Mercer Law Review

Volume 52
Number 3 *Articles Edition - A Symposium: Ethical Issues in Settlement Negotiations*

Article 8

5-2001

Symposium Speech - Those Who Worry About the Ethics of Negotiation Should Never be Viewed as Just Another Set of Service Providers

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A SYMPOSIUM: Ethical Issues in Settlement Negotiations

Those Who Worry About the Ethics of Negotiation Should Never be Viewed as Just Another Set of Service Providers

by Lawrence J. Fox*

It is an honor to address this distinguished group of lawyers and law students this evening as part of the very first Symposium funded by the duPont Company's generosity by way of Judge Lawson. The issues

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This Article is adopted from a keynote address I delivered on March 9, 2001, at the Walter F. George School of Law's Symposium on Ethical Issues in Settlement Negotiations. If I had spoken at this length on these issues then, an audience revolt would have occurred. No one put similar restraints on the written word.

raised by the topic of ethics in negotiation mirror some of the most important themes in the bigger professional responsibility arena, and examining them with this level of care can inform the profession more widely.

It is ironic then that when Professor Pat Longan invited me to give the keynote address, he himself negotiated my appearance in a highly questionable manner. "Would I like to be the keynote speaker at this upcoming Symposium?" Would I? Of course, being so self-absorbed that I never turn down a chance to preach. "Yes," I shot back. "Love to."

But now I am here and I learn that this keynote address is being given, not at the beginning of the Symposium, but when the Symposium is half-way completed, that I am speaking after a delicious dinner, complete with ample quantities of wine, that my speech follows an eloquent address from Frank Cater Jones, the legendary Macon native, Mercer Law School graduate, King & Spalding partner, and former President of the American College of Trial Lawyers, and that this weekend features the ACC basketball tournament, which means many in this audience cannot wait to get back to their televisions. The thought did cross my mind that perhaps Pat omitted a few key facts when we "negotiated" my appearance here at Mercer.

I am particularly pleased to be invited to participate in this event in Georgia. I have had a splendid affinity with this state for a long time. Perhaps it is because of the outstanding Commission on Professionalism that the Georgia Supreme Court established years ago. Perhaps it is because I am currently handling a death penalty case on behalf of Tommy Lee Waldrip[1] who is incarcerated in a prison in Jackson just up Route 75. Perhaps it is because of my many friends in the Georgia bar or because I was lucky enough to steal my wife away from Georgia Legal Aid.

I. ETHICS OF SETTLEMENT NEGOTIATIONS

A. Client Autonomy

There are three themes in the Symposium that I find particularly fascinating and worthy of highlighting. First, the whole question of client autonomy is one the profession must revisit in the negotiation context. Too often lawyers take control of the client's matters in a way that conflicts with the prerogatives of the client, particularly in the negotiation process. While lawyers may well have a better view of the best interests of the client, or at least think they do, the role of the

1. Waldrip v. Head, Case No. 98-V-139 (Butts County Superior Court).

lawyer as an agent of the client does not permit the lawyer to usurp the authority of the lawyer's principle. Permit me to review seven areas of client autonomy worth serious discussion.

First, as a general matter the client must authorize the initiation of settlement discussions. Totally legitimate reasons exist why clients would not want to discuss settlement. Regardless of what judges or lawyers might think, a client can view, quite properly, the initiation of settlement discussions as a sign of weakness. Corporate clients that face multiple claims of the same type can adopt a policy that no cases of this kind will ever be settled. Clients are entitled to have their cases tried by judge and jury. Thus, absent some court-imposed requirement that the parties engage in settlement, the lawyer needs the client's authority to commence negotiations.

