for a number of years before entering law school. She worked for Marks and Feinberg as part of a full-time placement in the Urban Legal Laboratory program while she was a student at Detroit College Law School in the fall of 1978. She considered it her best semester in law school, and she found it hard to go back to the classroom. But she managed to arrange her schedule to work part-time with the firm after her return. Following graduation, she worked at the Michigan Civil Rights Commission (the State Fair Employment Practices Agency) because the firm had no openings. But she kept in touch and was hired on a three-day-a-week basis in 1980. Eventually her position was increased to five days a week, and she became a partner at the beginning of 1987. In order to finance herself in those early days, she found part-time work at the University of Michigan Law School in a clinical public-interest
program for law students representing tenants in the Ann Arbor area. She still is an employee of the Law School, working roughly fifteen hours a week as a supervisor.

About two-thirds of Ruth's practice is employment-discrimination work at the agency and trial level. She greatly enjoys representing people who have lost their jobs, for whom winning is enormously important. Ruth finds that a "let's work it out" attitude with those company lawyers willing to look carefully at a case will almost invariably lead to good results through settlement. An occupational hazard is obsessive clients who spend years so wrapped up in their case that they are unable to move on with their lives. The remainder of her practice includes cases that are generated from her known expertise in landlord-tenant work and in tenant organizing in and around Ann Arbor, some immigration work, occasional tort work as second chair to Joel, and some civil rights work like police misconduct cases and a long-standing lawsuit initiated by Alan to remedy conditions at the Detroit House of Corrections (city jail).

Ann Burch had first become interested and active in prison issues while an undergraduate at SUNY Buffalo in the wake of the great Attica uprising. In 1977 she moved to Detroit and took a position at a state school for the mentally retarded, where she advanced from a caseworker to assistant division director in charge of 120 staff and six hundred to seven hundred clients in ten living units at the school. After constant struggles with the administration of the school, she entered the Law School at Wayne State in 1981, continuing to work as a consultant to establish community residential centers and innovative programs for the retarded. She clerked, while a student at Wayne State, at Marks and Feinberg, and she became an associate at the firm in the fall of 1984, specializing primarily in criminal work and prison litigation. Her prisoner clients are a great source of satisfaction to her because their situation is so dismal that she feels that virtually anything she achieves for them amounts to immense relief. Like Ruth's clients, Ann's jailhouse lawyers use their considerable free time to become deeply absorbed in their cases. Another source of encouragement has been the renewed interest of the Michigan Supreme Court, which has recently rendered more positive decisions in prison cases.

Ann expresses an appreciation for the experience of working with first-chair senior partners like Alan and Joel in major trials. One of their prisoner cases reached the United States Supreme Court. She works long hours, about fifty-five hours a week, but enjoys it. She believes both Alan and Joel are superb attorneys, always well prepared, with whom it is easy to work and feel comfortable. They show her respect. Everyone in the office "gets a voice in things." She is not told what to do but asked if she wishes to work on a case and asked her opinion on cases and office issues. The attorneys in the office do first-rate work and feel right about the position they are taking for clients. (Or as Carol McHugh puts it, people at the firm "care about what they are doing." There is a real "honesty" in the enterprise.) The firm will take on unpopular, "political-message" cases regardless of the fee.

The atmosphere around the firm is highly informal: casual dress except for court or clients, discussions around the lunchroom table about current cases and issues in the law. But this family-style atmosphere is, by all accounts, not as warm as it was some years ago, when the firm had its own set of offices. In the early 1980s, a fire in their building forced the firm into a nomadic existence while it negotiated with a landlord determined to increase the rents in the building, thus dispersing the old crowd of public-interest lawyers and agencies. Marks and Feinberg joined in a space-sharing arrangement with a three-person firm, and three solo practitioners (two of whom are of counsel to Marks and Feinberg) in a modest suite of modern offices with a conference room, kitchen, and small library. The dispersal of Marks and Feinberg lawyers throughout the space, and the complications and occasional frictions involved in dealing with other support staff, have sharply reduced the intimacy and quiet of the old office. The lawyers, however, get along well and the sharing arrangements work out more or less to the satisfaction of everyone.

