

2000

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Lawrence J. Fox

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## Recommended Citation

Fox, Lawrence J., "Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs" (2000). *Minnesota Law Review*. 1790.  
<https://scholarship.law.umn.edu/mlr/1790>

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# Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs

Lawrence J. Fox<sup>†</sup>

## I. PROFESSIONAL INDEPENDENCE UNDER ATTACK

While most of the world has slept, even the world of lawyers, the Big 5 accounting firms have mounted a frontal assault on the legal profession that threatens to destroy the foundation of professional independence, loyalty and confidentiality that the lawyers of America have always promised the public. Ignoring our rules that lawyers may not share fees with nonlawyers,<sup>1</sup> the critical rule that is designed to assure professional independence (he who pays the piper calls the tune), the accounting firms have hired thousands of lawyers who leave their law firms on Friday and show up on Monday doing the exact same thing for the exact same clients, but now as employees of the nonlawyer Big 5.

In order to rationalize the fact that these lawyers are blatantly violating our profession's fee-sharing rule, these lawyers now assert that they are not practicing law; rather they are practicing tax, ERISA, employment, merger and acquisitions, or otherwise consulting. To compound this ethical violation of Rule 5.4, they violate our profession's rules governing conflicts of interest and confidentiality, and our profession's prohibitions on limitations on lawyer liability, on restrictive covenants and on the direct solicitation of clients—all because they tow the Big 5 line that our professional rules are outdated, not worthy of respect, and unnecessary in the brave new economic order, where business success is the only value. But all of this should come as no surprise to those of us who have been watching with disillusionment and dismay. Because, while the accountants

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<sup>†</sup> Partner, Drinker Biddle & Reath LLP, Philadelphia, PA.

1. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1983).

have set out to attack the rules of the legal profession, they have also set out to undermine their own.

The core business of the Big 5 is the audit function. I take a back seat to no one in my respect for what these firms are supposed to do and the importance we all should attach to the work the auditors must perform. The integrity of the financial reporting function for public companies literally makes the concept of public company possible. Knowing that these highly-trained individuals bring their expertise and independence to their daunting task means that when a public company tells us what its balance sheet shows and how it has done for the last year, we are not receiving data colored by the interests of management in their expensive stock options, in their exalted salaries and bonuses, or in securing the adulation of a fawning financial press. Rather we know that these financial statements have been the subject of the healthy skepticism, rigorous auditing standards and consistent accounting principles established by the independent auditing profession. As a result, millions of us, either directly or indirectly, rely on these financial statements in committing our life savings, our retirement accounts, and our children's educational funds to investments in companies whose financials have received the Big 5's "Good Housekeeping Seal of Approval."

But the Big 5 long ago struck out on a new course. Though the audit function gave them entrée into the inner sanctum of virtually every public company in America, the audit business promised slow growth and little romance. So the Big 5 (the Big Eight when this all began) decided to leverage their connections by offering other services—consulting, advisory, investigatory, data processing, websites, e-commerce and now, even legal. They have done so by trading on their good names, capitalizing on the special relationships their client's need for their clean opinion accords, and without regard to the effect their earning of ever higher non-audit fees would have on their independence.

It took the Securities and Exchange Commission (SEC) to issue a wake-up call to the accounting profession.<sup>2</sup> Increasingly the corporate watchdogs in Washington, D.C. have expressed concern that the rapidly expanding non-audit work provided by the Big 5 threatens not only the appearance of their independ-

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2. See, e.g., Elizabeth MacDonald, *Top Accounting Industry Group Sets Conflict-of-Interest Compliance Rules*, WALL ST. J., Feb. 2, 2000, at B2.

ence, but the fact of their independence in conducting the auditing function.<sup>3</sup>

One of the more recent manifestations of this concern came in a letter to the American Bar Association's (ABA) Multidisciplinary Practice Commission from the Chief Accountant of the SEC.<sup>4</sup> In that communication, Lynn Turner first reviewed the law, particularly *United States v. Arthur Young & Co.* in which the Supreme Court observed:

"... the private attorney's role [is] the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust."<sup>5</sup>

Turner then noted that the SEC itself has identified the rendering of legal services as something that must be considered in making independence determinations.

