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Is It the End of the Legal World as We Know It?*

Honorable Charles L. Brieant**

I will start right out; I am a lawyer. What makes me a lawyer is that I am registered with the Office of Court Administration for the State of New York. I thank you in my capacity as a lawyer for inviting me to join this symposium. I will focus on the provision of legal and other services through the medium of multidisciplinary practices, or one-stop shopping. Having concluded a half century of membership in the Bar of the State of New York, I have seen a lot of changes. Some say I have been against them all.

Go back into the history of our profession in this state and in this country, and you will find a time when we were small in numbers and restricted by law and custom as to what we could do for our clients. Indeed, at that time we were modestly compensated. In colonial New York, there was a division between barristers and solicitors as there was in England, and legal fees were regulated by law, custom, or both.¹ We did very little by way of business services; taxation was simple in the first century of our nation's history. Enterprises were smaller, book-keeping was not a big deal, and businessmen did not seek business advice either from lawyers or accountants. When I entered the practice in White Plains, New York, our law firm prepared individual tax returns and fiduciary tax returns for all the trusts and estates represented in the office. We did this

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1. See Alison Crawley, *Solicitors, Accountants and Multi-Disciplinary Practice The English Perspective* (visited Feb. 5, 1999) <<http://www.abanet.org/cpr/crawley.html>>.

without computer programs and without word processing. When I began, and even later after it was reworked in 1954, the Tax Code of 1939 was simple enough so that those services could be rendered successfully and profitably at a reasonable cost to our clients.

This work of the lawyers has long since passed to the accountants after the lawyers in Congress made the tax code incomprehensible.² At the same time, the accountants showed the market that they could do it better. Because law firm billing rates would result in excessive costs for taking care of a simple individual or fiduciary return, lawyers bring in the accounting firms to do this work, and no one thinks anything of it.

Events of the last fifty years have had the effect of raising the comparative standing of lawyers, both financially and in the quality and extent of the services they offer. Of course, the same has happened for the accountants. Specialization and rationalization contributed to this change. We really do not, either of us, produce anything. We simply make the way smooth for the productive people and the enterprises that they serve. These services for which lawyers are now so much better paid than before, represent what is known as a transactional cost. If one-stop shopping will decrease transactional costs through greater efficiencies, we should be for it, and it is probably inevitable.

The prospect of multidisciplinary professional practices directly implicates concerns about lawyers' professional independence of judgment and their duty to the clients and the justice system,³ as well as the issue of economic survival for those who do not choose to enter this brave new world. These values of professionalism in the practice of law are supposedly maintained by the rules of professional responsibility prohibiting fee sharing, entering into a partnership or employment with a non-lawyer, as well as licensing, accreditation of law schools, and the disciplinary process for removing lawyers from practice.⁴

2. See American Bar Association Commission on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Developments* (visited Feb. 5, 1999) <<http://www.abanet.org/cpr/multicomreport0199.html>>.

3. See *id.*

4. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1996).

The values themselves, however, derive from the concept of the law as an ancient, honorable, and learned profession. We must first ask ourselves whether the practice of law should remain a regulated, monopolistic, protected profession that prides itself in its independence of judgment and fulfillment of duty to the client above all, or whether it should become a segment of a largely unregulated business subject to easy entry, and unfettered competition from non-lawyers, or non-lawyers employing and controlling lawyers.⁵

Lawyers think, with some justification, that accountants wish to provide what we have come to define over the years, somewhat loosely I think, as legal services.⁶ Of course this threat of competition portends a profound adverse effect on the professional earnings of lawyers. It also offers an opportunity, we think, for the accountants to increase their economic status in the world, perhaps at our cost. Having a great deal of faith in the creed expounded by Adam Smith and Alfred Marshall, I believe that efficiency and profit will improve for our professions when the market shakes itself down to the point where each of us is forced by the iron law of economics to do that work which we do most efficiently, and leave to the other professions that which they do most efficiently, such as filling out tax returns under incomprehensible Internal Revenue Codes, or creating the financial schedules necessary to obtain a divorce under equitable distribution. These are two basic legal efforts into which the accountants have entered and become indispensable, and I am sure there are others.

The practice of law first developed to provide representation in a court of law, or a court of equity, with trials before judges and juries. It moved historically from trying cases into the preparation of lofty and important documents claimed by us to be "legal," such as deeds, wills, trusts, convoluted corporate charters and structures, tax returns, tax avoidance schemes, and things of that sort; all for the essential purpose of aiding clients as much as possible in subverting the sovereign when

5. See Herbert M. Kritzer, *Rethinking Barriers to Legal Practice*, 81 JUDICATURE 100 (Nov./Dec. 1997).

6. See American Bar Association Commission on Multidisciplinary Practice, *Summary of the Testimony of M. Peter Moser* (visited Feb. 5, 1999) <<http://abanet.org/cpr/moser1198.html>>.

the sovereign for some reason or another stood between clients and doing what they need to do in order to serve their economic interest. The practice of law was expanded further into the inner workings of business and corporate activity. Lawyers began structuring deals and negotiating business contracts. At times, lawyers also became brokers, a few also became trustees, money managers, and a very exalted few, the economic peak of our profession, are now also investment bankers. This was unheard of when I went to law school.