Office sharing precipitated the creation of a special role for Ruth Fried, who shares the duties of the Office Management Team with Joseph Baum, the head of the other firm in the office. The two members of the team work out problems involving the building and space, the lease with the landlord, and common receptionist and secretarial services. Ruth also is responsible for interviewing and hiring the three or four law students who work for Marks and Feinberg throughout the year. The students provide valuable investigative and backup support for the attorneys, some at no cost to the firm because they earn law school credit during their placements. Ruth is having
more difficulty attracting paid clerks to Marks and Feinberg because the wages at large firms continue to increase. Jack Osman, a student intern in the office from Wayne State, describes how much he likes the work of the office and the caring, informal style, but he doubts he could afford to work at Marks and Feinberg: he couldn't earn enough to pay back his student loans. "Besides," he adds, "there will always be just four lawyers here."

Outsiders Look at Marks and Feinberg

Al Fox, a successful plaintiffs' personal injury lawyer, views both Joel and Alan as highly skilled attorneys, "amongst the best" trial and appellate advocates he has seen. They have had a very successful track record in a varied criminal and civil practice. Joel, for example, tried his first medical malpractice case a few years ago. It was a difficult lawsuit against the manufacturer of an IUD and a health plan and normally would require an expert in the field. Yet Joel got a very good result. Fox is involved now in a case with Joel and admires his intellect, his penchant to get to the heart of issues and to think practically. Fox and Marks and Feinberg do not refer many cases to each other, except that Fox sends criminal cases their way because he does not do that work. Criminal law is a significant part of the Marks and Feinberg practice. "They believe in it," remarks Fox. If he were ever in trouble, he says, he would call Joel.

Fox describes Joel and Alan as dedicated to issues of social and political importance over an extended period of time. This has hurt them economically at times. Their longevity in these causes is remarkable. Fox recognizes that civil rights attorneys are caught in an economic squeeze, but he argues that much of this is a "change in the times."

When I was young, we lived in a two hundred dollar a month apartment and my wife worked. Ten to fifteen thousand dollars a year income was OK. But now I am close to forty and I have a house and three kids. The expectations of progressive lawyers have changed when everyone you know is living in a style which is expected and accepted. Your willingness to live in a certain fashion changes when the norms change. And so you take on more personal injury cases, do less pro bono and develop a taste for a higher income.

Thomas Stoughton is a Detroit lawyer with much the same practice as Marks and Feinberg. He once shared space with them and sees them socially. On occasion they have worked on cases together. Stoughton ranks both Alan and Joel as absolutely first-rate talents. If he, God forbid, were ever indicted for a major felony, the first person he would turn to defend him would be Alan Marks. Alan is more charismatic in the courtroom. He makes people want to like and do things for him. Joel is more scholarly, and effective in a different way. Marks is not only extraordinarily skillful in the courtroom but has a special ability to mobilize public opinion in appropriate cases. For example, a few years ago Marks represented a man accused of being a sexual rapist. The community was understandably frantic, and Alan not only succeeded in obtaining not guilty verdicts for his client, but he also was able to move the public to a general feeling that the man was innocent, an extraordinary service for his client.