"Certain concurrent occupations of accountants engaged in the practice of public accounting involve relationships with clients which may jeopardize the accountant's objectivity and, therefore, his independence. In general, this situation arises because the relationships and activities customarily associated with this occupation are not compatible with the auditor's appearance of complete objectivity or because the primary objectives of such occupations are fundamentally different from those of a public accountant . . . .

A legal counsel enters into a personal relationship with a client and is primarily concerned with the personal rights and interests of such clients. An independent accountant is precluded from such a relationship under the Securities Acts because the role is inconsistent with the appearance of independence required of accountants in reporting to public investors."<sup>6</sup>

Turner concluded that the Office of Chief Accountant would consider a firm's independence from an SEC registrant "to be

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3. *See id.*

4. *See* Letter from Lynn E. Turner, Chief Accountant of the SEC, to Commission on Multidisciplinary Practice (Jan. 22, 1999), *available at* <<http://www.abanet.org/cpr/turner.html>>.

5. *Id.* (quoting *United States v. Arthur Young & Co.*, 465 U.S. 807, 817-18 (1984)).

6. *Id.* (quoting SEC, CODIFICATION OF FINANCIAL REPORTING POLICIES §§ 602.02.e.i, 602.02.e.ii.).

impaired if the firm also provides legal advice to the registrant or its affiliates."<sup>7</sup>

Nonetheless the accounting profession, in the name of the Big 5, have continued to expand their legal services, hiring new lawyers, launching their own law firms (McKee Nelson Ernst & Young),<sup>8</sup> and establishing special relationships with existing firms. To justify this clear compromise of their independence, they employ the same artifice (these people are not practicing law) they have used to ignore our profession's rules—and to the same effect. In each case, the core values of a profession lie bleeding on the ground.

Equally troubling is the recent announcement from the SEC that half the partners of PricewaterhouseCoopers, including thirty-one top executives, had violated the auditor independence rules that prohibit investment in audit clients of the firm.<sup>9</sup> The SEC found "widespread" noncompliance, which reflects "serious structural and cultural problems in the firm."<sup>10</sup> The statistics regarding the violations are just staggering. A total of 1,885 staffers committed a total of 8,064 violations, with 45% of the infractions carried out by partners auditing public companies.<sup>11</sup> The SEC suggested that fifty-two companies hire another firm to replace PricewaterhouseCoopers.<sup>12</sup> The response from the offending firm was alternatively dismissive ("the vast majority of [the] infractions resulted from an honest failure to appreciate the importance of compliance, failure to check restricted investments, and a lack of understanding of the intricacies of the rules"<sup>13</sup>), defensive ("[a]t no time was the integrity of our audits compromised"<sup>14</sup>), and

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7. *Id.*

8. I have addressed this topic elsewhere. See Lawrence J. Fox, *New Firm: Wolf in Sheep's Clothing*, NAT'L L.J., Jan. 24, 2000, at A23.

9. See Elizabeth MacDonald & Michael Schroeder, *Report by SEC Says Pricewaterhouse Violated Rules on Conflicts of Interest*, WALL ST. J., Jan. 7, 2000, at A3.

10. *Id.* (quoting the SEC's report summarizing a yearlong review of auditor conflicts of interest at PricewaterhouseCoopers).

11. See *id.*

12. See Elizabeth MacDonald, *Accountant Faces Salvo from SEC*, WALL ST. J., Feb. 28, 2000, at A3.

13. MacDonald & Schroeder, *supra* note 9, at A3 (quoting a letter from PricewaterhouseCoopers's chairman, Nicholas Moore, and Chief Executive Officer, James Schiro).

