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Lawyers, Accountants, and the Battle to Own Professional Services

Gary A. Munneke*

Competition between lawyers and accountants is not a new concept.¹ At various times during the past century, these two professions have clashed over the scope and definition of their respective services. Lawyers traditionally have relied upon a professional monopoly to provide “legal” services as a device to exclude nonlawyers from the practice of law.² Supported by statutes in many jurisdictions making the unauthorized practice of law a criminal offense³ and ethics rules prohibiting lawyers from assisting in the unauthorized practice of law,⁴ lawyers have always been able to identify some inner sanctum

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1. The existence of this professional monopoly has been the subject of criticism in the legal literature. See John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market Lawyers May Find Themselves Blindsided by the Assault but Also Limited by Professional Rules*, A.B.A. J., Feb. 1998, at 42.

2. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3-5 (1981); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors - or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 166-68.

3. See, e.g., N.Y. JUD. LAW §§ 476, 478, 484 (McKinney 1983).

4. RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

“A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1999).

of professional services that only they could handle.⁵ Because of jurisdictional differences in both substantive and procedural law, state-by-state licensing of lawyers created a somewhat balkanized practice milieu, notwithstanding the fact that many areas of practice were based on federal, rather than state, law.⁶

Accountants, on the other hand, have always enjoyed a national or even international scope to their practice. While laws differ from state to state, numbers and bookkeeping practices do not; generally accepted accounting principles ("GAAP") mean that an accountant in California can audit the books of a company or individual in her own state, New York, or Singapore.⁷

In smaller towns and cities, the ways accountants and certified public accountants ("CPAs") conduct their practices is similar to the way lawyers practice law. Both in terms of the size of firms and types of clients, law and accounting are often characterized as cottage industries. In larger metropolitan areas however, where the clients are frequently large national or international corporations, the nature of accounting practice has fostered the development of a handful of powerful industry-dominating accounting firms.⁸ These firms have been able to cross state and national boundaries to provide services to clients much more easily than law firms constrained by local practice and ethics rules, which today continue to tie law firms and

5. See Kathleen Eleanor Justice, Note, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 181 (1991).

6. Although an argument supporting national licensing of lawyers can be made, the fundamental concept of self-regulation of the legal profession has evolved through the offices of state supreme courts, which oversee admission to practice, lawyer discipline and other regulatory functions. The inertia of this well-entrenched system is unlikely to change, despite the fact that licensing on a state-by-state basis impedes lawyer mobility. Moreover, according to one commentator, restraints on interjurisdictional practice by lawyers infringe on multidisciplinary practice as well. See Anthony E. Davis, Remarks at the American Bar Association Annual Meeting (August 9, 1999).

7. See ANTHONY PHILLIPS ET AL., BASIC ACCOUNTING FOR LAWYERS 43-61 (4th ed. 1988).

8. See Gianluca Morello, Note, *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, 250 (1997).

the legal profession to fairly narrow boundaries defining the role of lawyers.⁹

In other ways, the professions of accounting and law have encountered similar changes. Beginning in the late 1970s, both accountants and lawyers were freed from restrictions on active client development.¹⁰ Both professions have had to cope with rapid societal change from a revolution in technology to a globalization of economies that has swept through the business world.¹¹ Both professions have faced increased litigation concerning the quality and effectiveness of their services.¹²

In the freewheeling business environment of the 1980s and 90s, accountants and lawyers have found themselves increasingly drawn into direct competition with each other for client business.¹³ It still may be the case that most small business owners select CPAs to get their books audited and a lawyer to draft articles of incorporation, or that an individual chooses an accountant to do her taxes and a lawyer to handle her divorce. In the world of large corporations playing on an international stage, however, the line between the practice of law and the practice of accountancy may not be as easy to discern.

Lawyers traditionally possessed a monopoly on the right to represent clients in court.¹⁴ The natural extensions of this monopoly included the work associated with drafting legal documents and dispensing legal advice. However, this monopoly has never been absolute. Litigants have always had the right to represent themselves pro se, and lay representation of individu-

9. Lawyers can only practice in jurisdictions where they are licensed, and realistically most lawyers are licensed in one, or no more than a few, states.

10. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), *In re R.M.J.*, 455 U.S. 191 (1982), *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

11. See *ABA Special Commission Endorses MDP with Conditions*, 3 PROF. RESP. NEWS: SPECIAL MDP EDITION 2, 2 (1999).

12. See, e.g., *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980); *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987); *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985); *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318 (N.Y. 1992); *Ronson v. Talesnick*, 33 F. Supp. 2d 347 (D.N.J. 1999); *National Credit Union Admin. Bd. v. Aho, Henshue & Hall*, Civ. A. No. 90-4443, 1991 WL 174671 (E.D. La. August 30, 1991); *Locicero v. Leslie*, 948 F. Supp. 10 (D. Mass. 1996).

13. See Anthony E. Davis, *The Draft to Multidisciplinary Practice*, N.Y.L.J., Nov. 2, 1998, at 3.

14. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 2, TITLE B (Proposed Final Draft No. 2, 1998); see generally Rhode, *supra* note 2, at 11-12.

als before certain administrative tribunals is commonly allowed.¹⁵ Guardians and trustees representing the interests of others are not always lawyers. It is possible to practice before the United States Patent Office without graduating from law school.¹⁶ Accountants have long been permitted to practice before United States tax courts representing taxpayers.¹⁷

Mediation, arbitration, and other forms of alternative dispute resolution have diluted the lawyer's prerogatives with respect to being an advocate for a client.¹⁸ Outside of litigation practice, the line between what is and what is not the practice of law has become even more blurred.¹⁹ It is not always clear what makes a document "legal" or how much editorial work in the preparation of a document constitutes drafting.²⁰ Nor is it altogether clear whether documents prepared by lawyers and later modified or recommended by unlicensed practitioners should fall within the ambit of practicing law.²¹

The concept of advising pushes any meaningful distinction between legal and nonlegal work almost to absurdity. In a rule-based society where every form of human activity has legal implications and virtually all forms of advice have some legal elements, it would be futile to suggest that only lawyers could give advice with a legal component.²² If not all advice with a legal element is legal advice, then where do we draw the line between

15. See UNAUTHORIZED PRACTICE HANDBOOK: A COMPILATION OF STATUTES, CASES AND COMMENTARY ON THE UNAUTHORIZED PRACTICE OF LAW 171-77 (Justine Fischer et al. eds., 1972) [hereinafter UNAUTHORIZED PRACTICE HANDBOOK].

16. See *id.* at 169-70.

17. See *Sperry v. State ex rel. Florida Bar*, 373 U.S. 379, 385-402 (1963). See generally Gibeaut, *supra* note 1, at 45.

18. See JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION 49-50 (1996).

19. See Linda Galler, *When Lawyers Work for Accounting Firms*, N.Y. Prof. Resp. Rep. 4 (Feb. 1999). This problem was addressed by the author in the context of ancillary business activities by lawyers. See Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 562 (1992).

20. In an era where word processors regurgitate and reuse legal documents, the authorship of specific language is often uncertain. See Munneke, *supra* note 19, at 570.

21. See *Florida Bar v. Brumbaugh*, 355 So.2d 1186 (Fla. 1978), where the owner of a form preparation service was prosecuted for unauthorized practice of law and it was held that there is no unauthorized practice where the service merely filled in blanks on forms and did not give legal advice.

22. See Justice, *supra* note 5, at 180.

what is legal advice and what is not? Is it that the advice is predominantly legal? Is it that the advice was given by a person trained in the law? Is there some arbitrary rule that sets the limit? There is no simple answer to these questions, but the fact that there is no answer suggests that such lack of definition invites others besides lawyers to offer legal advice.

Accountants have taken advantage of this uncertainty by reading the definition of legal advice narrowly and construing advisement broadly.²³ Particularly with respect to tax matters, accountants argue that the interpretation of tax statutes is ancillary to the provision of accounting services.²⁴ Recently, accountants have pressed to extend clients' right to privileged communication to cover accountants representing clients in tax court.²⁵ Such a privilege makes utilization of accountants into a true alternative to hiring lawyers in tax cases.

Accounting firms, especially large national practices, have recognized that their clients typically encounter a variety of business-related problems, particularly in the field of what could be called "business planning."²⁶ The notion of "one-stop shopping" for professional services is not a new one, but it has proved to be an appealing approach to accounting firms, which have broad national client bases and seek to expand the scope of firm services to include a wider range of activities.²⁷ Whether they are described as consulting services or planning services, the upshot is the same: at least some of the work that might have been characterized as legal in former days is siphoned off to accountants and other professionals who define the scope of their services more broadly.²⁸

Outside the United States, American restrictions on the ownership of law firms do not apply, and accounting firms have

23. See Gibeaut, *supra* note 1, at 44.

24. See Galler, *supra* note 19, at 4; see also Gibeaut, *supra* note 1, at 45.

25. Section 3411 of the Internal Revenue Service Restructuring and Reform Act of 1998 added Section 7525 to the Internal Revenue Code, creating a privilege similar to the attorney-client privilege between CPAs and other federally authorized tax practitioners and their clients.