What about "off the record" negotiations? Can the lawyer who has not discussed the possibility of negotiations or who has been told in no uncertain terms not to commence them, tell the other side, "I have no authority to discuss this topic, but I wouldn't be surprised if $300,000 would settle this case?" The statement is truthful as to the third party, but the initiation has hardly been authorized by the client. These discussions happen all the time, but whether they should is the kind of question this Symposium must address. In my view those who would argue that these settlement negotiations are impliedly authorized have a very heavy burden in light of the client's authority over "the objectives of the representation."[2]

Second, the client should be consulted about the means to be employed as to how the negotiations are to proceed. If the client wants to settle for $100,000, should the opening offer be $500,000? Should you wait until the eve of trial to make an offer? Until the other side raises settlement first? Until a key deposition has been taken? While the rules say that the "lawyer shall consult with the client as to the means by which [the client's ends] are to be pursued,"[3] it is in rare cases that the lawyer will spend much time on this sort of consultation. Even when a discussion does take place, lawyers generally view the consultation as "reporting in" rather than as a collaborative process. Is that, however, the right result? It is true there is a lawyer component to how best to proceed with negotiations. (Is this the juncture in the case at which the client's case is strongest?) Negotiations, however, present a business decision as to which the client may have even more expertise than the

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2. RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 33 cmt. c (Proposed Final Draft No. 1 1996) ("[A] lawyer shall abide by the client's decisions concerning the objectives of the representation.").

3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995).

lawyer, and in any event, the client has a stake in how the negotiations are conducted as to both the amount of any offers and their timing.[4]

Third, it is critical that the client's confidences be kept, even in the course of negotiations. At least in two ways this obligation is breached on a fairly regular basis. First, lawyers often forget that their client's "bottom line" is itself confidential information. Judges should not ask for that information, but they regularly do so.[5] The opposing party is always in search of that number. But if a lawyer fails to obtain consent from the client before negotiations begin, then this key fact remains one that should not be shared with anyone. Lawyers, of course, can avoid the problem by responding with the answer to a different question. ("My client needs at least $2,000,000," or "less than $2,000,000 is an insult.") But if finesse is not an option, the answer is no disclosure.

Equally problematic is the common practice of lawyers sharing with judges, mediators, or the other side their difficulty with getting the client to be realistic about settlement. Sometimes that disclosure is simply a ploy to take the blame off of the lawyer and, therefore, is itself a questionable representation; but if it reflects the truth, it clearly is the disclosure of confidential information, an indication that the negotiations between lawyer and client have failed, and a disparagement of the client that is impermissible under the rules of professional conduct.

Fourth, no matter how insulting, all settlement offers should be communicated to the client. Rule 1.4's requirements, as unhelpful as its key word "status" may be, surely include this information within the mandatory client reporting obligations.[6] And well it should. While it

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4. *Model Rules of Professional Conduct* Rule 1.4 provides: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

5. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-370 (1993).

6. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4. Comment [1] of this rule provides in relevant part: "A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable." The proposal of the ABA Commission on the Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) is more helpful:

> (a) A lawyer shall (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with

is great bluster to tell the other side how inadequate the offered pittance is in this case, the client's learning of the settlement offer may sober the client or, at a minimum, trigger a desire by the client, despite the lawyer's advice not to dignify the offer with a counter, to respond with some counter proposal.

Fifth, the unambiguous principle—not subject to debate but well worth emphasizing—is that the client's interests must come first. If the lawyer has put in tens of thousands of dollars in time and the offer will give the lawyer a "loss," the lawyer nonetheless must accept the client's decision to settle once that decision is reached. Similarly, if the settlement offer is generous and the lawyer would be handsomely rewarded but the client wishes to press forward to trial, that decision too is solely the client's and must be honored by the lawyer, no matter how much the lawyer is convinced that trial could yield a goose egg.

Similar conflicts arise for defense counsel who may be enjoying the lucrative benefits of defending a "bet the company case" but whose client has decided to settle, perhaps for far too much in the lawyer's view, but with an eye to putting the matter behind it. Any conflict between lawyer and client must be reviewed carefully under Rule 1.7(b)'s requirement that any material limitation on the representation created by the conflicting interest of the lawyer be addressed.[7] The negotiation conflict between lawyer and client is a classic example of this.