At the same time, the accounting profession has gone from simple internal auditing to audits relied upon by banks and distributed to the public, and now holds the lion's share of the tax work. The accountants already practice tax law to such an extent that most lawyers today do not even prepare their own tax returns. Accountants, by training, may be much better suited than lawyers to provide tax advice, even when it includes so-called legal services such as structuring deals, or negotiating business plans or contracts.

Perhaps the practice of law has become too far ranging for the legal profession's abilities and resources. If so, let the market forces move to the accountants the work that they do best. There will remain certain areas in the practice of law which require the independence of judgment, the undivided duty to the client, confidentiality and other various privileges, as well as many other responsibilities that only lawyers subject to licensure and professional discipline can be allowed, or relied upon to discharge.⁷

The attorney-client privilege and the ethical obligations of confidentiality and undivided loyalty support a belief held by most lawyers, that much of their traditional work should be left to lawyers and lawyers alone.⁸ Unfortunately, some lawyers appear to be acting no longer as professionals, but rather acting in the more lucrative capacity as business consultants and entrepreneurs, often even trading with their own clients for their

7. See American Bar Association Commission on Multidisciplinary Practice, *Written Materials of Linda Galler, Hofstra University* (visited Feb. 5, 1999) <<http://www.abanet.org/cpr/galler.html>>.

8. See Gianluca Morello, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted in The United States*, 21 *FORDHAM INT'L L.J.* 190, 244-45 (1997).

own account, and wheeling and dealing with the public in manners contrary to these ethical obligations. This has caused others to question whether there really is any area of the law which should be left solely to lawyers.

As to whether the profession as I knew it half a century ago is dying, it seems to me that those assembled at the bedside disagree about the seriousness of the illness, and whether anything can or should be done to save the patient. Must lawyers learn to compete in the open market doing the same work or overlapping with the full-service financial firms? May a lawyer be permitted to become an employee of a full-service financial firm, to be a partner, or agent, or employee of non-lawyers and still be held to the same high ethical standards required by the canons of ethics?⁹ If you really think about it, there is no reason why an executive lawyer employed by a full-service firm cannot be held to the same standards of confidentiality, to the same standards and the same privileges required of a lawyer who is a small cog in a major law firm.

There has to be no practical reason why the one-stop shopping firm, or the multidisciplinary practice firms cannot establish internal barriers to the exchange within their firm, of sensitive, privileged or confidential information, as the larger law firms have already done.¹⁰ Would competition by unregulated non-lawyers who are employed by full service firms benefit the public by lowering the cost of those legal services,¹¹ which, as rendered today, are certainly not the same practice of law as known by Patrick Henry and Abraham Lincoln?

Should government insist that continued licensing of lawyers and regulation of the practice of law is necessary to protect the public from unskilled, unscrupulous non-lawyers, who are not subject to professional regulation or the discipline of disbarment? One can argue that either way.¹² There are other solutions, both civil and criminal, for misconduct by a professional.

9. See *id.* at 203-04.

10. See American Bar Association Commission on Multidisciplinary Practice, *Summary of the Testimony of Ward Bower* (visited Feb. 5, 1999) <<http://www.abanet.org/cpr/bower1198.html>>.

11. See Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 703-04 (1996).

12. See *id.*

Attorney discipline does not seem to have eliminated all the bad apples in the profession. My own view is that taking a more narrow view of what constitutes the practice of law for purposes of licensing and regulation represents the most likely result of recent trends. This would allow for the coexistence of the traditional profession of practicing law as a much smaller trade, apart from the business of financial and property services, which lawyers would have to share with our non-lawyer competitors, such as accountants, tax-practitioners, real estate brokers, title abstractors, investment bankers, and a score of odd consultants, all competing with each other on an equal basis. Non-lawyers desiring to enter into that competition argue that this will end the "monopolistic" practices at the bar and allow for full service, better service, and price competition.¹³ Non-lawyers wish to profit by providing ancillary legal services which affect their other professional clients. Apparently they intend to do so through licensed lawyers whom they hire, employ, and control.¹⁴ Next, the full service people will obtain a JD degree in order to supplement their MBA or their accounting degrees. Although this may give persons at the entry level a tremendous amount of student loans, once they get out there they will be able to perform both the work of an MBA and the work of a lawyer.