14. *Id.* (quoting Kenton Sicchitano, PricewaterhouseCoopers's global managing partner of regulatory and independence issues).

apologetic (we are making "sweeping changes to our processes").<sup>15</sup>

Far more instructive (and more troubling) was the response from unnamed sources in the profession, not lamenting this professional "black eye," but rather railing against the independence rules, saying they have to be modernized, arguing that the firms have set up their now famous firewalls (presumably the same ones that they use to take on directly conflicting matters) which separate those who work on an audit from those who want to invest in companies being audited, asserting that the rules have not kept up "with the firms' evolving push into every market niche under the sun."<sup>16</sup>

In other words, just like the way the accountants wish to repeal the legal profession's imputation rules governing conflicts of interest ("if we impute conflicts beyond the individuals working on the engagement we'd have to turn down so much business"), they also hope to repeal the rules governing independence of their own profession so that no one will look askance at the millions in non-audit services they are billing their audit clients, and everyone will be comfortable with accountants and their families investing in companies their firms audit.

I am a director of Big 5 audited closed-end investment companies. Our investors, my fellow directors and I rely every day on the independence of a Big 5 firm to audit our companies without any outside influence. The last thing we would want to learn is that the firm's partners were investing in our companies or that the firm was providing extensive non-audit services to our advisor.

Perhaps this latest development should come as no surprise. It was Sam DiPiazza of PricewaterhouseCoopers who testified before the American Bar Association Multidisciplinary Practice Commission on behalf of his profession's foray into the practice of law (oops! legal consulting).<sup>17</sup> To support his argument that the legal profession should not be concerned, Mr. DiPiazza asserted that the two professions, accountants and

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15. *Id.* (quoting Kenton Sicchitano, PricewaterhouseCoopers's global managing partner of regulatory and independence issues).

16. *Id.*

17. See Hearings Before the Commission on Multidisciplinary Practice (Mar. 11, 1999) (written remarks of Sam DiPiazza, Jr., Managing Partner, Tax Services-Americas PricewaterhouseCoopers LLP), available at <<http://www.abanet.org/cpr/dipiazza.html>> [hereinafter DiPiazza Remarks].

lawyers, were actually twins separated at birth.<sup>18</sup> After all, both have the same values, confidentiality, loyalty and professional independence,<sup>19</sup> a view surprisingly echoed by someone who really knows much better, Professor Geoffrey Hazard in his keynote address at this Symposium.<sup>20</sup>

I have already addressed elsewhere how the accounting profession's notions of loyalty and confidentiality bear little resemblance to ours.<sup>21</sup> For them loyalty is an individual matter and entirely subjective; for us loyalty is a firm-wide matter and our conduct is judged objectively. For them, confidentiality is waived to fulfill their attest function; to us, it admits of only two exceptions, imminent death or serious bodily harm.<sup>22</sup>

When it comes to professional independence, we are even further apart. Moreover, unlike loyalty, as to which the accountants could, if they were really committed, adopt our standard, but exactly like confidentiality where, because they are auditors, they cannot, the accountants' standard of professional independence only has in common with the lawyer requirement the same name. Their "independence" is independence from the client. When we read that Arthur Andersen has opined on the financial statements of some company, we want to know that Arthur Andersen was free of influence from its client, able to bring healthy skepticism to its work to protect the public from relying upon financial statements that have not been prepared in accordance with generally accepted accounting principles after an audit conducted in accordance with generally accepted auditing standards. Like the Chief Accountant of the SEC, we want no advocates here, but rather professional distance and objectivity.

For lawyers, professional independence is a completely different concept. Yes, it means we give our clients our best advice, even if it is not what the client wants to hear. But it also means that we are free from outside influences—especially the government, other clients, third party payers and our own self-

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18. *See id.*

19. *See id.*

20. *See* Geoffrey C. Hazard, Jr., *Foreword: The Future of the Profession*, 84 MINN. L. REV. 1083, 1093 (2000) (transcribing Professor Hazard's address).

21. *See, e.g.*, Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (written remarks of Lawrence J. Fox, Drinker Biddle & Reath, LLP), available at <<http://www.abanet.org/cpr/fox1.html>>; Written comments of Lawrence J. Fox to the Commission on Multidisciplinary Practice, available at <<http://www.abanet.org/cpr/fox2.html>>.

22. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983).

interest—to permit us to exercise unbridled loyalty and zealous advocacy on behalf of our clients.