Sixth, the lawyer must avoid entering into any agreements with the client that compromise any of these principles. If the client grants the lawyer the authority to conduct the negotiations on the client's behalf, that authority must be revocable at will.[8] The lawyer may not seek agreement from the client that the lawyer may withdraw if the client refuses a settlement the lawyer recommends.[9] Nor can an agreement

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reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

7. Rule 1.7(b) provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third parson, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

8. RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 33. Comment c provides that the client may "confer settlement authority on a lawyer, provided that the authorization is revocable before a settlement is reached."

9. *See* Jones v. Ferger, Collison & Killmer, 903 P.2d 27, 34 (Colo. Ct. App. 1994).

require both lawyer and client approval of a settlement.[10] In each case the client's autonomy is unfairly compromised, and, therefore, even seeking this sort of condition impermissible.

Finally, only the client has the authority to settle the case. While the other side may assume that the lawyer has authority and, therefore, a settlement agreed to by the lawyer may be enforceable as to the client, the client has a claim against the lawyer if an unauthorized settlement is foisted upon the client.[11]

B. Truth In Negotiations

The second fascinating topic this Symposium will address is the role of the lawyer in negotiations with third parties. Rule 4.1, as we all know, states a lawyer may not make a "false statement of material fact or law to a third person." On the other hand, as an earlier draft of the Litigation Section Guidelines observed in language that is unfortunate but highly evocative, there is a permissible area of "lawyer dissimulation" or puffing.[12] The comments to Rule 4.1 acknowledge a convention that lawyers may misrepresent in certain areas where, in effect, both sides have agreed that each will violate Rule 4.1.[13] Included within this category is boasting about the strength of one's case or the discussions about the minimum one's client will accept or the maximum one's client will pay. This puffing, we are told, is totally permissible because in these cases everyone has engaged in a collective wink. Fingers crossed, I can lie that my client's bottom line is $25,000, and I don't lose my ticket to practice when she, that very day, accepts $15,000.

But the line between the permissible and a violation of Rule 4.1 is not always clear, and any time lawyers do make representations based on

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10. *See* RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 33 cmt. c.

11. RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 33 cmt. c (Proposed Final Draft No. 1 1996). A lawyer is forbidden "to make a settlement without the client's authorization. A lawyer who does so may be liable to the client or the opposing party . . . and is subject to discipline." *Id.*

12. ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, Section 4.1.1 (Draft December 2000).

13. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt. 2. Comment 2 provides:

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

client information, the lawyer treads into uncertain territory. The litigating lawyer really faces a particular ethical trap when the lawyer becomes involved in settlement negotiations. Here is an advocate prepared to do battle, presenting the client's cause using any proposition—factual or legal—that can be advanced in good faith,[14] suddenly placed in a negotiating posture in which Rule 4.1 obligations are triggered, sometimes with no more of a transition than switching from one sentence to the next. How lawyers manage this role transition may be the difference between fulfilling one's professional responsibility and potential liability for the lawyer.

C. *Should Everything Be Negotiable?*

A third issue this Symposium will address is the public policy as to whether there should be limits on what is negotiable. I have identified five policy concerns, but there may be others worth discussing.

First is what I have referred to in another context as "make him go away."[15] The client is fed up with the lawyer on the other side and urges her lawyer to pay extra money if the opposing lawyer will agree never to take a position adverse to the client again. Variations on this theme include proposals to make the "extra" payment directly to the lawyer or for the client to retain the lawyer in a way that achieves the same result.

All of these propositions appear to be violations of Rule 5.6[16] as agreements placing restrictions on the right of opposing counsel to practice law in the future.[17] But some commentators have suggested that these restrictions are outdated and too paternalistic of lawyers.[18] The conflicts created by these sort of offers, however, are real (as little

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14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

15. *See* Lawrence J. Fox, *Legal Tender: A Lawyer's Guide To Handling Professional Dilmemmas,* "Make Him Go Away," (Section of Litigation, American Bar Association 1995).