This open market approach to the delivery of legal services certainly would be a victory for our friend and judicial colleague from Chicago, the Honorable Richard A. Posner of the Seventh Circuit, who states that the law is "fantasy, merely politics and rhetoric masquerading as something more."¹⁵ Judge Posner has contended, and still contends that the legal profession, like the other medieval guilds, was built on selfish, anti-competitive restrictions on entry and on the conduct and pricing of the work.¹⁶ This view of the legal profession is as some hulking monopoly with its feet in the Middle Ages, milking clients for the cost of unnecessary, duplicative, and occasionally inefficient services,

13. See Edward Brodsky, *Accountants and the Practice of Law*, 220 N.Y.L.J. 3 (1998).

14. See Demetrios Dimitriou, *Legal Ethics in the Future: What Relevance?*, PROF. LAW., Spring 1998, at 2.

15. Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 35-37 (1993).

16. See *id.*

some of which we are not too well qualified to deliver, and at the same time hiding behind ethical rules that do nothing but curtail good old-fashioned competition. While that analysis does seem to be a bit extreme, those thoughts are out there¹⁷ and it is very hard to refute the claims made by those who endorse Judge Posner's view.

We have to face the fact that we are no longer and will never again be insulated from economic force.¹⁸ We have been subject to the federal antitrust laws since 1975. In the famous Goldfarb case, the Supreme Court held, for the first time in our country's history, that the ancient and commonly used minimum fee schedule for attorneys which was published by a county Bar Association and enforced by law in those states that had an integrated bar, which New York did not, was price fixing in violation of Section 1 of the Sherman Act.¹⁹ On several occasions since 1975 the Supreme Court has stricken down and disapproved similar monopolistic restrictive policies not only in our profession, but in others.²⁰ There is some encouragement for those that wish to remain as we were, that the vestige of these restrictive practices survive where state action is involved.²¹ This historic doctrine is grounded in the notion that the federal government is supposed to respect state sovereignty and a state's right to make policy concerning economic matters that affect its citizens, in choosing to license and regulate professions and occupations.²² The states implicitly have found that the public interest is best served by licensing and regulating lawyers rather than allowing open competition. In the 19th century some states, notably Indiana, had constitutional provisions which said that any person of good character could be admitted to the bar. No academic requirements! I am told by old timers that those non-regulated lawyers were referred to as

17. See Rhode, *supra* note 11, at 705.

18. See Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911 (1996).

19. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

20. See American Bar Association Commission on Multidisciplinary Practice, *Statement of the Section of Antitrust Law* (visited Feb. 5, 1999) <<http://www.abanet.org/cpr/mcdauid.html>>.

21. See *id.*

22. See *id.*

"constitutional lawyers" because they got their status solely from the Constitution, rather than by any graduate degree.²³

However, states are free to do what they wish in this economic area and they make policy decisions everyday about many different kinds of activities. In most places, lawyers enjoy the competitive advantages of a regulated monopoly, but so do holders of New York City taxi medallions.²⁴ Lawyers are members of a regulated profession with significant barriers to entry, but so are doctors and accountants.²⁵ Lawyers hold a license attesting to a particular level of competence, but so do plumbers, electricians, architects, engineers, accountants and many others.²⁶

If a government wants to carve out an area in the practice of law that it finds safely can be done by non-lawyers, that is the legislature's prerogative.²⁷ Of course, those of us who are realistic in our view of government have learned that the legislature in many states may be had by lobbying, and sometimes, it is said, by adequate contributions spent in the right places so that the various interested parties receive protection of their monopoly or gain entry into someone else's monopoly.

Cornelius Vanderbilt, head of the New York Central Railroad, was noted for having made regular trips to the state capitol with a carpetbag full of greenbacks. There must be a modern equivalent; I think it is called soft money, whatever that means, and they go get what they want through the democratic process. A recent example of entry by lobbying can be found in the federal government's recent action with respect to the practice of tax law. Now there is a new profession called "Tax." The Internal Revenue Service now allows us as licensed lawyers, Certified Public Accountants, and another class of people they call enrolled agents, to whom they give a written examination that they do not require of us, to practice Tax.²⁸

23. See Bogus, *supra* note 18, at 929.

24. See Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 580 (1998).

25. See *id.*

26. See *id.*

27. See Dimitriou, *supra* note 14, at 7.

28. See *Written Materials of Linda Galler, supra* note 7; see also American Bar Association Commission on Multidisciplinary Practice, *Summary of the Testimony*

Supposedly the examination shows they are competent in tax matters.²⁹ All of us share equally, and can practice before the Treasury. If wrongdoing occurs, the Director of the Treasury brings disciplinary proceedings to suspend or disbar those enrolled practitioners who are not lawyers.³⁰

Congress has given those enrolled Tax practitioners the attorney-client privilege which we have enjoyed since medieval times.³¹ So far the sky has not fallen. The states or Congress can do just the same thing in other areas of practice we think of as law. The practice in that area of law will then be regulated in accordance with whatever policy decisions are deemed appropriate. The experience with the Tax practitioners really seems to eliminate the argument that unskilled, incompetent, and unregulated non-lawyers will endanger the public interest because the Treasury has proved that that is not so.