26. See Arash Mostafavipour, *Law Firms: Should They Mind Their Own Business?*, 11 GEO. J. LEGAL ETHICS 435, 436-37 (1998).

27. See New York State Bar Association, *Report of Special Committee on Multi-Disciplinary Practice and the Legal Profession* 7 (1999).

28. See Justice, *supra* note 5, at 192-93.

been even more aggressive through the acquisition of ownership interests in law firms.²⁹ Such amalgamated service providers now can offer both legal and nonlegal services to their clients.³⁰ Many observers of the legal profession in the United States believe that accounting firms secretly covet a significant role in the provision of legal services.³¹ Some lawyers are aware of the accountants' agenda and have manned the barricades to keep out these invaders.³² This is not an idle concern. Just as a "full-service" law firm can market a broad scope of services to potential clients and cross-market its services to current clients, "full service" professional service firms can offer clients "one-stop shopping" for their professional service needs.³³

Ironically, it was not too many years ago that the American Bar Association ("ABA") engaged in a cathartic debate about whether law firms could own ancillary nonlegal businesses.³⁴ After numerous starts and stops, the ABA adopted Model Rule 5.7, which permitted ancillary business ownership by law firms, provided they took steps to assure that other ethical responsibilities likely to be threatened by ancillary business activities would be protected.³⁵ The District of Columbia Bar went so far

29. See Morello, *supra* note 8, at 250.

30. See Gibeaut, *supra* note 1, at 44.

31. "The naysayers, led by Lawrence Fox, claim that the Big Five accounting firms have manufactured the demand for integrated services. They would have us believe that the Big Five woke up and said, 'let's start practicing law,' but no clients are driving this demand." John S. Dzienkowski & Robert J. Peroni, *Proposal on MDPs Goes Overboard*, TEX. LAW., Aug. 9, 1999, at 38, 38.

32. From the beginning of the multidisciplinary practice debate, some lawyers have advocated an aggressive campaign to stop accountants from encroaching on lawyers' turf. See *id.*; Letter from Jay G. Foonberg, Delegate at Large, American Bar Association, to the Members of the American Bar Association House of Delegates (January 8, 1999) (on file with author).

33. The concept of multidisciplinary practice contemplates a team of professionals with differing skills who work collectively when necessary to solve whatever problem the client may have. The term "one-stop shopping" seems to refer to modern superstores that displace a variety of specialized merchants.

34. See American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-1998*, 268-69 (1999).

35. RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

as to make joint ownership of a law firm by lawyers and nonlawyers permissible under Rule 5.4 of its Rules of Professional Conduct.³⁶ The passage of these rules does not seem to have generated widespread changes in the way law is practiced, either in the District of Columbia or the United States.

While opening the door to lawyer ownership of nonlegal businesses, the ABA has been much less amenable to nonlawyer ownership of law firms.³⁷ Thus, it is still improper for a lawyer to share fees with a nonlawyer, enter into a partnership with a nonlawyer if any of the activities involved constitutes the practice of law, or allow a nonlawyer to influence the lawyer's independent professional judgment.³⁸ It seems, at least according to lawyers' rules, that a law firm can own an accounting firm, but not vice versa.

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services know that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when performed by a nonlawyer.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1999).

36. (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

- (1) The partnership or organization has as its sole purpose providing legal services to clients;
- (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
- (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
- (4) The foregoing conditions are set forth in writing.

District of Columbia RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999).

37. Although Model Rule 5.7 opened the door to law firm ownership of nonlegal businesses, Model Rule 5.4 continues to prohibit ownership, or even investment in legal businesses by non-lawyers. Economic protectionism rather than ethics may explain the disparate treatment. See Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 615 (1989).

38. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102, DR 3-103 (1999).

In the past, the ABA and various professional groups created voluntary inter-professional agreements that attempted to define the limits of their respective practices.³⁹ These agreements are not currently published or distributed by the ABA or state bar associations. The inter-professional accords represent an institutional attempt to address the question of appropriate limitations on law-related activities by other professionals. Whether or not professional associations could or would reach similar answers today is a moot point since further discussions are unlikely to occur.⁴⁰

While these agreements never had a binding effect on lawyers and other professionals, they have little or no force today. Although the agreements have not been formally abrogated by the ABA, they have become virtually ignored in the legal community. Given the two or more decades that have elapsed since these agreements were last reviewed and the changes in law and other professional fields during this period, there is serious doubt that such accords would provide meaningful guidance in today's marketplace.⁴¹ This seems to suggest that lawyers and accountants will find little common ground in the accords to help resolve their differences.