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6. Rule 5.6 states:

> A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or (b) an agreement in which a restriction of the lawyer's right to practice is part of the settlement of a controversy between private parties.

Id.

17. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-371 (1993).

18. *See* Stephen Gillers, *A Rule Without Reason*, 79 A.B.A. J., Oct. 1993, at 118, quoted with approval in Feldman v. Minars, 658 N.Y.S.2d 614, 617 (N.Y. App. Div. 1997).

as one extra dollar to the client for the lawyer's future forbearance creates a conflict between lawyer and client), and therefore, this area is deserving of serious study.

Second, there is the "filthy" issue of attorney fees. In cases in which the lawyer receives the fee, not from the client's recovery, but from the court's determination under a statutory fee-shifting provision,[19] it is all too easy for the opposing party to offer to settle at the client's exact number, on the condition the lawyer waive any entitlement to, or limit dramatically, the amount the lawyer seeks by way of a fee. Indeed, that lawyer may have an ethical obligation to do so. Yet this offer creates the same trap discussed above with respect to restrictions on the right to practice, driving the lawyer from her client as much as if they were opposing parties. With no thanks to the United States Supreme Court's decision in *Evans v. Jeff D.*,[20] this sort of approach to negotiations is permissible because, theoretically at least, it is said that the lawyer can protect herself from this result by an agreement at case inception.

However, lawyers know that this view is not really the case and that lawyers are regularly forced, in cases suffused with public policy concerns, to waive any right to recover fees to achieve their clients' ends. While we all agree that clients' interest must come first, Rule 5.6 reflects a judgment that there can be situations in which that rule can work too great a hardship. The attorney fee area, in my view, raises the identical issues, and the Supreme Court's too facile approach to the problem, plus lawyers' real life experience since then, suggests that this Symposium might be a wonderful launch pad to addressing this issue anew, if not here and now, then at one of the succeeding duPont symposia.

Third, fourth, and fifth are all issues relating to the interests of the nonparty public in the settlement of litigation. May lawyers agree that settlements are confidential when the information relating to the settlement would surely be of real interest, as opposed to something of curiosity, to third parties? I have in mind the settlement of a product case in which there may be many more potential victims. The Ethics 2000 Commission certainly was importuned to have the Model Rules declare that confidentiality agreements of this sort should be unethical.[21]

Similarly, can lawyers agree to return documents and even undertake never to use them again when the documents could well reflect on other parties' potential claims? Here, I am thinking of a case against a

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19. *See, e.g.*, Civil Rights Act, 42 U.S.C. § 1988 (1994).

20. 475 U.S. 717 (1986).

21. Letter from Richard Zitrin, Esq. to Chief Justice Norman Veasey dated September 19, 2000, enclosing Proposed Rule 3.2(b) (on file with the author).

broker-dealer whose salesman you suspect has led other investors astray. Putting aside for a moment whether those conditions might be restrictive enough of the lawyer's practice so as to violate Rule 5.6, is the lawyer otherwise compromising an important public policy in acquiescing in the return of the documents?

Finally, what if the lawyer observes criminal or unprofessional conduct by the other side? At the present time lawyers are free to threaten prosecution and agree to withhold it in order to secure a more favorable outcome for the client[22] and, except apparently in Illinois, treat the professional misconduct of the opposing lawyer as subject to Rule 1.6's prohibition on the disclosure of confidential information as a basis for not reporting the misconduct.[23] But is that balance correct? Should the responsibility to report criminal conduct be lower than to report professional misconduct? This great question warrants further discussion.

II. ETHICS 2000 EMANATIONS

I also wanted to share with you two issues that have been presented to the Ethics 2000 Commission during our deliberations that bear directly on the issues you are going to address at this Symposium. The first involves Rule 4.1, which I discussed earlier. The Ethics 2000 Commission heard from a number of advocates, particularly those practicing in the patent and trademark field, arguing that lawyers should be permitted to send individuals into places of business posing as customers, lessees, and/or employees for the purpose of unearthing or confirming misconduct of one kind or another.[24] The proponents of these ideas always come up with a poster child that is particularly compelling, for example, sending in a matching pair of prospective tenants to determine if the landlord is discriminating on the basis of race. While all of them appear premised on good intentions, this approach cannot mask two facts.

