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The Jonathan M. Ault Symposium: Professional Responsibility and Multi-Disciplinary Practice - Introduction

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THE JONATHAN M. AULT SYMPOSIUM:

PROFESSIONAL RESPONSIBILITY AND MULTI-DISCIPLINARY PRACTICE

INTRODUCTION

When the papers making up this symposium were first commissioned, the Enron scandal had not yet made front-page news. Though in the printed versions of several of the papers Enron is mentioned in passing, it is given no sustained treatment. Some might think that fact a disadvantage in understanding the phenomenon of multi-disciplinary practice ("MDP"). After all, the Big Five accounting firm of Arthur Andersen has been very much a part of the scandal. And the hiring of lawyers in record numbers by the Big Five is the reason the subject got on the lawyers' radar screen to begin with. Thus, some have been so bold as to suggest that the Enron/Arthur Andersen debacle will put an end to debates about MDPs all together. Those prognosticators, I think, are dead wrong; and the papers in this symposium show how they are wrong. I think these papers demonstrate that the Enron affair is not particularly germane in considering the major challenges that MDPs present to the legal profession. Enron will simply be enfolded into the larger debate about competition and adaptation in the twenty-first century world of economic globalization, where free-market capitalism reigns without rival.

In 1953, Roscoe Pound, Dean Emeritus of the Harvard Law School, could confidently proclaim that members of a profession do not regard themselves as in competition with their fellow professionals.[1] In 1967, when I became licensed to practice law, I was given two documents by my local bar association. The first was the Canons of Ethics, as adopted in my state, Pennsylvania. The second was a Minimum Fee Schedule, adopted by the county bar association. It was a violation of the Canons at that time for me, as a practicing lawyer, to charge a fee below what the minimum fee schedule set as an

[1] ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 10 (1953).

appropriate fee for a given professional activity. Although the Canons of Ethics gave way to the Code of Professional Responsibility shortly thereafter, that change was not very significant for lawyers. Radical change came in 1975 when the Supreme Court of the United States in *Goldfarb v. Virginia State Bar*[2] struck down, as anti-competitive and a violation of the antitrust laws, a Minimum Fee Schedule, similar to the one I was given at the time I became a member of the bar. Dean Pound has surely turned over uncomfortably in his grave many times since then. What he had considered a bedrock principle of professionalism has been overturned, first by *Goldfarb*; then by a series of advertising and solicitation cases[3]; then by the bar itself, in events like the "ancillary business" debates at the ABA in the early 1990s[4]; and, now, by the globalization of the matter through the debates about MDPs. Competition is now part of the life of every professional.

Our first paper contextualizes the problem very well. Laurel Terry offers her own very studied "spin" on the recent case of *Wouters v. NOVA*.[5] The case involved the issue of whether the Netherlands Bar could prevent lawyers from becoming partners with auditors, even though the Bar permitted partnerships between other recognized professionals and lawyers. Already we are in a different world. In America, the technical problem, caught in our ethics codes, was that lawyers could not share fees, nor become partners with any non-lawyers.[6] In Europe, the question is a second generational one: is there any particular group that lawyers *cannot* become economically one with? As noted by Professor Terry, the most interesting things about the opinion of the European Court of Justice in *Wouters* are not to be found directly connected to its holding that the Dutch Bar could prevent lawyers and auditors from becoming partners. Rather they are to be found in the conditions the Court placed upon the Bar in its regulatory role, particularly that antitrust rules would apply to Bar rules.

Andrew Bailey's comment follows Terry's because he had recently been working as an Academic Fellow with the SEC, trying to develop rules to deal with the problems of developing independence

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2 421 U.S. 773 (1975).

3 *See e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); Bates v. State Bar, 433 U.S. 350 (1977).

4 In 1992, the ABA passed a version of Model Rule 5.7 severely restricting lawyers from engaging in law-related services; only to repeal the rule one year later. In 1994, a very liberal rule was passed. *See* GEOFFREY H. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING, 1043-1045 (3d ed. 1999).

5 ECJ Judgment, Case C-309/99, Wouters v. NOVA, 2002 ECJ CELEX LEXIS 186, at *1 (Feb. 19, 2002).

6 MODEL RULES OF PROF'L CONDUCT R. 5.4 (2000).

rules for auditors. Auditors do owe their allegiance primarily to the investing public, rather than to the public firms which pay for their audits. For this reason, the SEC has long maintained that offering legal services to audit clients will be considered a prohibited conflict of interest. Bailey would change that informal rule into a formal one. With *Wouters* and the SEC both pushing against the alleged tide of expanding scope of services by not allowing or practically forbidding the lawyer and the auditor from working together in one firm to provide services to a single client, it might look like the MDP wave was dissipated before it hit the shoreline. The paper by Bryant Garth and Carole Silver readily dispels that conclusion.