In many jurisdictions, unauthorized practice committees, which flourished in the 1930s and 40s, have been disbanded or de-emphasized by the bar. The primary focus of the ABA's current unauthorized practice initiatives is in the area of legal practice by paralegals.⁴² In California, for instance, the legislature has considered a bill permitting licensed paralegals to per-

39. See New York State Bar Association, *supra* note 27, at 7. These compacts appeared annually in the *Martindale-Hubbell Directory* from the early 1950s through the early 1970s when they fell into disuse. See also CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 15.1, at 825-26 (Student ed. 1986).

40. The ABA has not pressed for renewal of the compacts during either the ancillary business or MDP debates, perhaps out of concern that cooperation might be treated as price fixing or monopolistic activity under the Sherman Antitrust Act. See *infra* note 41 and accompanying text.

41. The possibility exists that any effort by the legal and accounting professions to carve up the tax business would constitute a restraint of trade in violation of antitrust regulations. See Sherman Antitrust Act § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1977)).

42. See generally Debra Baker, *Is This Woman a Threat to Lawyers?*, A.B.A. J., June 1999, at 54.

form certain routine legal services in competition with lawyers.⁴³

As for the immediacy of the paralegal problem, lawyers tend to fixate on short term issues. For the short term, paralegals in many jurisdictions have been pressing for the right to perform routine legal work that involves basically low-level legal judgment, such as filling out forms, especially in areas that lawyers have more or less abandoned as uneconomical.⁴⁴ Since a great many community colleges and some four-year colleges offer paralegal degrees, thousands of paralegals graduate without law-related employment, which exerts increasing pressure on the marketplace to expand the scope of activities paralegals are permitted to perform and, at the same time, curtail lawyers' professional monopoly.⁴⁵ Current dissatisfaction with lawyers and legal fees also contributes to this movement.⁴⁶

The ABA is a voluntary association of lawyers and, therefore, its actions are not binding on either state bar associations or on state courts that regulate lawyers' conduct.⁴⁷ The immediacy of the paralegal problem, the general economic environment, and the potential for antitrust violations are three basic reasons for the shift in emphasis away from cooperation with other professional groups about the limits of a professional practice. Prosecutions for unauthorized practice involve obvious attempts by nonlawyers to perform legal services, rather than for activities such as answering legal questions in the context of a professional setting.⁴⁸

A healthy economy may help to explain the lack of attention paid by the bar to unauthorized practice in the 1990s. Historically, the most vigilant efforts by lawyers to enforce the professional monopoly coincided with the years of the Great Depression, when business activity was perpetually sluggish and everyone was scraping for any work they could find just to stay

43. See Justice, *supra* note 5, at 204.

44. In California, when the state legislature considered a bill authorizing limited practice by paralegals, the argument was made that the paralegal would be doing work that lawyers did not want. See Justice, *supra* note 5, at 202.

45. See *generally id.*

46. See *id.* at 184 n.23.

47. See WOLFRAM, *supra* note 39, at § 2.6, at 57 n.50.

48. See, e.g., N.Y. JUD. LAW §§ 476, 478, 484 (McKinney 1983).

afloat.⁴⁹ It is not surprising that the legal profession sought to enforce its prerogatives more during this period than it does today. Some commentators speculated that the oversupply of lawyers and a downsizing of the United States economy in the early 1990s triggered the most recent round of economic protectionism by the bar.⁵⁰

Other than periodic debates such as those surrounding the adoption of the Model Rules of Professional Conduct and the ancillary business battle, there is little evidence of support for a reinvigorated unauthorized practice effort targeting other professionals.⁵¹ If anything, a blurring of the lines between what is legal work and what is not will result in both lawyers and nonlawyers working both sides of the fence. Also, because the likelihood of harm caused by nonlawyer professionals dealing with legal questions in the context of their own professional expertise is small, there is little incentive to prohibit conduct that does not produce tangible injury to members of the public.