One, what is someone's holy crusade, viewed from the other side may be totally unwarranted and intrusive conduct. Every self-righteous cry

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22. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363 (1992).

23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(c). This rule and comment [2] make clear that "[a] report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." *Id.*

24. *See* Draft Recommendation and Report dated May 1998 prepared by Representative of the IPL Section to ABA Section/Division Committee on Professionalism and Ethics (on file with author).

that all they are doing is trying to uncover misconduct can be met with equally strong denunciations of invasions of privacy and harassment. And, two, whatever else is happening here, the lawyer who either poses as a customer or sends someone else in to pose as a customer is engaging in misrepresentation to a third party in violation of Rule 4.1.

As efficacious as it may be for lawyers to assist their clients in this way, the Ethics 2000 Commission correctly rejected these attempts to water down lawyers' truth-telling obligations as unethical. But if these proponents persist, as I am sure they will, you can see how their attempts to compromise Rule 4.1's prohibition would also have an effect on the role of the lawyer under Rule 4.1 in negotiations.

One response to the Ethics 2000 Commission's rejection of the "testers" proposal described above has been an end-run attempt by some to compromise the prohibition in Rule 8.4 that provides that a lawyer may not do "through the acts of another" that which would violate the rules of professional conduct if done directly by the lawyer. Some have argued to Ethics 2000 that this provision does not apply when the acts of another, through whom the lawyer is violating the rules, are the acts of the client.[25] For example, the argument has been made that, because there is nothing illegal or improper about a client sending someone into a wholesaler to pose as a department store buyer, the lawyer should be free to counsel the client to do so directly rather than having the lawyer do the posing or hiring the poser. This issue raises some troubling questions, and even if it does not put lawyers over the edge, it certainly puts them very close to it.

You can also see how this construct would have a direct impact on the ethics of lawyers engaging in negotiation because, if it were to take on a life of its own, lawyers could be counseling clients in the negotiation context in violation of Rules 4.1, 4.2 and 4.3—the rules dealing respectively with representations to third parties, contacts with represented persons, and dealings with unrepresented persons—under the rubric that the lawyer was simply giving the client advice of what the client can do. As the Litigation Section Ethics of Negotiation project goes forward, both of these issues should be reflected in the final product.

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25. Letter from Donald Hilliker, Esq., Chair, ABA Standing Committee on Ethics and Professional Responsibility, to Ethics 2000 Commission, March 8, 2001 (on file with author).

III. MORE FUNDAMENTAL ISSUES

Before I close, I want to address some issues that I consider far more important and far more fundamental. While we as conscientious lawyers are spending this time at Mercer Law School considering these very important professional responsibility issues relating to negotiation, events are proceeding apace to call into question whether we will have a profession and whether, in holding a Symposium like this, we are merely rearranging the deck chairs on the Titanic while our professional ship is running into an iceberg.

A. Cognitor

To what do I refer? I have three distinct issues in mind. First, I want you to think of just one word, "cognitor." How many people have actually heard that word? I see just a couple. Well, I predict that before long we will all be familiar with the word, and we will all rue the day we first heard it. You see our friends at the accounting firms have decided that we lawyers are just another set of service providers like auditors, accountants, investment bankers, and title clerks. They have also decided that the idea that lawyers are different or special or should be subject to unique rules of professional responsibility is as quaint a notion as the buggy whip. So they have invented a new term called "cognitor," which does not mean "know-it-all," but rather, I suppose, "wise person" as a descriptive phrase to be applied to any educated person who provides services to businesses.[26]

