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# Foreword: The Future of the Profession

Geoffrey C. Hazard, Jr.<sup>†</sup>

## INTRODUCTION

The following are my views of the multidisciplinary practice (MDP) problem and how the American Bar Association (ABA) and, more generally, the legal profession should respond to it. I want to emphasize that these are my views. They do not necessarily and probably will not, in fact, correspond with the views of the ABA MDP Commission. The Commission is made up of a large number of people with diverse views and backgrounds and different approaches to the subject, to say nothing of diverse views on many other subjects. Moreover there are other participants in this symposium, who are as well informed on this subject as I am, and who have somewhat different views as to various aspects of it.

I come at this subject considering myself to be a practicing lawyer, which I am, and have been for the last twenty years. I was introduced into the law in the capacity of an associate at a general practice law firm. I have never been a judicial clerk, a fact that, I think, has influenced my take on the law ever since. As an associate you start at the bottom trying to make the system come out in a way that is consistent with your clients' interest. The person you are working for in a law office does not have the awesome power that reposes in the courts. I still consider myself a lawyer. I do legal work, and I think I think like a lawyer as well as an academic. I care a great deal about the legal profession, and I have always tried to consider its best interests.

I will begin with my conclusions about what the ABA and the state bars ought to do now. I offer these conclusions because I think many lawyers are predisposed to do something ill-advised, going on stupid. What I think they ought to do is ei-

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ther not change the rules at all or else change the rules in a way that would facilitate bringing into the recognized profession those lawyers presently engaged in occupations that call on their technical training in law but who work in settings in which, in this country and some other countries abroad, it is unlawful for them to call themselves lawyers, or in which it would work serious inconvenience to their employers if they were to call themselves lawyers. Therefore, these technicians call themselves tax specialists or consultants or something else, but they do not call themselves lawyers. I think it is a mistake to keep them outside the law's professional tent. Hence, if any modification in the rules is to be made, I would modify the rules to permit them to come into the tent. However, if we are not going to modify the rules in that direction, I would recommend that the rules be left alone. Let the forces of competition, which are blowing very hard these days, produce whatever may come. I think it is foolish to try to resist the forces of this magnitude with what will be relatively ineffectual legal controls.

The salient actors embodying these market forces have been the big accounting firms. The Big Five are no longer simply accounting firms. They are big, multidisciplinary professional service organizations, including not only accounting but management information services, financial services, management consulting, environmental consulting, and still other specialized functions. They are seeking to offer the efficiencies of faster and more sophisticated communication, quicker and more effective integration of various specialties, and the advantage of offering various services under a common name and with a common reputation. At a fundamental level, the driving market force is increased efficiency in transmitting information. The Big Five are big organizations, having tens of thousands of employees, whereas the biggest law firm has fewer than 10,000 employees and fewer than 3,000 lawyers.

In contemplating the MDP issue, we naturally think first of the big accounting firms. However, there is a multitude of other entities that are responding to the same underlying market forces. We should include the management advisory firms that are now competing with the accounting firms. We should include the big banks that are managing huge amounts of money, in all different kinds of ways—money market accounts, securities trading, loans and other investments, and now insurance. We should include the insurance companies, which are themselves branching into other fields, for example

healthcare financing and management. We should include investment and securities companies, some of which have merged with or been merged into banks and insurance companies. None of these companies can operate without a large internal corps of lawyers. Of course, these lawyers are serving the entity by which they are employed and thus are not engaged in the unauthorized practice of law. But the work these lawyers do establishes the legal framework for the transactions with their employers' clientele. In that sense, the corporate legal staffs are providing legal services to the outside clientele.

We should also include the information companies associated with the term Silicon Valley and epitomized by Microsoft. The businesses of these companies absolutely depend on some legally defensible, or at least legally arguable, definitions of intellectual property. Intellectual property is a legal concept and requires lawyers to articulate and enforce the concept. Finally, we should include organizations like the University of Pennsylvania Medical Center, which is a huge enterprise enmeshed in a complex web of legal regulations. The regulations to which a modern hospital is subject come forth in relentless streams and require large legal staffs to read, review and interpret to the doctors, the hospital administrators and, at least secondarily, to the patients. All of these entities must have a lot of lawyers just to open the door tomorrow morning.

