

PROBLEMS IN DEFINING AND CONTROLLING THE UNAUTHORIZED PRACTICE OF LAW

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A lively debate is taking place within the states on the question whether lawyers should be permitted to practice law in professional services organizations that provide both legal and nonlegal services and that are owned, in whole or in part, by nonlawyers. At this time, the states are divided; some endorse the notion of multidisciplinary practice (MDP) while others do not.¹ At its August 2000 meeting, the American Bar Association (ABA) House of Delegates rejected a proposal to permit lawyers practicing in MDPs to render legal services. In so doing, the House urged the states to enforce their laws prohibiting the practice of law by entities other than law firms and, to that end, admonished states to reevaluate and refine their definitions of the "practice of law".² The House reasoned that a clear delineation of law practice would enable states to vigorously police the unauthorized practice of law (UPL) by nonlawyers.³

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1. A web site maintained by the ABA reflects that as of March 5, 2002, the following state bars have voted in favor of MDP to some degree or have received a reports from duly authorized committees or commissions endorsing the concept of MDP: Arizona, California, Colorado, District of Columbia, Georgia, Maine, Minnesota, North Carolina, South Carolina, South Dakota, Utah, and Virginia. The following state bars have rejected MDP or have received reports from duly authorized committees or commissions recommending that MDPs not be permitted: Arkansas, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and West Virginia. AMERICAN BAR ASS'N, MDP INFORMATION, *at* http://www.abanet.org/cpr/mdp_state_summ.html (last visited March 17, 2002). The terms or parameters of the state bar recommendations and reports vary.

2. At the time, two states, Washington and Texas, had already commenced efforts to define the "practice of law".

3. The House recommendations drew heavily on the New York State Bar Association Report. AMERICAN BAR ASS'N COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, *at* <http://abanet.org/cpr/mdp-report10f.html> (last visited Jan. 26, 2002) [hereinafter A.B.A. REPORT]; N. Y. STATE BAR ASS'N SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, PRESERVING THE CORE VALUES OF THE

This paper argues that the ABA's UPL directive was misguided. Prosecuting UPL actions does not address the core value concerns of those who oppose the emergence or growth of MDPs and therefore is the wrong means for addressing MDP. Moreover, attempts to refine the definition of the "practice of law" in the context of UPL could narrow the scope of services that fall within the boundaries of law practice, with the unintended result that lawyers might not be subject to legal ethics rules when they render services that fall outside of the definition.

The lesson that should have been learned from the ABA's MDP debates is that MDPs will be palatable only if preservation of our profession's core values is ensured. Clients who seek legal advice or representation should continue to receive those services with guarantees of confidentiality, loyalty, and freedom from conflicting interests on the part of the provider. The bar, therefore, should focus its energies on assuring that all lawyers comply with professional regulations when they provide legal services, regardless of the type of firm that employs them. A definition of the "practice of law" for this purpose would have meaning. Indeed, it could be instrumental in addressing the "civil disobedience" of large accounting firms and their lawyers, who claim not to engage in the practice of law but who provide legal services nonetheless.⁴

I. THE ABA RESOLUTION

The ABA House of Delegates resolution rejecting MDP began by affirming the importance of the legal profession's core values. These were delineated as follows:

- a. the lawyer's duty of undivided loyalty to the client;
- b. the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
- c. the lawyer's duty to hold client confidences inviolate;
- d. the lawyer's duty to avoid conflicts of interest with the client;
- e. the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice, and

AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS (Apr. 2000), at <http://www.law.cornell.edu/ethics/mdp.htm> [hereinafter MACCRATE REPORT]. The latter report explicitly links a clear statutory definition to "a strong legislative policy to prevent nonlawyers from engaging in the practice of law, whatever that may be." *Supra*, at 373, 376.

Regardless of whether [the state of Washington's] or some other formulation of the definition of the practice of law is adopted, this Committee recommends that it be combined with meaningful enforcement mechanisms consistent with NYSBA (and ABA) policy, and that the unauthorized practice of law be policed with increased vigor, with a view toward protecting the public against injury at the hands of those who lack the professional training, governmental oversight, and ethical inculcation of daily licensed attorneys. *Supra*, at 376.

4. Lawrence J. Fox, *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); Lawrence J. Fox, *Dan & World: A Free Enterprise Dream; An Ethics Nightmare*, 55 BUS. LAW. 1533 (2000).

f. the lawyer's duty to promote access to justice.⁵

With the exception of (e), the list is not controversial.⁶ The resolution also reaffirmed the substance of ABA Model Rule 5.4, which prohibits the sharing of legal fees with nonlawyers, and ownership and control of the practice of law by nonlawyers. The resolution then urged states to take action in three areas: reaffirming their commitments to vigorously enforcing the law governing lawyers, evaluating and refining their definitions of the "practice of law," and retaining and enforcing UPL laws.⁷

The resolution's postulate regarding the centrality and importance of the legal profession's core values was never contentious. Both sides in the MDP debates acknowledged the importance of those values; they differed only in their views as to whether the legal profession's core values could be protected where legal services were rendered through MDPs. Indeed, the ABA MDP Commission itself explicitly asserted, immediately after making its principal recommendation that lawyers be permitted to share legal fees with nonlawyers, that:

This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and *pro bono publico* obligations.⁸

Moreover, the ABA MDP Commission declared that "obligations of all lawyers to observe the rules of professional conduct should not be altered."⁹

According to a brief report accompanying the ABA House of Delegates resolution,¹⁰ the sponsors relied heavily on a 388-page report prepared by a committee of the New York State Bar Association chaired by Robert MacCrate (MacCrate Report),¹¹ which reached essentially the same conclusions as the House of Delegates. The MacCrate Report describes a "strong legislative policy to prevent nonlawyers

5. AMERICAN BAR ASS'N COMM'N ON MULTIDISCIPLINARY PRACTICE, RECOMMENDATIONS TO THE HOUSE OF DELEGATES, at <http://www.abanet.org/cpr/mdprecom10f.html> (last visited Mar. 17, 2002) [hereinafter A.B.A. RECOMMENDATIONS].

6. One might argue that this duty neither exists nor reflects a core value of the legal profession. Inclusion of this purported duty, to help maintain a single profession of law, among the others, is self-serving.

7. The resolution also directs the ABA Standing Committee on Ethics and Professional Responsibility to review the Model Rules and recommend any changes necessary to assure the preservation and protection of core values in the context of strategic alliances and other contractual relationships between lawyers and nonlegal professional service providers, and discharges the ABA Commission on MDP. A.B.A. RECOMMENDATIONS, *supra* note 5.

8. *Id.* Similarly, the District of Columbia Special Commission on MDP stressed the centrality and importance of core values in its preliminary report supporting the notion of MDP. D.C. SPECIAL COMM'N ON MDP, PRELIMINARY REPORT AND REQUEST FOR COMMENTS 3, 13, 17-19, at http://www.dcbbar.org/about_bar/mdpcommittee.pdf (last visited Mar. 17, 2002).

9. A.B.A. RECOMMENDATIONS, *supra* note 5.

10. A.B.A. REPORT, *supra* note 3.

11. MACCRATE REPORT, *supra* note 3.

from engaging in the practice of law.”¹² The Report addresses definitional issues, however, only in the context of UPL and recommends both that New York adopt a “clearly delineated and analytically supportable definition of the practice of law”¹³ and that the new definition “be combined with meaningful [UPL] enforcement mechanisms.”¹⁴

II. THE ABA DIRECTIVES WERE MISGUIDED

A. MDP is Not a UPL Problem

In the context of MDPs, UPL is a red herring. In fact, legal services provided by MDPs would always constitute the *authorized* practice of law because they would be rendered by lawyers or, as in the tax area, legal services provided by MDPs would be rendered by nonlawyers who are specifically, but limitedly, authorized to practice law.¹⁵ While the MDP movement within the organized bar was initiated because nonlawyer-controlled entities, primarily the large “Big Five” accounting firms, were beginning to provide legal services to their clients,¹⁶ none of the participants in the debates ever considered it even marginally acceptable for nonlawyers within an organization to provide legal services (unless, of course, the law already permitted them to do so). Indeed, the Big Five were busily staffing their legal departments with attorneys.

Pursuing MDPs through UPL actions would likely fail on policy grounds because MDP legal clients would be represented by competent lawyers who are licensed to practice and are subject to the ethical obligations and professional regulations of their profession. It is difficult to envision a court holding that such individuals are engaged in unauthorized behavior. Similarly, where legal services are provided by nonlawyers who are authorized by law to provide such services, there is no UPL.¹⁷

UPL actions taken on a large scale also risk failure due to the relative lack of resources available to prosecute them. Despite the great pains to which proponents of MDP went in asserting the broad impact of the phenomenon outside of tax practice, it has always been clear that it was the escalating tax practices of Big Five firms which aroused the intense interest and concern on both sides of the debate. While UPL

12. *Id.* at 373.

13. *Id.*

14. *Id.* at 376.

15. For example, nonlawyers are permitted to practice before the IRS. *See infra* text accompanying notes 20–22. They are also permitted to practice before the United States Patent Office and the Immigration and Naturalization Service. *See Sperry v. Florida*, 373 U.S. 379 (1963) (discussing federal statute which authorizes nonlawyers to practice before U.S. Patent Office); 8 C.F.R. § 292.1–2 (2002) (permitting nonlawyers to practice before Immigration and Naturalization Service).

16. Actually, the Big Five had been providing largely the same sorts of services for years. What distinguished recent activity was the significant growth in practice size and the aggressive recruitment of lawyers at all levels of practice.