This watering down of our professional birthright comes from the accounting firms with ill grace. As some of you realize, these firms have systematically hired more than five thousand of our best and brightest, a number that grows with each passing day. These lawyers leave their firms on Friday evening and on Monday morning show up at the Big 5 providing the exact same services for the exact same clients, but they are now not practicing law. Rather they are practicing "tax," "pension consulting," "litigation support," or "mergers and acquisitions." Anything but the practice of law. And why are they not practicing law? Because if they were practicing law, they would have to follow the rules of professional conduct, and they are not doing so; rather they are systematically violating our rules governing sharing fees with nonlaw-

26. *See* Mark Hansen, *A New Credential: CPA's 'Cognitor' Plan Draws Wary Response from Bar*, 87 A.B.A. J., Feb. 2001, at 18-19.

yers, conflicts of interest, limitations on liability for malpractice, restrictions on the right to practice, and confidentiality.[27]

You can see how this approach to the use of the word "cognitor" makes a mockery of the Symposium being held here. While we pride ourselves on our hard work as we struggle with and worry about the ethics of negotiation, we can be sure that no similar symposium is, or ever will be, held at Citibank, Goldman Sachs, Arthur Andersen, or Commonwealth Land Title Company.

B. Is It the Practice of Law If Others Can Do It?

The second development that I wish to share with you has arisen as the ABA Multijurisdictional Practice Commission ("MJP") has confronted the very real issues raised by the desire of clients and lawyers to permit out-of-state counsel to conduct certain activities in jurisdictions in which they are not admitted. I have in mind the depositions in California of a case pending in New Jersey or the negotiation of a purchase by a New York lawyer on behalf of a Delaware client of a Silicon Valley company. Regardless of how dimly I viewed the MJP movement, until I read the recent proposal adopted by the Council of the Business Law Section of the ABA ("the Section"),[28] it never occurred to me that what might be at stake was the very existence of the profession. In advancing what has to be the most far-reaching proposed expansion of multijurisdictional practice yet suggested, the Section included in its proposal an idea so pernicious and devastating to the future of the legal profession that its mere breadth left me stunned. This provision would offer a safe harbor for any lawyer to practice anywhere in the United States—even the world—regardless of bar admission, the location of the client, or any nexus to the jurisdiction, so long as the work being undertaken was work that could be undertaken by a nonlawyer.

Anyone with a short memory will recall that this argument is one that the accountants have used to justify the civil disobedience of the thousands of lawyers they have hired. To support the proposition that what these lawyers are doing is permissible, the Big 5 point to all the nonlawyers who advise individuals and companies on tax matters,

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27. For a more extensive discussion on these issues, see Lawrence J. Fox, *Redefining Lawyers' Work: Multidisciplinary Practice Old Wine in Old Bottles: Preserving Professional Independence*, 72 TEMP. L. REV. 971 (1999); Lawrence J. Fox, *The Future of the Profession: A Symposium on Multidisciplinary Practice: Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097 (2000).

28. Position Statement on Multijurisdictional Practice of ABA Section of Business Law dated January 14, 2001 (on file with author).

human resources, pensions, transactions, and trial preparation. Because those nonlawyers are allowed to do this work, they contend, surely lawyers can as well without following the rules of professional conduct so long as lawyers make it clear that they are not practicing law. These individuals may have bar admission certificates with huge embossed seals they carefully place on their walls, and they may maintain bar memberships and regale their future clients with their prior experience at King & Spalding. But they are no longer lawyers; no, instead just another set of service providers for whom the rules of professional conduct are a mere nuisance and anachronism that can get in the way of the natural growth of multidisciplinary firms to their oligopic level of "efficient" size.

And now we find the Business Law Section giving aid and comfort to this notion. So long as lawyers are providing services that look like what nonlawyers do, who needs to worry about niceties like bar admission and limiting one's practice to the jurisdiction in which one is properly admitted when it gets in the way of the expansive views of these high-powered lawyers who want to practice wherever they choose?