Stoughton is clear minded about the business problems facing firms such as his and Marks and Feinberg. A criminal-defense and civil rights practice is affected by inflation, as well as the increasing complications of the law. Very few private individuals can afford a private lawyer for criminal defense, except those accused of white-collar or drug offenses, or affiliated with organized crime. White-collar defendants do not usually choose civil rights lawyers: the large corporate firms now have criminal-defense departments and vie for that business. Work on drug crimes fluctuates dramatically, and many lawyers have concerns about organized crime work. The criminal appointment work through the federal court has kept such poor pace with inflation that the forty dollars out-of-court hourly rate and sixty dollars in-court rate make it difficult to sustain a practice without more lucrative specialties. Section 1983 work (lawsuits for infringement of constitutional rights under federal statute), which has been a contingency-fee staple of firms like his and Marks and Feinberg, got a shot in the arm with 1988 amendments permitting court-awarded fees. But generally, the handful of firms around the country that have practices like Marks and Feinberg are having difficulty staying economically viable.
A lawyer who can try Section 1983 or Title VII (employment discrimination) cases can, according to Staughton, easily try personal injury, products liability, and malpractice cases. A client who has an accident somehow never thinks that the person who handled his civil rights action could do a superb job in the personal-injury case. The civil rights lawyer is typecast, even by other lawyers who might refer business. It is like the movie star who has made her name in TV sitcoms who tries to get dramatic roles. It is a struggle telling people you are available. Nowadays when Staughton is asked what he is doing, he tends to respond by saying what he would like to be doing: “I’ve started trying malpractice cases.” Other lawyers think of firms like Marks and Feinberg when they have cases they are afraid of, avoid because of the unpopularity of the client or case, or feel won’t generate enough money. They think, “Alan will make something out of this.” But they would never send something Alan could really make something out of.

In Staughton’s view, one of the tragedies of the profession is to see featured in newspapers lawyers with lucrative criminal-defense business who sometimes do terrible work and who haven’t seen the inside of a law library for years. He thinks they couldn’t carry Alan and Joel’s briefcase. An honest lawyer is hard to find. A competent lawyer even harder. But the great lawyers, thoughtful, highly analytical, and effective, like Alan and Joel, are truly rare.

Some Clients’ Views

Alan’s and Joel’s characteristics are appreciated as much by clients as by colleagues. Thomas McIver, a client of Alan, headed an interior furnishings company for commercial customers. His wife of sixteen years was on the town council of a suburban community, and they had two children. McIver was a man of impeccable habits, with a stable family life and successful business career. All this was shattered by a hideous accident he suffered driving home on the freeway one evening. The passenger in the other car was killed, and McIver was briefly hospitalized and then charged with driving under the influence of alcohol and recklessly endangering the lives of others. McIver was terrified, barely able to function, but finally began to search for a defense attorney. He interviewed eight attorneys and chose Alan Marks. He remembers asking Alan why he should go with him.

Marks paused and said, “I’m thorough,” the world’s greatest understatement, adds McIver admiringly. “He seemed genuine . . . someone who really was what he projected himself to be.” For McIver, who has had “less than the best” relations with lawyers and accountants, it was crucial that he have confidence, and he never lost it. “It was the best decision I ever made.” Marks’s fees were extraordinarily modest—another illustration of something McIver had learned in business: what you pay doesn’t necessarily have much to do with what you receive.

McIver began with what he describes as an extremely intense one-hour session with Marks where he discussed all his fears, after which the case was in Marks’s charge. McIver had found his experience after the accident so traumatic that he became something of an emotional wreck. He eventually sold his business, and Marks helped him find a therapist. McIver describes Marks as extremely sensitive to a client’s vulnerabilities, someone who would never even consider manipulating the client. Marks never “yo-yoed” him emotionally, never gave himself points to make himself look good by playing on the client’s fears (something that McIver obviously feels many lawyers do much of the time). Marks would not allow McIver to get emotionally ahead of himself by either building up his hopes or by letting him get despondent.

McIver’s case was complicated by the fact the head nurse at the hospital where he was taken after the accident told a trooper friend of hers that McIver was “stinking drunk,” which led to the charges against him. Contradictory testimony came from a physician, and the evidence also showed the driver of the other car had a history of alcohol and drug abuse. At his first trial, McIver was acquitted of all charges except driving while intoxicated, which was overturned on appeal. His second trial ended in a hung jury, and the prosecutor decided to drop the charges against him. McIver is now pursuing (with Marks as his attorney) a civil suit against the nurse in order to recover the $125,000 in costs he incurred in his defense over six years.