## I. THE CURRENT RULES

### A. WHAT IS LEGAL?

Before we become too involved in the MDP debate, let me define what I think is now legal and illegal under the Model Rules as they stand. What I think is legal is this: If a firm, let us call it Pricewaterhouse, so desired, it could have a letterhead with its name on the upper left-hand corner, and on the right-hand corner it could have the name of Sullivan & Cromwell with the subscript "LC" (legal counsel) under the firm's name. It could have the same designation on its brochures. (A firm of nonlawyers can advertise the identity of their law firm.) There could be a contract arrangement between Pricewaterhouse and Sullivan & Cromwell under which the law firm provides legal advice to Pricewaterhouse. The agreement would also provide that when the clientele of Pricewaterhouse might have need of legal assistance, the clients would ordinarily be referred to Sullivan & Cromwell. The client, obviously, has to consent to a

referral and would retain the right to engage any other law firm for any matter. Pricewaterhouse has to want to send the client there rather than sending it across the street or somewhere else, and Sullivan & Cromwell has to be willing to take the client. Under this kind of separate arrangement, each entity sends separate bills to the client, Pricewaterhouse for whatever it is doing and Sullivan & Cromwell for whatever it is doing. As the rules currently stand, there would be nothing unethical or improper with this arrangement.

As a matter of fact, that is exactly what Ernst & Young has established in the District of Columbia with the firm McKee & Nelson, except that the law firm is called McKee Nelson Ernst & Young. The names of people who were not lawyers have been tacked on pursuant to a rule in the District of Columbia that permits a law firm to use a trade name. Thus, lawyers have the trade name as a subscript to their identification, and Ernst & Young has held out their affiliation with the law firm. I have it from a reliable source that Ernst & Young chose to include their name in the firm's name in defiance of the organized bar, challenging the bar to try to suppress the arrangement. There was an additional reason they wanted to include Ernst & Young in the firm name—that designation permitted the accountants to advertise the relationship particularly to their European clients, in effect saying that they had special access to super American tax lawyers who will be able to help out. Under the current rules, at least in the District of Columbia, there is nothing wrong with including Ernst & Young in the firm's name.

There is a simpler variation of these arrangements that was presented to the Commission in testimony from various witnesses. It is one you could visualize in Bemidji or Rochester, for example. There is an office building with an entryway leading to a reception center for professional offices. If you enter the reception area and look to the left over a doorway, it says Smith & Jones, Lawyers. If you look to the right over a doorway, it says Black & White, Accountants. You can walk in and engage whichever service seems appropriate. To comply with current rules, the firms operate as parallel organizations, each with their own name, staff, suite, record-keeping and billing system. The two firms coordinate their services very closely and cross-refer clients. Essentially, the operation considered as a whole is a multidisciplinary service, run as two separate firms.

The arrangement is especially advantageous to the law firm. Clients of the accountants have very cordial relations with members of that firm and usually would accept referral recommendations. Also, the business clients of the accounting firm come in at least every three months in connection with their tax returns. That creates other possibilities for referral of legal matters that might otherwise fall by the wayside.

Many attorneys see the connection between accountants and their clients as a pathway by which the law firm across the hall could get additional business on mutually favorable terms. The terms are more favorable to the law firm because additional business is involved, and more favorable for the accountant because the accountant does not have to take the risk of giving advice that should be coming from a lawyer. The terms are more favorable for the client because less tension and anxiety is involved in dealing with a lawyer introduced by an intermediary with whom the client has had a continuing and positive relationship. Many people find it a very terrifying experience to deal with lawyers. Some people would say that we train ourselves to be terrifying so we can stand up to the other side when we get in court. In any event, the fact is that lawyers as a class are not the world's greatest at public relations and many are not good at establishing positive human relations. The relationship of accountant and client, on the other hand, is more relaxed and supportive from the client's viewpoint.

There are of course all kinds of ethical problems implicated with this arrangement. Was this the best lawyer available to be recommended to the client? Should a specialist be consulted? Is there a problem of keeping matters confidential? What about the attorney-client privilege? Undoubtedly, those problems and others would arise. However, problems of this sort are not much different from the problems that exist in ordinary practice today. If the participants pay attention, the problems can be identified and resolved.

If the rules stay as they are, I predict that similar arrangements will proliferate. I do not think the result will be disappearance of the "traditional" law firm. The traditional law firm, where everyone is a lawyer and nothing else, has a lot going for it, particularly in dealing with especially difficult transactions and litigation. At the same time, I doubt very much that the bar could succeed in achieving adoption of rules that would prohibit arrangements of the kind I have described.

The real question is, therefore, whether the rules should be changed to facilitate anything beyond this.