In the final analysis, the biggest single factor impeding aggressive measures aimed at unauthorized practice by the bar is the potential for antitrust liability.⁵² This position was forcefully made in the two leading articles on the subject by Barlow Christensen and Deborah Rhode.⁵³ In her article, Professor Rhode cogently dismantles the arguments in favor of anticompetitive practices and supports a deregulated marketplace in which lawyers do not have a monopoly on legal services.⁵⁴ Although courts have continued to exercise their inherent power to exclude unlicensed practitioners from engaging in actual legal representation, drafting, and advising, bar associations have tended to take Rhode's advice and back off.⁵⁵

49. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 2, TITLE B (Proposed Final Draft No. 2, Apr. 6, 1998); see generally Christensen, *supra* note 2, at 160.

50. See CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995 1-3 (1999). See also American Bar Association, *Legal Education and Professional Development - Education Continuum Report of the Task Force on Law Schools and the Legal Profession: Narrowing the Gap* 13-18 (1992).

51. See Rhode, *supra* note 2, at 9.

52. See *id.* at 54-55.

53. See Christensen, *supra* note 2, at 160; Rhode, *supra* note 2, at 54-55.

54. See Rhode, *supra* note 2.

55. See *id.* at 15.

What does all of this mean? The shorter answer is that lawyers now find themselves in a highly competitive, largely unregulated marketplace. Past attempts to limit the activities of other professional groups, while subject to legitimate criticisms, represent a rational effort to define the limits of the practice of law. The rules were developed at a time when attention to the question of what constitutes the practice of law was being discussed actively by both lawyers and nonlegal professional groups. It would be a mistake to think that we could learn nothing from the professions' leaders of a generation ago.⁵⁶ Despite significant change, many elements of the practice of law, as well as the fundamental relationships with other professions, have not changed. Legal practice still involves giving advice to clients on the meaning, interpretation and enforcement of the common, statutory and regulatory law; drafting and executing legal instruments for clients; and representing clients in judicial proceeding.⁵⁷ There has never been any real dispute about whether the practice of law included these fundamental services, or whether the state, through the judicial branch, can delimit a monopoly to certain individuals licensed to carry on such activities.⁵⁸

The debate has always occurred at the fringes.⁵⁹ Are administrative hearings like judicial proceedings? Is answering a question with legal implications giving legal advice? Is the preparation of standard forms the same as drafting documents? Are basically ministerial activities such as transferring title to property the same as representing a party in a real estate transaction? Earlier case law, bar ethics opinions, and the agreements between lawyers and other organizations all demonstrate how futile it is to attempt to draw lines and create rules that provide meaningful guidance over time. The legal

56. The unauthorized practice cases prior to 1970 provide interesting insight into the fundamental components of the practice of law. *See Sperry v. Florida ex. rel. Florida Bar*, 373 U.S. 379 (1963); *Smith v. Public Serv. Comm'n of Missouri*, 336 S.W.2d 491 (Mo. 1960); *Florez v. City of Glendale*, 463 P.2d 67 (Ariz. 1969) (in banc).

57. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 2, TITLE B (Proposed Final Draft No. 2, Apr. 6, 1998).

58. *See WOLFRAM, supra* note 39, at § 16.2.2, at 880-83.

59. The fringes of the practice of law include those activities where the legal component is a small percentage of total service.

literature is replete with hundreds of cases that make fine distinctions on points that provide little insight to the contemporary reader.⁶⁰

For example, in the area of title insurance and real estate transactions, there appear to be considerable differences from jurisdiction to jurisdiction.⁶¹ In some states, title companies have all but driven lawyers out of the real estate closing business, at least with respect to fairly simple residential transactions.⁶² For high stakes matters, it is still the case that the parties utilize independent legal representation.⁶³ Since the title company does not actually represent a party to the transaction—it is merely making a business decision to issue title insurance - buyers and sellers who want their legal interests protected inevitably seek a lawyer. In some states, lawyers have managed to keep the title companies at bay,⁶⁴ and in still others, lawyers and title companies coexist uncomfortably.⁶⁵ In these states it is not uncommon for a lawyer to own a title company and to funnel routine transactions through the title company, sometimes while representing other clients directly. However there is no requirement that title companies be owned or operated by legally trained individuals.⁶⁶

One problem for any provider of real estate settlement services, whether a lawyer or not, is that land records are maintained in the county where the land is located, which makes it difficult for non-local providers to review titles efficiently.⁶⁷ A local law firm or title company can review the land records from the date of the last transaction in which title was reviewed by that provider, rather than going back to the original grant of the property, which can sometimes be decades or more. Out-of-