Mr. DiPiazza betrays his (and undoubtedly his entire profession's) misunderstanding when he asserts:

To suggest that the threat to independent judgment is unacceptably higher when a non-lawyer has an economic interest in a law firm than when a lawyer is under pressure from a long-standing client to take a particular position or is encouraged by a senior partner in his own firm to accommodate a client's interests, strikes me as a doubtful proposition.<sup>23</sup>

It may be doubtful to him, but it is anything but to us. Being “under pressure” from a long-time client is exactly where the pressure should be. Being “encouraged” by a senior partner is exactly who should be doing the encouraging. We are beholden to our clients (so long as the suggested conduct is lawful and ethical) and we are supervised by other lawyers (whose guidance we follow unless the ethical or legal violation is clear). The former is our client to whom we are ethically committed and the latter is a lawyer, similarly conversant with our values, subject to our rules and liable to the same disciplinary sanctions as we. It is pressure from nonclient, nonlawyers that we must be ever vigilant to guard against and it is precisely those influences that compromise our professional independence.

This leads me to an even more fundamental point. In the rush for lawyers to become part of the great MDP movement, for other enterprises large and small to own and operate law firms, we have forgotten entirely what it means to be a lawyer.

We are not just another set of service providers. We are not just another cohort of business consultants. We are not just another kiosk at a one-stop shopping center for financial services.

We are officers of the court. We have the power to file complaints, draft subpoenas, take testimony under oath, appear before tribunals from justice of the peace court to the United States Supreme Court, make representations of fact and law to judges, issue opinions that permit great corporate and individual transactions to occur, confer privilege on conversations with our clients.

We have responsibilities to improve the civil justice system, to seek improvements in the law, to provide pro bono service to those who cannot afford lawyers, to race to the de-

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23. DiPiazza Remarks, *supra* note 17.



fense of judges, to enhance the organized bar, to be responsible citizens of our communities.

Indeed, we are a priesthood. Perhaps we have forgotten this. Perhaps we have become too cynical or too interested in billable hour goals and our lofty financial expectations. Perhaps we have left ourselves vulnerable to the takeover that is now upon us by failing to remember our mission and failing to fulfill our responsibilities.

But that does not mean it is too late. The great offensive by the Big 5 could be turned into an advantage. It might not only unite the profession to resist this disastrous incursion, but also motivate us to refocus and rededicate our efforts to recapturing our own professional values.

## II. RUMINATIONS

The foregoing was written weeks before the Symposium that was held at the University of Minnesota Law School on February 25-26, 2000. Since then events have continued apace, and I have listened to the many thoughtful speakers the *Minnesota Law Review* recruited to participate in this event. As a result it seemed important to offer some additional observations to the ongoing dialogue.

### A. THE ONE-STOP SHOPPING ARGUMENT DIES

One of the foundations of the multidisciplinary practice argument is that clients are better off with, want, yes, even demand, one-stop shopping. Break down the artificial barriers created by Rule 5.4, and we will give our clients what they deserve, or so goes the argument. Thus, the accounting firms set out to be all things to all people. And the only two impediments to accomplishing that goal remain the lawyers, who despite overwhelming criticism, hang onto the "antiquated" principle that lawyer independence requires that lawyers not work for others, and the quiet voice of the SEC whose Chief Accountant I quoted above.<sup>24</sup> Each argue that one-stop shopping might be desirable, but not if the cost to be paid was greater than the so-called benefit that might accrue from making one telephone call instead of two.

On February 16, 2000, it was reported that PricewaterhouseCoopers was splitting off its tax and auditing work from

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24. See text accompanying *supra* notes 4-7.

its other consulting business, which in turn might be split into two or more entities.<sup>25</sup> Of course, the devil is in the details, which have not been announced (and how the ownership is allocated among the principles of these new firms will determine whether what we are dealing with is form over substance); yet, it does appear that this Big 5 firm recognizes that the SEC will not tolerate the threat to auditors' professional independence caused by the offering of so many other services to audit clients of the firms.

The second shoe dropped when on March 1, 2000 the accounting firm of Ernst & Young announced that it would be selling its non-audit business to Cap Gemini S.A. of France, a public company with its headquarters in Paris.<sup>26</sup> Again, we do not yet know how "independent" these various businesses will be—one from the other—but it would appear that Ernst & Young audit clients will have to go to the great inconvenience of making a second call if they want to secure other services from the auditing firm's former colleagues.

