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### The Future of The Legal Profession

Linda Galler

*Maurice A. Deane School of Law at Hofstra University*

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# POINT & COUNTERPOINT

## POINT: THE FUTURE OF THE LEGAL PROFESSION

by James P. Holden, Washington, D.C.

Below I provide a statement relating to the newly enacted tax practitioner-client privilege, the employment of lawyers by accounting firms, and the developments in the delivery of legal services outside the United States by accounting firms. I also present suggestions about possible changes to the rules restricting partnerships and fee-sharing between lawyers and nonlawyers.

### THE TAX PRACTITIONER-CLIENT PRIVILEGE

This privilege was enacted as a result of the combined effect of two forces, one profession-oriented and the other consumer-related. First, the AICPA did a very effective job of convincing legislators that fairness requires a leveling of the playing field for professionals who represent clients in the tax marketplace. Second, legislators accepted the proposition that consumers of professional tax services are entitled to assurance that communications with their tax advisors will not be disclosed to the IRS regardless of the professional affiliation of the advisor.

The new privilege will probably achieve its intended purpose to protect most forms of tax advice provided by tax practitioners who are not engaged in the general practice of law. It suffers from two kinds of uncertainties. The first kind consists of the uncertainties that are inherent in the existing attorney-client privilege.<sup>1</sup> The second kind consists of uncertainties that result from legislative tailoring to restrict the new privilege to the tax setting, a venue that is substantially more limited than that of the attorney-client privilege. These latter kinds of uncertainty include the restriction of the privilege to communications of tax advice,<sup>2</sup> the restriction of the privilege to tax proceedings,<sup>3</sup> the denial of privilege in criminal matters,<sup>4</sup> the denial of privilege for certain forms of corporate tax shelter activity,<sup>5</sup> and the limitations imposed by an effective date.<sup>6</sup> These uncertainties will be addressed by the courts in summons enforcement cases and in discovery and evidentiary rulings and will, over time, be resolved. Ultimately, however, it is likely that the privilege will serve its intended purpose.

To my knowledge, accounting firms have been circumspect with regard to the availability of the privilege. While delighted to have it, they have not trumpeted it in a competitive

context. The AICPA has produced a video program for use by accounting firms in training their staff personnel with regard to the privilege. The larger accounting firms have developed their own training materials, both for their staff personnel and for their clients. Caution, rather than aggression, seems to be the current byword.

### THE EMPLOYMENT AND USE OF LAWYERS BY ACCOUNTING FIRMS

Accounting firms continue to attract lawyers to practice with them. Many of these lawyers are highly qualified and have had significant private practice and/or government experience. This is particularly true in the tax field but is also the case in areas such as corporate and employee benefits. These lawyers are now widely engaged in legal planning and opinion writing. It is only natural that the accounting firms will aspire to engage these lawyers even more fully in the practice of law, including ultimately the representation of firm clients in court.<sup>7</sup> In that objective, they will be supported by their clients, who wish to be able to utilize the services of the lawyers of their choice, whether those lawyers are affiliated with law firms or accounting firms.

The individuals in question are lawyers and, as a group, appear to be as well qualified in their areas of

1 Significant among these are difficult concepts of waiver. For example, what are the limits on disclosures of privileged information within the lawyer's firm that may occur without risk of waiver? Although disclosure within a law firm has not generally been thought to waive privilege, the sheer size of some of the firms who may benefit from the new privilege raises the question whether this principle will have to be revisited.

2 If a written communication includes both tax advice and other advice, is only the tax advice portion protected, or does the entire document lose privilege? If the former, is the IRS entitled to receive a redacted version?

3 Communications with tax advisors will not be protected from disclosure in proceedings before any other federal agency (thus, for example, the chairman of the SEC is free to obtain what the Commissioner may not), in civil litigation, and in state tax or other proceedings. This restriction raises difficult and uncertain subject matter waiver issues.

4 If communications were protected prior to a civil examination turning criminal, do they lose protection once criminal proceedings commence? If a criminal proceeding is followed by a civil proceeding, may privilege be reasserted?

5 The privilege is not available for written communications in connection with the promotion of the participation of a corporation in a shelter. Given the very broad definition of "tax shelter," there are many uncertainties inherent in this restriction.

6 The privilege is available only for post-enactment communications. Will the fact that pre-enactment communications on the same subject matter have been disclosed result in a holding of subject matter waiver with regard to otherwise privileged post-enactment communications?