#### B. WHAT IS ILLEGAL?

Under the current rules, two matters of conduct relevant to the MDP debate are involved. The first is prohibition of fee sharing with nonlawyers, provided by Rule 5.4 of the Model Rules of Professional Conduct. The second is imputation of conflicts from one professional to another, governed by Rule 1.10.

The question of fee sharing is, I think, a non-issue. Every law firm today either keeps close records of professionals' time or could readily do so. That being so, law firms control the information necessary to render separate bills for each professional, and do not need to "share" fees. Nothing would prohibit a firm composed of lawyers together with accountants or social workers or members of other professions, from sharing rent, the cost of computers, or the cost of paraprofessionals and junior associates. Each member of the firm can have a monthly draw in the form of salary, which is not fee sharing. Annual adjustments to distribute profits would be fee sharing if the transaction is characterized in that way. On the other hand, if the division to the nonlawyers is defined as a bonus on top of salary rather than a sharing of profits, then it seems to me the distribution is not a violation of Rule 5.4.

However, this approach to division of revenues entails two problems. One problem is that in a disciplinary proceeding the form of the transactions might be disregarded. The other risk is probably more serious as a practical matter. Put very simply, it may be difficult for a multidisciplinary firm to attract top-level nonlawyer professionals who cannot be made partners and who therefore would be "second-class citizens" in the firm. I understand that this was the underlying problem that led the District of Columbia to permit formation of multidisciplinary firms.

The other problem, and probably a tougher one, arises from Rule 1.10, which has to do with imputation of conflicts. Rule 1.10 operates this way: If Larry Fox and I are in a law firm together, any conflict of interest that he would have is imputed to me. Thus, if I am considering taking on a new client, I have to take account of the interests of Larry's clients because any conflict of interest that he would have in the new undertaking will be imputed to me, and vice versa. The rule applies not only if

Larry and I are side-by-side in our office, but also if he is in one of the other offices of our law firm, say the one in Philadelphia, and I am in Harrisburg or Minneapolis or, indeed, in London. Therefore, if our firm gets to a size beyond two or three attorneys, we have to have a computerized conflicts system into which he feeds all his information about his clients and I do the same thing. The computer system does a continual matchup of clients and matters. We also have a procedure for discussing problematic cases because we both realize, as a result of experience, that you cannot rely simply on a computer.

Law firms are able to operate under this regime. In fact, some law firms have managed to grow quite large while still adhering to Rule 1.10. A number of law firms are colonizing around the globe. Of course, occasionally law firms get cross-wise in their clientele resulting in embarrassment and sometimes in motions to disqualify, but for the most part the firms live with Rule 1.10 and function satisfactorily.

Complications would arise if Rule 1.10 were applied to a multidisciplinary firm. For one thing, the rule of imputation is peculiar to the practice of law. Other professions and vocations do not have such a rule. Rather, they recognize the concept of "insulation," whereby professionals working in one firm can provide service to clients with conflicting interests so long as the specific professionals involved do not share information concerning the clients involved. Some lawyers recoil in horror at this idea, but accountants and financial managers see nothing wrong with it. Perhaps they regard each other as more trustworthy in maintaining confidentiality than do lawyers. In any event, it may be noted that the prohibition in Rule 1.10(a) frames the imputation of conflicts as absolutely critical inside law firms.

My own view is that the bar could have a satisfactory rule permitting insulation walls, but many strongly disagree. In fact, in England, there are little cells of offices in the Inns of Court where barristers who are directly confronting each other in court live cheek by jowl in their chambers. The barristers are all solo practitioners, and the same clerk may handle the work for three or four barristers. In this country, public defender offices in some jurisdictions have a similar situation. To reduce the scope of imputed conflicts among lawyers in the defender offices, they establish insulation walls between the offices and prohibit lawyers in one unit from looking at the files and conferring with lawyers in another unit. These arrange-



ments have held up in court. As these examples suggest, there are clearly feasible alternatives to Rule 1.10.

Strictly interpreted, Rule 1.10 would not prohibit a lawyer in a firm from undertaking a representation simply because it is adverse to the client of an accountant who is a member of the same firm. There is reason to think that disciplinary authorities might disregard the terms of the rule, or fall back on the obsolete concept of "appearance of impropriety." There is also risk that the fact that the firm itself will get some revenue from the accountant's client would be counted as an "interest" on the part of the lawyer. On that basis—the prospect of the lawyer sharing some of the accountant's revenue—the lawyer could be said to have a conflict of interest. Interpretations such as these strike me as far-fetched, but disciplinary authorities and courts have often been willing to disregard the rules of law in deference to the supposed higher needs of the profession. They could do so again.