McIver has had a lot of experience with lawyers. Most are a lot of “pomp and circumstance,” he says. Alan Marks has a “supreme sense of ethics,” which is not to say that other lawyers aren’t ethical, but that Alan has a much sharper vision of what is in the client’s best interest. “His [Marks’s] best interest is not at issue.” McIver is
He was going to do. He is a very quiet subdued man, not like other lawyers who "parade around" a lot. Can you imagine, with the kind of money he must be making, that he drives around in a plain station wagon!

Feinberg assembled all the evidence that had been gathered in Land's case, including two lie detector tests, psychiatric evaluations of both Land and the child making the accusations (one child withdrew her accusations), the lack of any physical evidence, and the testimony of Land's wife and former wife. Within a month of first meeting with Feinberg, all charges against Land were dropped. Feinberg followed up with a successful expungement proceeding and returned $15,000 of the retainer. A former police officer, Land said he would have committed suicide before going to prison. "If I had not had Joel, I don't know what I would have done. It is as if he was my heart surgeon. I will forever be grateful."

Jacqueline Frome describes her first visit to Joel Feinberg's office. She had heard from several different people how good a lawyer he was, and she was facing an academic tenure battle. She was impressed by the offices of the firm: they were unlawyerly. The offices felt homely, as if these discrimination lawyers had deliberately set up their offices not to intimidate people.

What was so striking about Joel was how bright he was. Hers was a complicated case. She gave him twenty names that first day. She never had to repeat anything. She always had his complete attention. Together they worked out an intermediate solution through internal procedures in her college. Five years later the issue of her promotion came up again, and the second round went well because Joel prepared the case so well the first time by constructing a good paper trail. Although he may be an excellent litigator, he was conservative in his advice, explaining to her that a court battle would cost a lot of time and money and that the odds were at best fifty-fifty before a judge. He encouraged her to develop an extralegal solution. Her confidence was strengthened by having him there to discuss the issues intelligently and to assist her in framing her strategy. Ms. Frome has dealt with many lawyers and felt most were interested in racking up time and indulging in last-minute, expensive maneuvers. She never felt Joel was greedy. He acted ethically. He was a steady, intelligent presence who had her case all in hand.
A Business in Difficulty

Alan’s interest in computers in the office has led to the purchase of personal computers for each lawyer, on which they do most of their work—there is no dictation in the office—with Carol doing the printing and billing using a billing software package. But neither Joel nor Alan is enthusiastic about law-office management or the business side of the practice. Ruth has, by default and without much eagerness, become the businessperson who has taken the lead in reviewing projected cash flow, collections, and expenses of the partnership. There is no expense or income budget. The discussion at the sporadic meetings of the partners on these matters is informal, consisting of a review and discussion of cases being handled by the firm, the prospects for billing, and the current status of the firm’s bank account.

The firm has learned from bitter experience that it is wise to undertake few, if any, employment-discrimination cases on a contingent-fee basis. Much of its work in this area involves court-awarded fees, if the plaintiff is successful. The firm has been trying to take on more financially remunerative work in civil litigation, but it is still known primarily for its civil rights and criminal-defense practice. Rachel Majev, who is of counsel to the firm, was active in recent years in attracting some malpractice work for the firm but lately has been focusing more on raising her young family than law practice. During one summer, there was a consensus among the partners that they should do something about client development. Both Alan and Ruth called some friends in large firms to indicate their interest in referrals, but the lawyers felt awkward about it, and there was no effort to continue the calls or follow through in other ways. Although a few cases were generated from the calls, not much came of what all acknowledge was a rather halfhearted effort.