7 While it is often suggested that it should be easier for accounting firm lawyers to gain access to the Tax Court than to other courts, that appears to be an erroneous premise. CPAs enjoy no special status concerning admission to the Tax Court. Section 7452 provides that no person shall be denied admission by reason of lack of professional standing. However, while the Tax Court rules provide for admission of lawyers, they require that any nonlawyer (including any CPA) successfully pass an examination as a condition of admission. In fact, very few nonlawyers have passed the examination and are admitted to practice before the Tax Court. Thus, as a practical matter, practice before the Tax Court is conducted exclusively by lawyers. If lawyers employed by accounting firms may represent firm clients before the Tax Court, it would appear that they may also represent firm clients before other courts because there is no fundamental difference between a lawyer's qualification for admission to the Tax Court and a lawyer's qualification for admission to any other court.

practice as lawyers practicing in law firms. The only factors that now restrict them from holding themselves out as engaged in the practice of law are the rules of professional responsibility and unauthorized practice statutes adopted in the various states.<sup>8</sup> Those restrictions will come under pressure as the professional and consumer forces that resulted in the new tax practitioner-client privilege are asserted in this area. While the tax practice area may be the first frontier in which change will be sought, it will certainly not be the only practice area targeted by firms not controlled by lawyers.

It is my understanding that accounting firms maintain that they are not engaged in the "practice of law" and that their lawyers are thus not bound by the rules of professional responsibility applicable to lawyers who are so engaged. However, if being subject to such rules were the price of being allowed to engage in the practice of law, it seems likely to me that accounting and other professional service firms would be willing to take that step. However, there may be limitations to this willingness. For example, it is open to question whether such firms would ever adopt conflict of interest principles quite as extensive and as torturous as those that the bar has imposed on itself.

#### SUGGESTIONS REGARDING FUTURE COURSE OF ACTION

As previously noted, economic and professional pressures will almost certainly compel some form of change in the rules regarding lawyer/nonlawyer affiliation in the near future. In the face of this reality, the organized bar must determine what course of action it will take. Three broad avenues are available. First, oppose any change. Second, stand idle and observe developments. Third, anticipate the inevitability of

change and attempt to shape it constructively. In my view, only the last alternative is responsible. Opposition will not long deter the forces that seek change because the opposition will be regarded as arising only from self-interest. Idleness in the face of fundamental change would be the height of irresponsibility. By anticipating the changes and by seeking to influence them constructively the organized bar best protects the interests of the public and of its lawyer constituency.

It seems evident that mere tinkering with the Model Rules will not suffice to meet the need for change. More imaginative action is required. The 1982 Kutak Commission formulation of Model Rule 5.4, rejected in 1983 by the House of Delegates, would have allowed lawyers and non-lawyers to participate in law practice so long as all participating lawyers met their professional responsibilities under the Rules. If Model Rule 5.4 were amended to reflect the Kutak formulation, lawyers affiliated with accounting and other firms would be able to engage in the practice of law. While that might seem at first blush a reasonable solution, it would not be adequate to the present situation. First, the amended Rule 5.4 would be effective only in those states that chose to adopt it. At best, the adoption process would be long and uncertain. Second, even if the amended Rule 5.4 were to become widely adopted, it is almost inconceivable that 51 individual jurisdictions could effectively exercise regulatory control over professional service firms offering a combination of law and other services on a national and international basis. If fundamental change is to occur in this area, it is vitally important that the resulting regulatory structures be capable of providing effective protection to consumers of professional services.

Different models for effectuating change can be conceived. One such model might involve federal legislation that would create a federal level commission ("the Commission") responsible for regulating professional service entities. This system of regulation would be elective in the sense that those lawyers who wished to remain subject to state regulation would be entitled to do so, continuing as before to observe the professional rules of their jurisdiction. On the other hand, those lawyers, other service providers, and firms who chose to do so could elect to become subject to the regulatory jurisdiction of the Commission. The Commission would regulate all professional services offered by an electing firm, whether those services consisted of law, accounting, engineering, economics, etc. The Commission would adopt rules of professional responsibility applicable to all disciplines within its regulatory jurisdiction; the rules for lawyers could, for example, be based on the Restatement of the Law Governing Lawyers, adopted in 1998 by the American Law Institute. In addition, the Commission would determine whether a single service firm would be entitled to offer all forms of service. For example, the Commission might evaluate whether the tension that exists between the disclosure obligations of an independent auditor and the confidentiality obligations of an advocate preclude a single firm from providing both kinds of service. The Commission might also consider whether there is a need to impose limitations on the permissible ownership of professional service firms subject to its jurisdiction. The Commission would also address issues related to admission to practice; it could rely on the states for initial testing and admission of professionals or, alternatively, it might administer its own testing and admis-