## II. EXPANDING THE LEGAL TENT

Returning to the current state of law and the MDP debate, I will focus on those lawyers who are not lawyers. I refer to lawyers who use their technical legal knowledge as staff members of accounting firms, financial service firms, banks, insurance companies, universities and hospitals, among other employers. The stated objection is that lawyers in such setting are under uncontrollable pressure to submit to unprofessional direction from superiors who are not lawyers. The idea of a lawyer being engaged in a setting in which he is very beholden to somebody not a lawyer is not, however, unheard of. In fact, this situation is precisely the role of in-house counsel. When I entered the law practice forty years ago, in-house lawyers were regarded as second-class professionals, if indeed they were considered professionals at all. They were the unfit who had been unable to make it in the big firms. Today, in-house counsel are very differently regarded, for these lawyers are now the ones who employ outside counsel. Accordingly, those of us in independent law practice have learned that those who used to be fallen brethren are now our esteemed colleagues.

Of course there was, and is, a risk that in-house lawyers—the corporate general counsel and her staff—will be under the thumb of the CEO or other members of corporate management. But it is also recognized that in-house lawyers have a positive counter-influence on corporate management. Today it is com-

monly accepted that in-house counsel is a real lawyer, somebody who goes to the bar association meetings, goes to CLE programs, is socialized into our profession, thinks of himself as a lawyer and, by golly, is a lawyer. Thus, although these men and women work for a single employer, they have come out from under the shadow and are a legitimate part of our profession.

An additional example of lawyers working for nonlawyers are those who are in small firms that do insurance defense work for a single insurance company. There is a legitimate argument that these "captive" firms are improper under the rules as they stand. But in many states it is perfectly legitimate for these lawyers to be employees of the insurance company and to have professional managers worry about managing the office. Perhaps even more to the point in terms of "realist" analysis, it is perfectly legitimate today for lawyers to be organized as a separate law firm called Smith & Jones, even though ninety percent of their business comes from two insurance companies. Will lawyers so situated be too sensitive to those insurance companies' interests, to the disadvantage of the interests of the insureds? Is there a risk that the lawyers might overlook their professional responsibilities to the insureds as clients? Of course there is. Are such arrangements nevertheless permitted on the premise that by and large the lawyers will recognize the proper priorities in their responsibilities? Of course they are.

Lawyers in these insurance company engagements can have difficult ethical problems when they get a client who has a coverage problem. The result obviously can be a conflict of interest with the company. But the lawyers can work it out. Doing so may be difficult, but that difficulty does not delegitimize the activity they are engaged in. The role of insurance defense counsel is just another example of an attorney forced to take suitable account of the interests of somebody who is not the lawyer's client and who has a very strong economic position vis-à-vis the attorney.

In recent years I have had an experience dealing with a very complicated problem in estate planning involving both lawyers and insurance analysts as consultants. There were two or three independent lawyers, as well as the financial consultant and an in-house lawyer for the insurance company. It required the knowledge and judgment of all of these professionals to figure out how best to address the situation. The fi-

nancial consultant and in-house lawyer were critical to the process.

In my observation, attorneys on the staff of insurance companies, trust companies, and accounting firms, for example, are in a position to bring very useful information and skill to resolution of very real client problems. Their usefulness increases as legal knowledge and technique get more and more specialized and underlying transactions get more distinct. A pension fund linked to General Motors is not the same as a pension fund linked to General Mills, for example. If a General Motors employee needs financial planning, it helps if the advisers involved are familiar with the specifics of the General Motors pension fund, rather than recently having had a course in pension law. The same proposition holds for healthcare coverages, whether from the point of view of the patient or the doctors or the healthcare institution. These kinds of arrangements are often bewildering in their complexity and they are getting more complicated. The only way anybody can really understand them is to learn by experience. Yet, as things stand, the bar wants to say that the lawyers who understand these arrangements are not really lawyers.

I estimate that probably thirty percent of our law school graduates end up in various staff positions of the kind I have described. This leaves about one-third of our profession in these settings where they cannot call themselves lawyers. The reason they cannot call themselves lawyers is because they are employed by corporations. If they call themselves lawyers, then they would be assisting the corporation in the unauthorized practice of law. So they call themselves tax advisors, personnel directors, or part of a law department that is representing only the employer.