60. See UNAUTHORIZED PRACTICE HANDBOOK, *supra* note 15, at 196-213.

61. See Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 259 (1997).

62. See Quintin Johnstone, *Land Transfers: Process and Processors*, 22 VAL. U. L. REV. 493, 501 (1988).

63. See Braunstein, *supra* note 61, at 259.

64. See *id.* at 261-63.

65. See *id.*

66. See Munneke, *supra* note 19, at 562 n.11.

67. Not only are the records physically inaccessible, a problem that may be eliminated with on-line records, but local lawyers are more likely to know the land ownership history than lawyers from outside the area.

county providers are also ill-positioned to develop referral networks with realtors who can refer buyers and sellers to them for services. Although the computerization of court records will eventually revolutionize the process of searching titles and the accessibility of information, it undoubtedly will continue to be problematic for any non-local provider to compete effectively for this kind of business for at least another ten years.

Another problem with real estate closings is that the settlement agent, whether lawyer or title company, must have a relationship with a title insurer.⁶⁸ Thus, when an agent concludes that title to a property can be transferred, it is common practice to issue a title insurance policy rather than to self-insure against errors or omissions.⁶⁹ The title insurer guarantees the title against defects and assumes the risk that the title cannot be defended successfully.⁷⁰ What this means for anyone considering expanding into this area is that it will be necessary to establish a relationship with a title insurer that will issue title policies reviewed by the provider.

The field of trusts presents a separate but similar set of problems. There, banking and trust institutions have traditionally managed trust accounts, either deposited in their institutions or separate designated trust assets.⁷¹ Traditionally, the work of drafting trust instruments has been the exclusive purview of lawyers.⁷² There are several reasons for this division of responsibility. Most prominently, legal drafting activities are widely viewed as a part of the practice of law, so such drafting by a nonlawyer would constitute unauthorized practice.⁷³ Even if the bank employed lawyers to draft trust instruments, the prevailing view is that the bank itself, not the individual lawyer, is practicing law.⁷⁴

68. See Braunstein, *supra* note 61, at 247-49.

69. See *id.* at 248.

70. See *id.*

71. The financial institution is often well positioned to administer trusts, given the nature of banking activities. Banks do not, however, have a monopoly over trust administration. The trustee may be an individual such as a lawyer or relative of the creator of the trust, or an institutional trustee such as a bank.

72. See UNAUTHORIZED PRACTICE HANDBOOK, *supra* note 15, at 184-88.

73. See *id.*

74. See *In re Co-operative Law Co.*, 92 N.E. 15 (N.Y. 1910); *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992).

The prohibition against corporations practicing law was upheld as recently as 1992 in *Lawline v. American Bar Ass'n.*⁷⁵ This case discusses all the problems that are traditionally identified with the unauthorized practice of law and purports to keep the barbarians away from the lawyers' frontier. In the real world, undoubtedly, many banks are using in-house lawyers to draft trust instruments, and other organizations are looking for ways to provide legal services to their clients as part of a larger package of services. Perhaps it is safer to have in-house lawyers prepare initial drafts of instruments, which are then reviewed by outside counsel, than to try to provide services to clients directly, but the additional review obviously drives up the cost of the service with little marginal increase in value to the client.

The second more serious problem associated with nonlegal entities providing legal services is that a conflict of interest arises when the drafter of an instrument is also named as a trustee, or otherwise benefits from the transaction, particularly when a substantial fee is involved.⁷⁶ If a fiduciary relationship exists between the service provider and the client, the responsibility owed to the client by the fiduciary is higher than the ordinary duty of care.⁷⁷ A lawyer involved in such a transaction has a clear duty to ensure the transaction is fair to the client, to explain the nature of the conflict to the client, to secure the client's informed consent, and to advise the client that he has the right to seek independent counsel. From the standpoint of many nonlegal service providers, it is less problematic to use independent counsel for drafting purposes in most circumstances.

75. 956 F.2d 1378 (7th Cir. 1992).

76. RULE 1.8(c) CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

"A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1999). The act of naming the maker of the instrument as trustee or executor could be viewed as making a gift in contravention of this rule, because a benefit is conferred on the attorney without further consideration.