<sup>8</sup> Rule 5.4 of The Rules of Professional Responsibility as adopted in the District of Columbia do allow nonlawyers to have a financial interest in a law firm. However, the Rule requires that the sole purpose of the firm be to provide legal services, that all persons having a financial interest agree to abide by the Rules, and that the lawyers having a financial interest undertake to be responsible for the conduct of the nonlawyer participants. This Rule, while of some benefit to purely local firms, is not of use to firms that maintain offices in other jurisdictions, given the fact that no other jurisdiction has adopted a similar rule.

sion procedures. The principles underlying these forms of regulation would be consumer protection and the efficient delivery of professional services.

This new federal system of regulating professional services for electing firms would preempt state regulation of the same subject matter for those firms. However, state regulation would continue to be effective for nonelecting lawyers. The nature of the practice of electing firms would be inherently national and international in scope, and thus the system should lie within the regulatory jurisdiction of the Federal government.

This concept is offered primarily to stimulate thought and to encourage evaluation of solutions that go well beyond mere adjustments to the Model Rules. The issues that the bar faces require a willingness to consider new ways of thinking about old problems. If the model suggested here contributes to that dialogue, it will have been successful.

## COUNTERPOINT: THE FUTURE OF THE LEGAL PROFESSION

*by Professor Linda Galler, Hempstead, New York*

"Ends of the Legal Profession" was the topic of the plenary session at the Tax Section's Midyear Meeting this past January. Five distinguished panelists discussed the recent and ongoing growth of accounting firms into areas traditionally serviced by law firms, and contemplated the future of the legal profession in light of the evolution of multidisciplinary firms. The discussion followed last summer's appointment by ABA President Philip Anderson of a Commission on Multidisciplinary Practice, which he charged with studying how professional services firms operated by accountants and other nonlawyers are seeking to provide legal services to the public. Although the tax consulting practices of Big Five accounting firms are the

Commission's primary focus, other types of legal services are targeted, as well.

Throughout the last decade, Big Five accounting firms have stepped up recruiting efforts with respect to both recent law school graduates and experienced attorneys. These firms now employ hundreds of lawyers in the United States and thousands of lawyers worldwide to conduct practices that are remarkably similar to those conducted by law firms. In addition to rendering tax planning advice, attorneys employed by accounting firms engage in such activities as estate planning, litigation support, employee benefits consulting, and business planning. Indeed, at least three of the Big Five accounting firms are now representing clients in all stages of Tax Court litigation.

Accounting firms claim not to engage in the practice of law. Thus, despite legal training, admission to the bar, work experience in law firms, and the nature of professional services provided, lawyers employed by accounting firms claim that they do not practice law but rather act as consultants. Such assertions are thought to liberate the firms from claims of unauthorized practice of law and lawyers employed by the firms from claims of assisting others in the unauthorized practice of law. With the expansion of consulting practices beyond traditional areas of tax return preparation and related advice, which generally are thought not to constitute law practice, and representation before the Internal Revenue Service, which is permitted by federal law, however, accounting firms may well be engaging in the practice of law.

The firms' claims also are thought to liberate employees who are lawyers from potentially troubling precepts of lawyers' ethics including obligations to maintain client confidentiality, conflict of interest rules, and independence rules (e.g., prescriptions against sharing legal fees with nonlawyers). This approach arguably is inconsistent with ABA

Informal Opinion 328 and numerous state bar ethics opinions, which state that lawyers who engage in a second occupation that is so law-related as to involve some practice of law are held to the standards of the bar in the second occupation.

Expected this summer, the Commission report will provide a basis for formulating the ABA's official position with respect to the practices of multidisciplinary firms. Although the report likely will recommend changes to the Model Rules, the Commission has not yet reached any conclusions on what changes ought to be made. Model Rules that are most likely to be affected are: 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest), and 5.4 (Professional Independence of a Lawyer). In each of these areas, ethical rules for lawyers are more stringent than the rules for accountants.

## CONFIDENTIALITY OF INFORMATION

Model Rule 1.6 prohibits disclosure of information relating to representation of a client, with limited exceptions. The duty of confidentiality generally applies to matters communicated in confidence by a client and to all information relating to representation, whatever its source. The evidentiary attorney-client privilege protects confidential communications made to the lawyer by a client for the purpose of obtaining legal advice and confidential communications made by the lawyer to a client in the course of rendering legal advice.