Now that does not touch directly the issue of licensed practitioners associating in multidisciplinary practices.³² Logically, there is no reason why a licensed person, working for a non-licensed person, cannot be held to the same professional standard, or disciplined in just the same way. I think that when the market shakes this out that will become obvious.

So the next question is how do we protect ourselves against this serious concern? How do we ensure that legal practitioners always act in accordance with these requirements even if they work for some wicked non-lawyer who has his or her mind solely on the financial benefits of practicing law? Must we prevent association between licensed and non-licensed practitioners simply in order to protect the public from improper influences, or conflicts of interest? Is it hypocritical for lawyers to act like business people instead of regulated professionals, and yet expect to retain the competitive protections granted them only because of their position as regulated professionals

of Leslie Shapiro (visited Feb. 5, 1999) <<http://www.abanet.org/cpr/shapiro1198.html>>.

29. See *id.*

30. See *id.*

31. See Dimitriou, *supra* note 14, at 7.

32. See American Bar Association Commission on Multidisciplinary Practice, *Summary of the Testimony of M. Elizabeth Wall* (visited Feb. 5, 1999) <<http://www.abanet.org/cpr/wall1198.html>> (noting that "Multidisciplinary practices have been a fact-of-life in continental Europe since the early 1990s."). *Id.*

belonging to some ancient and honorable guild? As long ago as 1984, Chief Justice Burger reported to the American Bar Association, "The standards and traditions of the bar that restrain members of the profession from practices and customs common and acceptable in the rough-and-tumble of the marketplace"³³ are no longer achieving that goal. By quoting him I do not necessarily agree with him. The American Bar Association in 1986 faced the same problem when it queried whether "our profession abandoned principle for profit, professionalism for commercialism?"³⁴ The ABA did not presume to answer that, but I think it implied what its answer would be. If so, what would be the effect of deregulating lawyers and allowing the pure market approach to the delivery of one-stop legal services? If we do that, will society rely only on the competition and the self-interest of legal services providers to give the client and public the best quality service at the lowest cost? In a multidisciplinary practice, those same market forces can be quite stringent and they can be supported by recourse to tort law against anyone who does anything wrong.

That may well be sufficient over the long run to protect the client for the loss or damages due to any lost professionalism resulting from the further destruction of our ancient guild. What is the answer to all this? I submit that the frequently expressed fears of the old timers, like myself, of loss of independence and loss of professionalism of lawyers hired by a full-service non-lawyer firm are present, but may be very much overblown.³⁵ If the theoreticians were to write on a new blank page (which you can never do because of the intervention of fortuitous events that happen in history and the unlimited power of the legislative body to perpetuate mischief), they might well create a single generalized, financial and property service pro-

33. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve The Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1254-55 (1995) (quoting Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 63).

34. American Bar Association Commission on Professionalism, ' . . . In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 251 (1986).

35. See American Bar Association Commission on Multidisciplinary Practice, *Summary of the Testimony of William Freivogel* (visited Feb. 5, 1999) <<http://www.abanet.org/cpr/freivogel1198.html>>.

fession in which the leaders of the firms would be vested with multiple post-graduate degrees, each qualified in law, accounting, economics and business. Beneath them, with time, most professionals under their supervision would be trained in at least two of the old professions.

Perhaps when we do this great utopian reorganization we will consign a smaller group to be trained solely as trial lawyers, just to hang around the police court, to try the violent crimes, and the drug cases, and defend Microsoft when necessary. I suggest to you that the next Bill Gates in history, whoever he or she may be, is not going to be out there looking for one-stop shopping when confronted by the mortal threat of a 19th century trade regulation statute. They are going to look for a lawyer who is a real lawyer. In this utopian world, with all this multidisciplinary practice out there, somewhere there will be a lawyer and he or she will come in and do just what Patrick Henry, Abe Lincoln, and Clarence Darrow were doing before.

My own faith in the future suggests to me that free market and laissez-faire economic imperatives in our national heritage which are so important in resisting all the inefficiencies brought out by monopoly and government regulation will in time bring us to just that reorganized and utopian profession. It will be a challenge. The old ways of teaching law will be shortened to make room for courses in finance, accounting, economics, and business management needed by this new multi-faceted service provider. Whether he or she will come forward in this brave new world with the ancient and respected professionalism of the lawyers of which we all have a right to be very proud remains to be seen. I hope so.