Members of the firm have strong feelings about trying to be true to their principles, and they have come to appreciate the costs associated with their sense of integrity. Two recent discussions in the firm illustrate their thinking. A landlord rather notorious in the tenants’ rights community as an exploiter of poor people was known to be looking for counsel to defend himself against a series of public charges of misconduct, in particular for lying to a grand jury about payoffs to housing inspectors. The firm ultimately was not approached by the landlord, but they did engage in a discussion about what to do if they were asked. Ruth Fried was deeply opposed to being identified with the landlord in any way, but she knows she would probably have been outvoted by her two senior partners. The lawyers of the firm have always felt it important to be on “the right side” of issues: advancing societal interests beyond the interests of individual clients is part of the special pleasure and satisfaction they take in their practice. While the firm never would have represented the landlord against a tenants’ union or in an eviction, Alan and Joel would have defended the landlord in a criminal prosecution because they define criminal-defense work as the “right side,” even though they are aware that few of these cases involve factually innocent defendants. Criminal defense, as Joel puts it, is a vehicle to advance rights that eventually protect us all. Joel and Alan regularly agree to accept court appointments to represent defendants charged with first-degree murder. They would only refuse to provide criminal-defense services if a case involved serious racial or ethnic prejudice.

Some time ago, Alan raised the issue of bringing into the partnership a fine lawyer he knew in the Wayne County district attorney’s office who was exploring entering private practice. The attorney offered the possibility of engaging in products-liability defense work for major corporate clients. After a discussion, the strong consensus of the office was that adding this type of practice to the firm was a mistake. Joel’s skepticism that the lawyer could actually bring in the business was far less important than the uneasiness everyone felt about getting on the wrong side of products-liability litigation. It did not fit with the firm’s sense of its own personality.

The decision seemed in retrospect to be excellent when Joel became involved with products-liability litigation in which the same former United States attorney, now in private practice, turned up on the other (or wrong) side. But the precarious state of the firm’s finances caused other problems in the litigation. A small group of civil rights and tenants’ plaintiffs’ attorneys began meeting to develop a novel strategy in lead-paint-poisoning cases. They devised a suit against paint manufacturers as well as landlords for damages resulting from the ingestion of lead-paint particles. Two of the other attorneys were from firms similar to Marks and Feinberg, that is, people who had established reputations for integrity and “cause” lawyering, with whom Joel felt totally at ease. The dilemma they faced, however, was the colossal cost of the litigation. The manufacturers, whose solvency
would be threatened by a successful suit, would be bound to present
the most comprehensive and dilatory defense imaginable, in short, a
scorched-earth campaign. Virtually every major corporate law firm
in Detroit—along with major national law firms—would be thrown
into the battle, and the carrying costs of litigation with important
ramifications for a whole industry would be enormous, far beyond
the resources of the three firms. A fourth law firm, a plaintiff firm
specializing in asbestos litigation that views lead-paint litigation as
a new line of business, was therefore invited into the suit, chiefly
because it had the resources to finance the litigation. The marriage
of convenience led immediately to tensions within the group, as the
asbestos firm refused to pool referrals generated by the publicity of
the lawsuit and brought in a media specialist to publicize its role in
the litigation.

The aggressive marketing of the asbestos-litigation firm is offen-
sive to Marks and Feinberg, who see the asbestos firm as a group
of unprofessional businesspeople. On the other hand, it underscores
the absence of any planning for the economic viability and future of
Marks and Feinberg. Alan Marks mentions in passing the multi-
million dollar judgment in a contingency-fee case won by a friend
with similar public-interest values. The wishful thinking for the big
one, the mother lode, is the small law firm’s counterpart to the
Cinderella syndrome (“some day my prince [case] will come”). Gross
income at Marks and Feinberg over the past few years has been
erratic, moving from $298,000 in one calendar year to $389,000 and
$313,000 in subsequent years. Gross income for forthcoming years
is likely to grow substantially, but expenses are up even more sharply,
particularly wages to employees and the commitment under the part-
nership agreement to Ruth Fried, who is paid a minimum of $33,000
plus a percentage of profits over $200,000. The annual net income
of each of the two senior partners has fluctuated from $46,000 to
$73,000 to $31,000, and more recently, a good year, $83,000. The
two partners have doubts whether they can substantially improve
their prospects for future net income.