First of all, Garth and Silver argue, the alleged challenge to law firms from the Big Five is a misleading characterization of what is going on globally. The challenge, simply put, is competition. Competition exists both between and among lawyers, but also between, among and against professionals from other disciplines. The MDP debate in America has not been resolved and is important, but larger economic forces are at work. These forces will push the American corporate law firm either to change internally to meet the threat of the Big Five and others, or to "partner" with other professionals to offer realistic competition.

As the managing partner of a 185-person corporate firm, Dale LaPorte confesses he and his partners are concerned about competitive disadvantage. Consequently, his firm has put a toe in the water by adding one "ancillary business" to its list of services offered to clients. He acknowledges both that other law firms are doing more in this arena than his own, and that the legal profession is "well behind the accounting and consulting firms" in offering a variety of services. He concludes by expressing the belief that lawyers will compete very well, thank you, but perhaps only when the competitive playing field is level. Next, Professor Gary Previts offers some sober advice to lawyers, although he offers it in a whimsical tone. If lawyers insist on the status quo, fine, accountants and others will be happy to take business away from those who do not recognize the sign of the times: competition.

One of the Deans of the fields of Professional Responsibility and the Legal Profession, Charles Wolfram, is forthright about the problem. With a few regulations in place, he would allow full-blown MDPs to flourish and compete, with lawyers and other professionals offering an array of services to an array of clients. He thinks legal services would even be improved by this emancipation. One of the reasons he thinks so is that, like many of those who participated in the symposium, Professor Wolfram does not think the Big Five challenge

is where the action is. Consistent with the data presented to the ABA's Commission, which studied the problem several years ago, the Main Street Lawyer, not the Wall Street Lawyer, is the one who will take the most advantage of any lessening of restrictions on who can partner and share fees with whom. Professor Wolfram also presents us with various models of cooperation between and among professional groups, and shows us how there is a split already in approaches to this problem. He suggests the train has already left the station, practically anyway, because the American Bar—despite many protestations about unauthorized practice and allied issues—does nothing to try to prevent the encroachment on what it deems to be its historic preserve, the delivery of legal services. Again, the forces of competition are proving too strong to resist.

Kevin McMunigal offers insights on conflict of interest rules based on sound theory that makes the traditionalists among us recognize once again, what is the nature of the loss we profoundly feel in this debate about MDPs. We have lost Roscoe Pound's sense of what a profession is all about. McMunigal is no apologist for a lost past. He simply offers a dispassionate analysis of conflict of interest rules, even suggesting ways advocates for MDPs might go about challenging current restrictions. As a protector of the public interest, the profession often made rules that swept with a broad brush. Many conflict of interest rules were like that. Better individual lawyers suffer than the public be injured, so the theory went. But those rules were anti-competitive, at the very least. So, they will be overturned in the new dispensation, which values competition, even in the professions.

The symposium concludes with a client perspective, that of the corporation. Clients think that "competition for services is a beneficial thing." Fred Krebs, President and COO of the American Corporate Counsel Association, is the representative voice here. And he is not only forthright in his approval of change, he suggests, on a happy-ending note, that the legal profession has always been good at adapting to changing needs and challenges. He sees no reason why it will not be up to this one.

There is one note missing from the papers that I wish someone had sounded. Most seem to favor competition and endorse its value. All seem to see the new world as one of increasing competition in all fields. Still, one question remains—what will become of those hurt in the competitive battles? I mean here, not just the clients of those delivering legal services, but especially the general public. What will happen if the vitality and fairness of legal procedures and institutions

are ignored?[7] I think of comparable problems in the field of medicine. Unbridled competition has not improved the health of Americans, nor lessened health care costs. Will justice and the costs of bringing justice to citizens be enhanced in this new competitive environment? Inevitably, some regulation by some body, or bodies, will be necessary. Which body and how this regulation is to take place is, of course, the subject of an altogether different symposium, one that should not lag too far behind this one.

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[7] This has been a long-standing concern of mine in dealing with fundamental issues of the professional responsibility of lawyers. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 316-335 (1990).

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