Unlike lawyers, accountants or firms that act as auditors of financial statements have a public duty, which requires disclosure of certain matters. That duty may override a client or accounting firm's desire to keep information confidential. Recent federal legislation creating a tax adviser privilege provides tax clients of nonlawyers with new, but minimal, protections. The new evidentiary privilege applies to certain communications between a client and a non-

lawyer tax adviser (including an attorney employed by an accounting firm that claims not to engage in the practice of law) and is meant to apply in circumstances where the attorney-client privilege would apply if the tax adviser were an attorney. In fact, however, the tax adviser privilege is very limited in scope. For example, it applies only in federal civil litigation, applies only when legal (as opposed to business) advice is rendered, and does not apply to written communications made in connection with advice on corporate tax shelters.

A key issue for the Commission to consider is how an auditor's duty to disclose can coexist in one firm with any realistic expectation of confidentiality on the part of a client. The lawyer's duty of confidentiality is incompatible with the accountant's duty to disclose. For example, if the tax department of an accounting firm acquires knowledge about a client's tax or financial situation and that information could be relevant to the client's financial statements, which the same firm is preparing, one would expect that tax department personnel would be required to turn the information over to the auditors for evaluation and possible disclosure.

### CONFLICTS OF INTEREST

Lawyers are advocates who have a duty of complete and undivided loyalty to their clients. Model Rule 1.7 and subsequent provisions, which set forth the general rule on attorney conflicts of interest and provide guidance on prohibited transactions and conflicts with former clients, are designed to ensure that lawyers exercise independent professional judgment, free of compromising influences and loyalties. Model Rule 1.10 disqualifies from representation in a client matter all lawyers practicing in a firm in which one attorney has a conflict, and effectively prohibits the use of screens within law firms to segregate lawyers representing opposing interests.

Accountants are permitted to con-

currently represent two or more clients in situations where lawyers are not. So long as the accountant believes that she can perform the professional service with objectivity, simultaneous representation is permitted, although disclosure and client consent are required. Accounting firms can and do use screens to separate representatives of conflicting interests.

The ABA Commission will consider whether the legal profession's conflict of interest rules should be relaxed, for example by permitting clients to waive conflicts or by sanctioning the use of screens within firms. Unsophisticated clients may need the protections provided by current rules more than their sophisticated counterparts, raising the possibility of different rules for different kinds of clients. Whatever the resolution, the conflict of interest area presents the most difficult issues faced by the Commission.

### INDEPENDENCE

Model Rule 5.4 contains several rules that are meant to protect a lawyer's professional independence of judgment. Lawyers may not share legal fees with nonlawyers, form partnerships with nonlawyers for the practice of law, or provide legal services under the control of a nonlawyer. These prohibitions are inconsistent with any sort of multidisciplinary practice in which legal services are rendered, and are likely to be modified.

The accountant's overarching duty to the public is expressed in terms of independence, integrity, and objectivity. Responding to an inquiry by the ABA Commission on Multidisciplinary Practice, the Securities and Exchange Commission's Chief Accountant recently questioned the independence of accounting firms that provide legal services. According to the Chief Accountant, the SEC would consider a firm's independence from an audit client impaired if the firm also provided

legal advice to that client. Thus, despite any position that the bar might adopt with respect to multidisciplinary practices, accounting firms will have to deal with possibility of violating SEC rules if they render litigation and other traditionally legal services.

### POSSIBLE RESPONSES TO THE GROWTH OF MULTIDISCIPLINARY PRACTICES

The panelists at the Tax Section's January plenary session did not offer particular solutions or proposals for change. The prevailing sentiment, however, seemed to be that the rules governing lawyers' ethics should be relaxed so that law firms can compete more effectively with accounting firms. For example, conflict of interest rules in transactional legal practices could conform to the accountants' model and/or lawyers could be permitted to join forces with non-lawyers in entities that are controlled by lawyers.