The lessons from these press releases are profound. First, consolidation, we have been told, is as inevitable as it is irreversible. But these announcements prove both of those propositions wrong. There are centrifugal forces at work that are more powerful than the centripetal forces that brought all this "consulting" together. And if PricewaterhouseCoopers can be split into a number of enterprises, the civil disobedience of the accounting firms in hiring thousands of lawyers can be reversed as well. The fait accompli with which our profession has been presented ("now that we've hired 5,000 lawyers we dare you to do something about it") is far more easily undone than the splitting off of all of Ernst & Young's consulting business will turn out to be.

Second, the profession has been lectured, even hectored, at this Symposium and elsewhere that the economic forces of progress are so powerful the only choice the profession has is to lie supine on the beach, let the tsunami sweep over us, and get drenched by the new paradigm of one-stop shopping, open competition for services, and lawyers working for nonlawyers—our

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25. See Elizabeth MacDonald, *PricewaterhouseCoopers Nears Plan for Restructuring Involving Split or Sale*, WALL ST. J., Feb. 16, 2000, at C11; see also Elizabeth MacDonald, *PricewaterhouseCoopers Will Divide into Two or More Parts, Under Pressure*, WALL ST. J., Feb. 18, 2000, at B8.

26. See John Tagliabue, *Cap Gemini To Acquire Ernst & Young's Consulting Business*, N.Y. TIMES, Mar. 1, 2000, at C1.

once great profession reduced to the lowest common denominator role as just another profit center at a department store for consulting services.

But progress is not like that. Symposium commentators may claim Rule 5.4 is as anachronistic as the manufacturer of buggy whips in an age of automobiles,<sup>27</sup> or note that when President Clinton was inaugurated there were five websites and today there are 150,000,000,<sup>28</sup> but what we are talking about when we discuss Rule 5.4 and professional independence has nothing to do with e-commerce or biochemical engineering. It has to do with values, values that are enduring, values that we might have to fight harder to maintain against forces that do not understand, appreciate or treasure them. But whether our clients are producing quill pens or Palm pilots makes no difference when what we are guarding against is (a) interference by nonlaw trained masters who wish us to take short cuts to maximize profits, (b) the loss of the privilege and confidentiality because it is not clear whether legal services are what is being delivered and (c) disloyalty reflected in "new" conflicts of interest rules that establish willy-nilly so-called fire walls between service providers in adjacent officers working on opposite sides of a matter, or allow each professional to look herself in the mirror and ask the subjective question "how do I feel about taking on this representation?" The arguments against Rule 5.4 premised on a changing world have no more validity than if we demanded that the preacher change the substance of his Sunday sermon simply because it was being narrowcast live over the Internet.

Third, the PricewaterhouseCoopers and Ernst & Young maneuvers occurred because the value of professional independence was deemed more critical than one-stop shopping convenience. The values we espouse as lawyers, through the protections provided in Rule 5.4, are at least as important as the value of auditor independence. I was surprised—no shocked is a better word—that not one of the academics at this Symposium asserted the importance of these values. Rather the only comments in this regard that I recall were cynical and

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27. See Peter C. Kostant, Remarks at the University of Minnesota, The Future of the Profession: A Symposium on Multidisciplinary Practice (Feb. 26, 2000) (videotape on file with the *Minnesota Law Review*).

28. See Edward S. Adams, Remarks at the University of Minnesota, The Future of the Profession: A Symposium on Multidisciplinary Practice (Feb. 26, 2000) (videotape on file with the *Minnesota Law Review*).

snide. One professor even asserted that he was "sick" (though not "sick to death") of hearing about core values.<sup>29</sup>

## B. THE GUERRILLA WAR CONTINUES

I have likened here and elsewhere the Big 5 assault on the legal profession to a guerilla war.<sup>30</sup> The analogy does not work perfectly because, while it is true that the insurgents are acting by stealth, choosing their moments in an opportunistic way, the legal establishment is not yet at war. Only now is the profession even beginning to wake up to the fact that it must mobilize. Yet the accountants are not quietly waiting for the next battle. They assault when and where they can.