In doing so they tear down a fundamental lawyer value. It is certainly true that much of what lawyers do is often undertaken by others. Investment bankers work on mergers and acquisitions. Title companies convey property, and realtors advise on the purchase of a sale of real estate. Accountants, and others, prepare tax returns. Advertising agencies prepare trial exhibits and conduct focus groups. Pension advisers structure ERISA compliance plans. But this overlap does not mean that when lawyers undertake these same tasks they are not practicing law; they clearly are, and this truth means not only that the lawyers bring to the endeavor their special training and experience, but also the unique ethical obligations and protections reflected in our rules of professional responsibility and our system of discipline to enforce those obligations.

The question for the profession is whether our society needs and wants lawyers to be cloaked with special responsibilities to our clients, the courts, and the system of justice, or will society simply be better off if lawyers are just another set of service providers with no special educational requirements, bar admission requirements, code of conduct, or commitment to fulfill the special rules expected of us now? Certainly with the Business Law Section's proposal, its Council has taken a decided vote for the latter. When lawyers do what others do, bar admission requirements, in their view, should just be jettisoned. Let us not go there because the proposal in itself is a bad idea, but far worse because of its implications for the future of our profession.

C. The Death of Lawyer Loyalty

The last of these fundamental issues I want to address is again prompted by the Business Law Section of the American Bar Association that seems intent on single-handedly dismantling so much of what makes our profession unique. A special ad hoc committee of that Section submitted to the Ethics 2000 Commission a proposal that would end imputation of conflicts of interest.[29] For those students in the audience who are not schooled in these matters yet, imputation is that principle that says that each lawyer who practices in a given practice setting must honor the loyalty commitment of every other lawyer in that practice setting.[30] As a result, if Dean Larry Dessem and I are practicing law together, I may not take a position adverse to Dean Dessem's clients, and similarly, Dean Dessem may not take a position adverse to my clients.

In my view this approach to loyalty reflects the best our profession offers. Not only do my clients receive my undivided loyalty, but they know that all of my colleagues with whom I share a firm name, the ability to call on anybody in our firm to work on a matter, and a commitment to share the economic rewards of our joint practice will also provide them with undivided loyalty as well.[31]

The accountants do it differently. They claim they have rules of loyalty, but their conflict of interest regime bears no resemblance to ours. All conflicts are personal. Each person working in an accounting firm simply asks him- or herself whether he or she feels comfortable taking on the assignment. Second, the evaluation of that question is totally subjective. Unlike lawyers whose conduct is judged by a reasonable lawyer's standard, in these situations for the accountants the only question is what did the individual in fact think. In addition, for the accountants there are no nonwaiveable conflicts, a stark contrast from lawyers who are barred from taking on any representation that no reasonable lawyer would undertake.[32]

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29. Letter from Business Law Section Ad Hoc Committee on Ethics 2000, October 5, 1999 (on file with author).

30. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.").

31. For a more extensive discussion of this point, see, Lawrence J. Fox, *Dan's World: A Free Enterprise Dream; An Ethics Nightmare,* 55 BUS. LAW. 1533 (2000).

32. Written Remarks of Sam DiPiazza (Managing Partner, Tax Services-Americas PricewaterhouseCoopers LLP) (March 11, 1999) (visited Apr. 12, 2001) <http://www.abanet.org/cpr/dipiazza.html>.

You can see by this proposal, which fortunately the Ethics 2000 Commission has not endorsed, the Business Law Section seeks in yet another way to make lawyers just another set of service providers. It might be good for business (you would have less work to turn away), but you could hardly say it was good for the clients or the profession.

IV. CONCLUSION

Professor Pat Longan wanted me to be funny. I am afraid the message here is anything but funny. But that does not mean that the message is not hopeful or uplifting. Being a lawyer is a splendid occupation. Law students can look forward to joining a remarkably dedicated group of professionals who take quite seriously that lawyers are special, not because they have special privileges, but because they have special responsibilities. Part of those special responsibilities is participating in a symposium like this one, symposia, as I have noted, that are unlikely to take place among other occupational groups. But while we are keeping one eye on these very important issues relating to the ethics of settlement negotiations, we cannot afford to ignore these other matters. Rather, we must organize ourselves now to repel the Visigoths at our gates.

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