Jim Holden's proposal, which was presented to the Commission on Multidisciplinary Practice in November (and is set forth in this Newsletter), is to create a federal commission to regulate professional service entities and persons (including attorneys) who elect to be governed by it. If an election were made, the federal commission's rules would preempt state regulation. Nonelecting attorneys would continue to be governed by state rules. Mr. Holden's proposal is interesting for many reasons, most notably because it builds on an already existing notion of federal regulation. Currently, all persons practicing before the Internal Revenue Service are governed by federal regulations commonly referred to as Circular 230. Circular 230 is taken seriously by practitioners; indeed, the level of IRS disciplinary activity plainly differs from that of state bar authorities, who rarely report instances of disciplinary action taken with respect to professional ethical violations in the tax area. In

dition, the Tax Court has adopted the ABA Model Rules so that any person (lawyer or nonlawyer) practicing before that court violates a court rule if she violates a Model Rule. While Mr. Holden's proposal would create a governmental agency that would not be part of the IRS, the

concept of federal regulation is not new.

Whatever the recommendations of the Commission, or the response ultimately adopted by the bar, it is clear that the world of tax practice is changing. As Mr. Holden states, "Economic and professional pres-

ures will almost certainly compel some form of change in the rules regarding lawyer/nonlawyer affiliation." ■

## CHAIR

FROM PAGE 11

Report is expected by June for consideration by the House of Delegates at the Annual Meeting in August.

I would encourage you to visit the Commission's web site at <http://www.abanet.org/cpr/multi-com.html>. Among other things, it contains a listing of Hypotheticals and Models posted by the Commission in early March. It also provides links to full texts of written submissions and summaries of oral testimony submitted before the Commission at its November 1998 and February 1999 hearings.

Our Globalization Task Force is involved in the fascinating Law of Jurisdiction of Cyberspace Project, created by the ABA Business Law Section. The Tax Section, through the Globalization Task Force, will take the lead on issues dealing with taxation of cyberspace. This is a particularly timely project as we enter the 21st Century. The Project is to issue a Report prior to the 2000 Annual Meeting and will sponsor a high-profile panel for the London 2000 program.

The U.S. Tax Court Judicial Conference was held April 6-9, 1999, in Williamsburg, Virginia. Council Member Don Korb and Brad Anwyll, Chair of our Committee on Court Procedure and Practice, were part of the Planning Committee for the event, and put together a great program. The Tax Section presented a Section Report at the Conference, and participated in a Joint Report

with the Internal Revenue Service. Kevin Kenworthy and Robin Greenhouse presented the Tax Section's segment of the Joint Report.

## PROVIDING LEADERSHIP WITHIN AND BEYOND THE LEGAL COMMUNITY

The Workshop on Low Income Taxpayer Clinics, held February 19-20 at American University, was, by all accounts, an unqualified success. The program attracted more than 100 attendees from all over the country (as well as several members of the tax press). Our thanks to all the Workshop participants, including Loretta Argrett, Assistant Attorney General of the Justice Department's Tax Division, IRS Chief Counsel Stuart Brown and Val Oveson, the National Taxpayer Advocate. A very special thanks goes to Janet Spragens, Chair of the Low Income Taxpayer Committee, for her vision, dedication and hard work.

Our congratulations to Nina Olson, Vice-Chair of our Low Income Taxpayer Committee and Director of The Community Tax Law Project in Richmond, Virginia, for the Project securing the necessary matching funds for the National Association of Public Interest Law (NAPIL) fellowship, which is being partially funded by the Tax Section. This pilot program, aimed at providing tax training, outreach and representation to U.S. newcomers and their advocates, will serve as a model for similar initiatives nationwide.

We are very pleased to announce that we now have Section liaisons in

place for key related organizations: Herb Beller is our liaison to the AICPA Tax Division; Larry Gibbs is our liaison to Tax Executives Institute; Carolyn Joy Lee is our liaison to the New York State Bar Association Tax Section; Stanley Blend is our liaison to the Texas State Bar Tax Division; Blake Rubin is our liaison to the D.C. Bar Tax Division; and Karen Hawkins is serving as the Tax Section liaison to the California State Bar Tax Division.

TAXi, the Section's interactive educational program with the IRS, has become a recurring item in this column and is, indeed, a great source of pride for the Section. At the ABA's Midyear Meeting in Los Angeles, TAXi was presented an ABA/West Group Partnership Award of Merit. It has also been nominated for the Section Officers Conference Award of Merit.

## NURTURING LEADERSHIP WITHIN THE TAX SECTION

It is a practice among other ABA Sections and Divisions actively to "nurture" their members for future leadership positions. If you are aware of, or hope to be, an up and coming Section member, I would ask that you bring him or her, or yourself, to the attention of the appropriate Committee Chair(s) and/or Council Director(s).

Goal IX of the ABA is "to promote full and equal participation in the legal profession by minorities." The Tax Section has been developing a Joint Diversity Program with the