The March 5, 2000 *New York Times Magazine* contains a splendid example. There Arthur Andersen ran a full-page color advertisement.<sup>31</sup> The main text could not be more worthy of approval. Under the headline "E-steem" appears a picture of a beautiful African-American woman dressed in a striking orange suit. The copy goes on to trumpet the fact that Arthur Andersen is "Title Sponsor of Clean Your Closet Week" designed to provide used clothing for those looking for entry into the job market.<sup>32</sup> Good p.r. Good image. Good cause. Then the advertisement lists Arthur Andersen's services: "Assurance" (that's the one they used to call auditing), "Business Consulting" and, continuing in alphabetical order, to "Legal Services."<sup>33</sup> What is this? Is Arthur Anderson finally admitting that the lawyers who work for the firm are practicing law? Maybe. A "note" at the bottom in six-point type observes "The services offered in particular areas may depend on local regulations. In some locations [Philadelphia? Minneapolis?], legal and/or tax services are prohibited by Andersen Legal, the international network of law firms that is associated with Andersen Worldwide SC."<sup>34</sup>

Putting aside the odd syntax (the services are not "prohibited by Andersen Legal," they are prohibited by rules like Rule 5.4 in every state and many other countries) and the misleading use of "some locations"—I assume they mean some whole

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29. Charles Wolfram, Remarks at the University of Minnesota, The Future of the Profession: A Symposium on Multidisciplinary Practice (Feb. 26, 2000) (videotape on file with the *Minnesota Law Review*).

30. See Fox, *supra* note 8, at A23.

31. *E-steem*, N.Y. TIMES MAG., Mar. 5, 2000, at 43.

32. *Id.*

33. *Id.*

34. *Id.*

countries—why is Arthur Andersen touting its legal services in a magazine 99% of whose circulation is in “locations” where those services may not be provided? This is a coolly calculated opening wedge, we can be sure, to this firm’s not so subtle campaign to snare more clients for its thousand plus lawyers working in the United States who, of course, we are told (and the SEC is told) are not practicing law.

### C. THE MYTH OF CLIENT DEMAND

One of the unquestioned givens in this Symposium was client demand for MDPs. It is surprising that such a skeptical band as law school academics would so blithely accept this “fact,” particularly given the present law school world’s love affair with empirical evidence. Where is the data? The only thing that came close to proof of the client demand proposition were the reports that, when asked, client groups, by and large, want choice. Give them an alternative, and they will decide.

But that litany does not substitute for evidence of client demand. For my part, I am waiting after thirty years for the first client to come to me, or anyone at my firm for that matter, and tell me “I wish you had economic experts on staff,” “we wish you would provide environmental listing services,” “I wish you could help me invest the assets of my mom’s estate.”

More important, when asked whether they prefer more choices, consumers will always say yes. I, for one, prefer twenty flavors of ice cream, three different hot fudge sauces and walnuts, peanuts and slivered almonds. But none of those who are polled have ever been told the consequences of the added choices. That would be too difficult to explain and might give clients serious pause. So full disclosure of the implications does not occur and the results of this unscientific testing is a clear (but uninformed) vote for choice.

One wonders what the results would be if these clients could learn what law professors teach their professional responsibility students about attorney-client privilege, confidentiality, loyalty and maintaining professional independence, and how fragile those values are, how they are under constant attack and how important they are to preserve. Although, I must admit, from the content of the participants’ speeches at the Symposium one must wonder, as important as those issues are, whether those things are being taught today at all.

#### D. WHERE ARE THE PROFESSORS?

Everyone agrees that 5,000 lawyers are engaging in civil disobedience when they assert they are not practicing law at the Big 5 accounting firms. It was just this civil disobedience that spurred the Commission to come up with its radical proposal. I opened the Saturday session of the Symposium pointing out that, if the ABA and all fifty states had adopted the Commission proposal, it would have made no difference because the Big 5 would not have registered as MDPs and would have continued the fiction that the lawyers who work there are not practicing law. The crisis confronting the profession then is figuring out what to do about *that*.