77. See RESTATEMENT (SECOND) OF AGENCY § 13, 14B (1957); see also WOLFRAM, *supra* note 39, at § 8.12.4, at 488-89.

The area of corporate formation services is much more difficult to address because no single professional group represents corporate formation providers. Books on corporate formation have been held to be protected First Amendment expression, and, therefore, beyond the regulatory pale.⁷⁸ Services that simply fill in the blanks in corporate formation kits may raise unauthorized practice issues.⁷⁹ However, as long as the providers do not advise the incorporators on matters such as corporate form, structure, governance, ownership or other legal matters, they probably can avoid criticism.⁸⁰ These services are really not much more than typing services. Most incorporations that utilize kits or services are small businesses with limited ownership and capital. Any new publicly held company almost necessarily has to use a law firm because of the complexity of the issues involved.

Whether a nonlegal professional firm could engage in more sophisticated incorporations is another matter. Such an effort would almost certainly raise the ire of a powerful segment of the practicing bar and would undoubtedly end up in litigation. Professor Rhode suggests that efforts to enforce the professional monopoly in areas such as this are unlikely to be successful.⁸¹ It is not entirely clear, however, what the outcome of litigation in specified areas such as trust drafting would be.

The strongest reason to exclude nonlawyers from a law-related activity is that the public will be disserved or harmed if those services are performed by individuals not licensed to practice law. However, in situations where the work is performed by a member of another profession whose standards are comparable to those applied to lawyers and are imposed by the state or the profession itself, the risk of harm is significantly reduced. Additionally, the specter of malpractice for violating the professional standard of care serves as a disincentive to undertaking cases beyond the provider's knowledge or experience.

78. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.* 179 F.3d 956 (5th Cir. 1999).

79. See *Florida Bar v. Brumbaugh*, 355 So.2d 1186 (Fla. 1978), discussed *supra* note 21.

80. See *id.*

81. See generally Rhode, *supra* note 2.

For instance, in a property settlement, the closing agent should recognize that a serious boundary dispute or cloud on the title may necessitate the involvement of lawyers in the case. Failure to refer the case to a lawyer, by either passing the title or trying to cure the defect, would subject the agent to liability.⁸² In the trusts area, there is a potential conflict between instrument drafting and trust administration, the former presenting more obvious unauthorized practice problems than the latter. With the corporate formation situation, since there is no clear nonlegal profession that ordinarily provides such services and most incorporations involve more than completing technical filing requirements, a nonlegal provider would undertake substantial risk to provide such services.

The keys for any organization seeking to provide law related services, such as those in the examples above, are the same. First, the client should be advised about the scope and nature of the representation and the fact that the service does not contemplate the provision of legal services.⁸³ Second, the client should be advised that he has the right to seek legal counsel to represent his interests at any time during the representation.⁸⁴ Third, the provider should obtain the client's written informed consent to the representation.⁸⁵ Fourth, at any time during the representation if it appears to the provider that the client ought to have independent counsel, the provider should

82. Under general professional liability principles, a service provider may be liable for undertaking a matter for which he or she lacks the requisite skills, thus causing harm to a customer. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32 (5th ed. 1984).

83. This responsibility is reflected in the lawyer's duty to advise the client of the scope and limitations on the representation. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1999). A financial institution following this precept might advise the client that it is not practicing law or giving legal advice and disclose its financial interest in the matter.

84. Under the Model Rules, a lawyer who has a personal interest in a transaction must advise the client of the client's right to obtain legal counsel in the transaction. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (1999). A parallel responsibility for institutions that prepare trust documents would clarify the nonlegal nature of the drafting.

85. Following the Model Rules, the nonlegal provider should advise the client about any limitations. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c), 1.7(b) (1999).

refer the client to legal counsel.⁸⁶ Fifth, if the client waives the right to utilize legal counsel, the provider should nevertheless withdraw from the matter if legal issues emerge that would clearly require the exercise of legal judgment.⁸⁷

There are circumstances in which the nonlegal service provider ought to defer to a licensed lawyer. First, the representation of the client before any court, legislative or administrative body should always be handled by a lawyer except where specific legal exceptions have been established (as in tax practice).⁸⁸ Second, the drafting of all instruments having legal force and effect should be drafted by legal counsel.⁸⁹ The extent to which modifying a pre-existing document represents legal drafting is unclear, but as a rule, where the change affects the legal relationship among the parties, it is more likely to be viewed as legal drafting. Third, when the client seeks advice involving the interpretation of statutory or case law, if the legal questions involved are complex, or the law is unsettled on a particular issue, then the nonlegal provider should step aside in favor of a lawyer.⁹⁰

These policies should be spelled out in writing, and any personnel of a provider of law-related services, who will be involved in transactions in these areas, should receive training to identify problem situations. When questions arise involving the application of these policies, the individual involved should maintain accurate records of events. There should also be some resource in-house or on retainer to advise the provider about how to handle close calls. Procedural safeguards may not elimi-

86. Just as Model Rule 1.8 establishes a requirement for lawyers in self-benefitting transactions to obtain the client's informed consent to the representation, banks or other trust preparers could protect themselves by obtaining their clients informed consent.