After a period of inaction, and not a little despair (at least on
the part of Alan Marks) over the hopelessness of their situation, the
firm was persuaded that they had to engage in the process of mar-
teting. They developed a three-page firm résumé describing the law-
yers, their areas of practice, and their significant cases. Each lawyer
resolved to contact people to get the word out that the firm was
interested in most forms of trial work. Alan Marks was generally
acknowledged to be the main “laboring oar,” both because he felt
more urgently the need to change the situation and because he had
more contacts and friends in large firms. The marketing strategy was
to talk to large firms and suggest Marks and Feinberg as an excellent
small litigation firm to which the large firm could refer clients who
prevented from undertaking litigation due to a conflict of interest.

The firm résumé serves as a written reminder and factual review
of the quality of Marks and Feinberg’s work. Sensing the inadequacies
of their homemade résumé, the firm recently spent $4,000 for a public
relations professional to clean it up, add pictures, make it look better,
and reduce the verbiage and the civil rights stereotyping so that the
brochure communicates more effectively the type of fee-paying work
the firm seeks to do. Joel remarks sarcastically, “Next for us is radio
and TV.”

Alan has begun a series of contacts that is referred to jokingly
around the office as “power lunches.” Alan despises what he is forced
to do, namely talk to his friends and acquaintances in the profession
about his need for work and the quality work he is capable of doing,
but he realizes that unless he makes a strong effort to market the
firm and bring in more business, the firm simply cannot sustain itself.
The painfulness and humiliation of it all recedes somewhat, the more
he does it. The pace has slowed to one lunch a month.

Power lunches have not generated much business, although Alan
suggests that they may be beginning to bear some fruit. All four
lawyers are aware that results do not emerge from a low-key mar-
teting process overnight, and Alan realizes he must continue the
lunches and relentlessly remind people of the availability and quality
of the firm.

One by-product of the firm’s new determination to market itself
did lead to some significant work. Alan talked about the needs of
the firm to a faculty member at the University of Michigan who was
of counsel to a large firm. The faculty member urged the firm to
refer to Marks and Feinberg litigation for a major bank that the firm
was barred from representing by a conflict. Although Alan had rarely
handled commercial litigation, the matter was concluded successfully,
the bank was pleased, and Alan has continued to do some work for the bank and to be referred work from other lawyers involved in the banking matter.

One other event has brought hope to the office. Alan and Joel remain on the list for capital cases because they believe they have an obligation to handle these matters. The assignment of a case occurs strictly by happenstance. The clerk calls the next person on the list for the next case that appears on the docket. Alan’s luck of the draw was extraordinary: he was asked to handle a homicide of a policeman in the course of a drug bust, an extraordinarily high-visibility case in the local media that soon became sensational. The police raid on the drug operation that precipitated the shoot-out was based on a warrant that described the anonymous informant as West Indian. Since Alan’s defendant was Puerto Rican, he requested early in the case that the informant be produced on the grounds that the informant might have exculpatory evidence that the defendant was not, in fact, involved in the drug operation. The state prosecutors delayed responding to the request for so long that the judge threatened to dismiss the indictment unless they produced the informant. The state finally admitted that the informant did not exist, and that the same mythical informant had been used in warrants involving fifty or sixty prior drug convictions. The judge dismissed the indictment, and the state appealed to the Michigan Supreme Court. The proceedings have been highly publicized and have generated a “fair amount of business,” according to Joel, from people who have called because they read the names of Alan and Ann in the newspaper.

Some additional criminal business also arose as a result of another lucky coincidence. A fugitive from a bank-fraud indictment in federal court in St. Louis contacted a friend of Joel, who turned to Joel for assistance. When the fugitive was apprehended and returned to St. Louis, he asked Joel to continue to represent him in the trial and appellate proceedings there. The client then recommended Joel to others with whom he was incarcerated. Now Joel and Ann have developed a small specialty of representing federal drug defendants in St. Louis.