No one picked up the challenge. More troubling, not a single speaker suggested that the conduct of these lawyers is worthy of condemnation. I must ask why that is so? We train lawyers to be law-abiding. We test their competence and their character and fitness. We make them take solemn oaths to uphold the law. We mandate they take continuing education courses, including instruction in ethics.

Then when something like five percent of our profession does not just violate our rules governing fee sharing (I suppose they might have the temerity to argue that this civil disobedience is in support of an important cause, just like Rosa Parks refusing to take a seat on the back of the bus), but also our rules governing conflicts of interest, confidentiality, limitation of liability and restrictive covenants, the academic world's response varies from silence to outright approval. What does that say about lawyers' obligations to be law-abiding? What example does that set for the law students of America when our moral and intellectual leaders stand silent?

Professor Bruce Green did argue that Rule 5.4 should be repealed because it assumes that lawyers will sell out.<sup>35</sup> Professor Green asserts there is no basis for assuming such unfortunate conduct from the members of our profession.<sup>36</sup> But Professor Green is demonstrably wrong. The need for Rule 5.4

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35. See Bruce A. Green, Remarks at the University of Minnesota, The Future of the Profession: A Symposium on Multidisciplinary Practice (Feb. 26, 2000) (videotape on file with the *Minnesota Law Review*); see also Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1149-55 (2000) [hereinafter Green, *Disciplinary Restrictions*].

36. See Green, *Disciplinary Restrictions*, *supra* note 35, at 1147, 1151-53.

does not rest on any assumptions. Its importance rests on the actual conduct of the lawyers who went to work for the accounting firms and how quickly they abandoned so many of our ethical requirements. Having erected the fiction they are not practicing law, they could then, with no further guilt or re-criminations, ignore our other rules as well.

#### E. ARE THERE BARRISTERS AND SOLICITORS IN OUR FUTURE?

The Big 5 really wish to change our rules governing imputation of conflicts.<sup>37</sup> Even if we abandon Rule 5.4, so long as our profession insists on imputation, the Big 5 cannot accept our ethical terms of engagement, because they do not impute; indeed they could never have gotten as big as they are if imputation were part of their rules governing conflicts. The idea that a client who seeks legal services from one of the Big 5 would be informed whether the Big 5 firm represented the client's adversary—a core value to the legal profession—is not one of the possibilities at these accounting firms which are already the world's largest MDPs.

There are some in the profession who also would like to abandon imputation. A few of our largest firms think it is perfectly alright for their Paris office to be opposite their New York office, maybe even the 43rd floor to be on the other side of the 44th. And some academics, including several at the Symposium, seemed prepared to compromise on this central point.<sup>38</sup> Those who say let the market take care of all these matters, as well as those who have far more faith in screening<sup>39</sup> than this author, would compromise the imputation principle, though few if any of them would do so in the case of a litigation matter.

There are at least four troubling aspects to traveling down this road of watered-down notions of loyalty. First, the idea of separate conflict rules for litigation engagements confuses decibel level with the concept of adverseness while, at the same time, assuming, quite incorrectly I believe, that clients care much more about the results in litigation than they do in transactional matters. For some clients litigation is simply a

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37. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983).

38. See Hazard, *supra* note 20, at 1088-89.

39. Screens are what we in the legal profession call the methods that are put in place to protect confidential information; the accountants go us one better and call them firewalls. Neither exist in a physical sense and "screens" conveys much better how likely they are to work since screens are those items we install in the spring to let in light, air and sound.

cost of doing business; a key merger, acquisition or application for a franchise may determine whether the enterprise survives. So the notion that clients do not care very much about having their law firm show up on the other side of a non-litigation matter does not comport with the reality of client apprehension.

Second, in abandoning imputation the proponents of conflicts-lite envision a system where market forces will solve the problem. But that ignores how this will in fact play out. A law firm will be representing corporation A in getting key financing from investment bank B. After weeks of negotiations, A is suddenly informed its law firm is representing B, but "don't worry, we have screened your lawyers from the lawyers at our firm who represent B." The client is put in an impossible situation. It must either accept the continued representation of the law firm (wondering whether A is really receiving zealous representation now that B is also a client, perhaps a much more important client of the firm) or change firms now, with the attendant loss of momentum, experience and trust.