87. The fiduciary nature of the trustee relationship would seem to call for any trustee to refer the beneficiary to independent counsel if the interests of the trustee and beneficiary become adverse.

88. *See supra* notes 17, 25 and accompanying text.

89. *See supra* notes 20, 55 and accompanying text.

90. Just as a lawyer should refer a client to another lawyer if the first lawyer lacks competence, a nonlawyer trustee should refer a client to a qualified lawyer if the legal issues are sufficiently complex. These three principles establish a general division of responsibility for nonlegal professional service providers. The threat of professional liability should serve as a deterrent to unqualified provision of legal services.

nate the problems, but they can help to avoid serious mistakes, and they can insulate the provider from criticism and possibly liability after the fact.

Assuming that the concerns present when lawyers engage in multidisciplinary practices - confidentiality, conflict of interest, solicitation of business, and independent judgment - are real, the dangers exist regardless of whether the organization is a law firm, an accounting firm, a bank or some other entity. Lawyers may argue that a lawyer at the top of the food chain will be more interested in protecting lawyers' ethical responsibilities than a nonlawyer in the same position, but this is not always true. Lawyers already work in a number of settings where nonlawyers exercise tremendous influence over the decisions they make and the way the lawyers practice law. In-house counsel in both corporate and government law offices typically are answerable to a nonlawyer supervisor.⁹¹ Even private practitioners who represent a single client, as well as lawyers who work for group and indigent legal services programs are often responsible to a nonlawyer board of directors.⁹²

The fact that our system has been able to accommodate this kind of oversight by nonlawyers where expediency or the Constitution seem to make it feasible raises questions about the prohibition against nonlawyer involvement in legal business in other settings. It would seem that the primary reason for prohibiting such involvement is economic protectionism, rather than ethical probity.⁹³

What all of this means for lawyers is that the barriers between the practice of law and other professional services are diminishing. Competition with other professional groups is inevitable, and further inroads into the traditional work domain of lawyers are probable. There is no doubt that the work we call lawyering as provided by law firms today will continue. As long as human beings live and work in close proximity within a complex economic system for delivering goods and services to con-

91. By definition, institutional lawyers report to their employers, which are nonlegal organizations. The lawyer in such an organization must exercise independent professional judgement despite the relationship with the organization.

92. See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

93. See Rhode, *supra* note 2, at 54.

sumers, there will be conflict, and that conflict will involve interpretation of the law. What may not be so clear is what types of organizations will be most well prepared to provide those services.

Will law firms provide a very specific and narrow form of problem solving described as legal services, or will they be international, multi-professional service companies that deliver a wide range of expertise and support to businesses that come to them for assistance? Will a license to practice law remain a ticket to engage in a judicially sanctioned monopoly in the professional services area, or will it become a mere license to appear in court possessed by certain members of the professional problem-solver community? Will law school graduates predominantly go to work as associates in traditional law firms, or will they find better opportunities in banks, financial services companies, and accounting firms? Will accounting firms and other professional service delivery companies evolve into multi-professional partnerships, or will they, too, remain hidebound to their professional roots? Will law firms, especially large law firms that compete for major corporate clients lose out in the Darwinian war for economic survival, or will they take on some of the trappings of their competitors to become multi-professional offices as well?

These questions give rise to considerable speculation, but no clear answers as to where these developments will lead. Law firms and the legal profession must address some fundamental questions: law firms will need to reconsider the professional values that have discouraged them from competing directly with accounting firms and other service providers. The question of ownership of law firms by nonlawyers will have to be addressed, just as the question of law firm ownership of nonlegal businesses was addressed. The District of Columbia model⁹⁴ may be the more viable approach to the interdependent professional environment that lawyers will face in the next century. Fee sharing limitations will also have to be changed. Lawyers may want to look closely at situations likely to produce abuse, while permitting lawyers to engage in business with other professionals in ways they cannot today. A frontal assault on the

94. See *supra* note 36 and accompanying text.

accounting profession is unlikely to be successful; lawyers and law firms would be much wiser to expend their energy becoming competitive rather than trying to prevent competition.