### III. CORE VALUES AND A VISION FOR THE LEGAL PROFESSION

In the MDP debate, there has been a lot of talk about the core values of our profession. However, we have to consider not only the values we profess, but the values we exhibit in practice. My experience in litigation suggests to me that, for many lawyers, the core values of our profession include being as nasty as we can be. We can smile at each other at the bar association meeting, but many of us behave very differently in the deposition room. I now make it a practice after I have been subjected to a deposition that has been conducted in a civilized

way to say to the lawyer who took it, "Thank you, sir, very professional." The reason for conferring this recognition of course is that I have also been subjected to many depositions that are unprofessional.

But what are the positive values? Confidentiality, to be sure. But do we not think that accountants recognize and observe confidentiality as a professional virtue? Of course they do. Indeed, accountants are subject to a legal duty of confidentiality derived from the law of agency. How about financial advisors? Do they not consider confidentiality an ethical and legal duty? Loyalty. Do not accountants and financial advisors have ethical and legal duties of loyalty? Do they not have a duty, as we have, to consider the matter at hand in terms of the client's viewpoint and objectives? Of course they do. Competence. Do our fellow professionals not have a duty to use competence in their engagements, and to decline and refer to other matters that are beyond their competence? Of course they do. All these ethical duties are supported by the law of agency and the law governing fiduciaries.

#### CONCLUSION: WHERE COULD WE GO FROM HERE?

If we wanted to be serious about restoring the profession to what we imagine it used to be, we could adopt the following ethical restrictions. You can call yourself a lawyer only if:

- You do not engage in any other economic activity except that of collecting revenues from passive investments. Other activities in which lawyers have engaged—real estate investments, corporate directorships, etc.—all dilute and confuse professional identity.
- You do not make public utterances on the subject matter you are presently handling for clients. We are spokespersons in court and we have no business being spokespersons on the courthouse steps. Being a special spokesman in court is a very important privilege, and its distinctive character should be preserved. A lawyer should not become a general mouthpiece for a client.
- You have professional malpractice insurance in a very substantial amount, say a factor of several times the annual revenues per lawyer. Lawyers are supposed to be responsible and real responsibility entails being financially answerable for one's conduct. Some

say that is impossible. In fact, malpractice insurance is already required in Oregon, and perhaps in a few other states.

- You have an accounting system that meets recognized accounting standards. Many law firms, particularly small firms, do not handle the money very well. Not everyone would be required to have the same system, but it must be a system that meets the professional accounting standards.
- You have an operative conflicts-checking system. All responsible law firms now have such systems.
- You are continuously subject to unannounced audits of your accounting and conflicts-checking systems. The disciplinary authorities would be authorized to come in anytime without warning and take a look. They are doing something like that in Iowa, and they have been doing it for years in British Columbia.
- You have periodic peer-review evaluations. To avoid conflicts problems it would be necessary to have these reviews done by lawyers from "out of town." Surely the rules could be arranged to make it feasible to have such reviews.

These are the kinds of things we should address if we really got serious about the values of the profession. Under such a regime the profession would be narrowly-defined. It would mean that people could not call themselves lawyers unless they conformed to these standards. There would be lots of people out there who are lawyers, who are trained lawyers, who are doing law functions, but could not call themselves lawyers. That would be their choice. A model quite similar to what I propose is currently the law in Sweden, and they seem to be surviving very nicely.

The possibility that such a model would be adopted in this country is of course remote, probably infinitesimal. An alternative is to step back and take a broader view of the function of law in our modern society. From that perspective we can see how pervasive legal intervention has become in the ordinary affairs of the community—environment, employment, tax, securities, health, education, etc. We could also recognize how diverse the mechanisms for providing legal services have become. On one end are the thousand-member international corporate law firms, nearly unthinkable even twenty years ago and bearing only nominal resemblance to the traditional law firm.

On the other end of the spectrum is the county attorney legal staff cooperating with family services social workers to provide guidance and assistance to the poor people in the locality. There is an infinite array between these variations.

We could consider that everyone is still a "lawyer" who has gone to law school and is now *not* in some distinct calling. I would like to see all these folks brought back into the profession by making it easy for them to call themselves lawyers, even if they are employed by corporations, even if they are working with accountants or whatever. I am very pessimistic about the possibility that the bar can bring itself to do that. The speeches at the bar meetings suggest that the sky would fall if we did. But at least we could avoid making the situation worse. Hence, the feasible and prudent course would be to leave the rules as they stand unchanged.