Third, as Dean Bayless Manning observed during the Symposium, whether a representation should be classified as transactional or litigation may be difficult to determine even at the outset of a representation and, in any event, representations evolve.<sup>40</sup> If one set of loyalty rules apply at the beginning of an engagement, but another set may apply later, which client ends up with the firm and which one is forced to now look elsewhere because the conflict that was not imputed, now is?

Fourth, and naturally following from three, if different rules of imputation apply to non-litigation matters, will any of my non-litigation partners want to remain in business with the Drinker Biddle & Reath trial lawyers? Won't we become a lodestone around their collective necks as they drag our higher standard of loyalty around when, if they simply jettisoned us, a whole array of new representations would be possible? Which brings me to the thought that one fallout of all this tinkering with our fundamental rules governing our commitment to our clients may be a fracturing of the bar—trial and transactional—with results whose consequences are hard to imagine.

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40. See Bayless Manning, Remarks at the University of Minnesota, *The Future of the Profession: A Symposium on Multidisciplinary Practice* (Feb. 26, 2000) (videotape on file with the *Minnesota Law Review*).



## F. WHITHER PRO BONO?

This Essay cannot end without an important nod at pro bono. Lawyers have an ethical obligation as officers of the court to perform pro bono legal services. The topic is the subject of a hortatory Model Rule of Professional Conduct, Rule 6.1,<sup>41</sup> and lawyers regularly contribute literally millions of hours of services each year in this arena.

One of the great concerns with lawyers suddenly becoming mere employees of Tony's Towing Service or American Express, institutions whose obligation is to maximize profit, will be a compromise of this commitment. Similarly, the type of cases lawyers are willing to take is likely to change materially. For the Big 5 and corporate America, whose idea of public service is chairing the Symphony Ball or sitting on the Art Museum board, representing unpopular causes and despicable clients might prove quite uncomfortable. I know all too well—from the reaction I have received as Chair of the ABA Death Penalty Representation Project when I have sought assistance from in-house counsel at major corporations for the unrepresented on death row—that H&R Block and Merrill Lynch will not want to be identified with “murderers” and Ku Klux Klan members, even though we know that lawyers who take on this work are not so identified under our lawyers’ ethics.

When I raised this issue at the Symposium, again I was shocked. I was, in effect, told, “You lawyers, do not undertake that much pro bono anyway. So what’s the big deal?”<sup>42</sup> Tell that to the fifty denizens of death row for whom our project has recruited lawyers in the last two years, including the Minneapolis firms of Dorsey & Whitney, Robins, Kaplan, Miller & Ciresi, Faegre & Benson, Lindquist & Vennum, and Fredrikson & Byron. Tell that to the indigent clients of Leonard Street and Deinard’s storefront office in Minneapolis’s Phillips neighborhood. Tell that to the First Amendment lawyers the ACLU has recruited across America to attack pandering politicians’ ideas for getting religion back into our public school classrooms.

Could the profession do more? Of course. Should it do more? Undoubtedly. But that does not mean that what is being done must not be cherished, nurtured and praised, and that

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41. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1993).

42. See, e.g., Charles Wolfram, Remarks at the University of Minnesota, *The Future of the Profession: A Symposium on Multidisciplinary Practice* (Feb. 26, 2000) (videotape on file with the *Minnesota Law Review*).

this work is not seriously threatened if lawyers' roles are diminished and their control over their professional lives is passed to nonlawyer bean counters. The solution for the inadequate level of pro bono commitment from the bar is to encourage more, not to permit practice settings in which the American public is guaranteed to receive far less.

### CONCLUSION

I write all of this with a heavy heart. The number of lawyers willing to stand up and be counted on the survival of our profession is far too few to respond to the brute forces of economic hegemony. Maybe, just maybe, a few law professors and lawyers will be inspired by these remarks to join the fray. It is not too late; but it will be soon.