The lead-paint class action drags on as the defense firms create a mountain of paper out of the proceedings. The plaintiffs uncovered virtually nothing in discovery. There are now seven or eight individual lead-paint cases in the office, a modest but not insignificant result of this major litigation initiative. Ruth Fried has also taken on some additional employment-discrimination work. A friend of hers on maternity leave from another firm asked Ruth to take over her caseload.

Joel continues to teach the prisoner-rights course and clinic at Wayne State, in part because he feels he needs the money (about $12,000 total for two quarters of the school year). Alan has been teaching a course on advanced criminal-defense advocacy during both semesters at Michigan, for which he receives about $20,000, but he plans to cut back to one semester during the next academic year.

Joel reports that the current calendar year looks like a “good year.” A couple of medical malpractice claims have settled, which helps greatly, and things look promising enough that the firm has decided to renew its option on its current space for one additional year. This next year will be an important test of whether the firm can make it together. Joel describes his hopes for the next year:

It is hard to say if things will work out: I have a notion that we’ve managed for sixteen years, so we ought to be able to continue. Things are also changing in the profession. Competition is affecting us, creating more of a problem than before. We see many of the lawyers doing our kind of work facing difficulty, breaking up, restructuring into loose affiliations and the like.

Alan adds:

Most of the lawyers who once had our kind of practice and are now doing well have specialized, usually as a result of one big successful case that gets them into a “pipeline” (steady referrals and reputation) for this work. They do almost nothing but lead-paint cases, criminal work, employment work, or stockholder-derivative work. Specialization and high volume reduces one’s overhead and increases profitability. But I don’t think I would be able to stand that kind of practice.

Joel agrees: “We probably don’t want to be specialized.” Ruth points out that the firm could learn from lawyers who specialize how to move their cases more effectively. Everyone agrees that employing
paralegals would help, but that represents a significant cost they are unwilling to face. The firm, Ruth emphasizes, is busy: "We have no end of low-paying work: the question is how to get work (or as Alan puts it, get 'wired' to receive steady referrals of work) that pays better."

The volatility or fragility of the small specialty firm struck close to home when Baum and Caskey, the two-lawyer firm with whom Marks and Feinburg shares office space, recently broke up. Joe Baum took a job with the Michigan Grievance Commission and Fred Caskey joined a larger firm. This adds significant overhead costs and puts an enormous strain on the decision whether to renew the lease or seek new space. Luckily, one of the refugees from the breakup of another civil rights partnership will be sharing offices with Marks and Feinberg when Baum and Caskey depart. The big decision will occur later in the year, when Marks and Feinberg will be forced to decide whether to renew their option and to rent their space for an additional four years or negotiate for yet another one-year extension. The marketing campaign has several months left to bear fruit.

The economic uncertainty facing two highly trained, experienced, and respected litigators, and their partner and associate, goes beyond the immediate problems of their variable cash flow. It is the emotional impact of "managing to squeak by" that is most troubling. They both sense that it has become harder and harder to practice in the manner they have done for the past fifteen years: "Something has got to give." They talk of a need to find a method of bringing in regular, well-paying clients. For Alan, the economic problems are a symbol—a "club"—that hits a more troubling issue. He muses why money is not the major problem:

I love to litigate, to win, and to contribute to the work as well as my clients' and our pocketbooks. Why, after close to twenty years of practice am I having to go through this? I have this strong feeling that I am a very good trial lawyer, comparable to some of the best people at the bar in terms of credentials and significant litigation experience. And yet I do not handle major cases. The day-to-day practice is not as challenging as it could be.

For the others in the office, the issues are more purely economic. Ruth would like to give up her demanding part-time work at the University of Michigan Law School. Everyone would prefer the firm to be able to afford its own office, and to more easily make choices like the addition of the kitchen and conference room and the subscription to Lexis, a computerized legal-research service. Marks and Feinberg are a group who enjoy what they do, but they ask themselves with increasing regularity: How can we continue without increasing our income?