17. Indeed, because nonlawyer professionals are often subject to their own professions' regulations, including licensure and standards of practice, courts could be persuaded that sufficient safeguards exist to protect the interests of their clients, as well.

actions against the Big Five are not likely to succeed in any event (because accounting firms by and large are engaged in the *authorized* practice of law or because the perpetrators are lawyers or nonlawyers acting within the scope of their legal authority), the Big Five have already demonstrated a willingness to commit substantial resources to defending against UPL claims.¹⁸

1. Authorized Practice of Law

Accountants and accounting firms often engage in the authorized practice of law. Under regulations commonly referred to as Circular 230, certified public accountants (CPAs), enrolled agents, and enrolled actuaries are permitted to engage in practice before the IRS,¹⁹ even when that practice involves the use of legal knowledge and skills. In addition, under Rule 200 of the United States Tax Court, nonlawyers who pass an examination are eligible to practice before the court. Federal regulation of tax practice in these areas, therefore, preempts the application of state regulation of unauthorized practice.²⁰

Because Circular 230 does not apply in some areas of tax practice, for example, drafting legal documents and litigation in courts other than the Tax Court, accountants do risk UPL charges if they engage in non-preempted activities. Therefore, accounting firms are well advised to assiduously avoid such activities. In transactional planning, accountants are often called upon to render opinions as to probable tax consequences. Some respected commentators believe that these activities do not constitute UPL so long as the tax issues do not present legal uncertainties, notwithstanding that legal knowledge and analytic skills are applied.²¹ Where there are legal uncertainties, however, the firms arguably do engage in UPL. If, as appears to be the case, Big Five accounting firms render written opinions in complex transactions involving legal uncertainties, then they are vulnerable to UPL actions.

18. In actuality, there are or will be more than five firms. In recent years, each of the Big Five firms has sold or spun off its consulting practice or has announced its intention of doing so. See Ken Brown, *Andersen Consulting Wins Independence*, WALL ST. J., Aug. 8, 2000, at A3; Kevin J. Delaney & Elizabeth MacDonald, *Ernst & Young To Sell Business To Cap Gemini*, WALL ST. J., Feb. 29, 2000, at C15; Raymond Hennessey, *IPO Outlook: KPMG Consulting Will Complete Separation With \$1 Billion IPO*, WALL ST. J., May 8, 2000, at C21; Rachel Emma Silverman, *Questioning the Books: Deloitte to Separate Consulting Services From Audit Business*, WALL ST. J., Feb. 6, 2002, at A8; Jonathan Weil & Rachel Emma Silverman, *Consulting Unit of Accountant to Go Public*, WALL ST. J., Jan 31, 2002, at A3 (PriceWaterhouse Coopers). There are currently no legal impediments on audit firms reconstituting their consulting businesses after a split-up. Tax consulting practices typically remain in the audit firm.

19. Circular 230, 31 C.F.R. pt. 10 (2002). The Treasury Department maintains Circular 230 under its statutory authority to regulate the practice of representatives before the department. See 31 U.S.C. § 330(a)-(b) (2000); see also 5 U.S.C. § 500(c) (2000).

20. *Sperry v. Florida*, 373 U.S. 379 (1963) (holding that a state may not prohibit nonlawyers from engaging in law practice before the U.S. Patent Office because federal regulations explicitly permit them to practice); see also *Grace v. Allen*, 407 S.W. 2d 321 (Tex. Civ. App. 1966) (holding that services rendered by accountants who were admitted to practice before the IRS, in connection with contesting a federal income tax assessment, were not UPL); see generally Bernard Wolfman et al., STANDARDS OF TAX PRACTICE § 801.2 (3d ed. 1995).

21. Wolfman et al., *supra* note 20, at § 801.3.1.2.

A second area of vulnerability exists when accounting firms advise their clients to initiate litigation in Tax Court. Such advice, if properly rendered, involves analyzing applicable precedent and relative procedural advantages in all three fora in which litigation of tax controversies may occur (Tax Court, federal district court, and Court of Federal Claims), and concluding that the likelihood of success is greatest in Tax Court. Of course, if the accounting firm concludes that another forum is preferable and so advises its client, that too would be the practice of law. As a practical matter, accounting firms have not aggressively moved into the litigation arena and, therefore, their UPL exposure in this area appears to be minimal.²²

Oddly, accounting firms and their lawyers claim not to engage in the practice of law. They may do this to minimize the risk of UPL actions²³ or because they believe that employees who are admitted to the bar are not subject to such potentially troubling ethical precepts as the obligation to maintain client confidentiality, conflict of interest rules, and proscriptions against sharing legal fees with nonlawyers, by virtue of not engaging in law practice.²⁴ This approach arguably is inconsistent with ABA Informal Opinion 328, which states that lawyers who engage in a second occupation that is so law-related as to involve some practice of law are held to the standards of the bar in the second occupation because, in carrying on a law-related profession, a lawyer “almost inevitably will engage to some extent in the practice of law, even though the activities are such that a layman can engage in them without

22. However, see Sheryl Stratton, *More Big Five Attorneys Appearing in Court*, 1999 TAX NOTES TODAY 23-6, reporting that at least three of the Big Five firms have formally announced that they will begin representing clients in Tax Court litigation. However, there are no reports on the extent of such activities. When the Securities and Exchange Commission issued new rules on auditor independence in February 2001, it did not expressly prohibit accounting firms from representing audit clients before the U.S. Tax Court. See Phillip Azzollini, *The SEC's New Rules on Auditor Independence*, BANKING & FIN. SERVICES POL'Y REP., Nov. 2001, at 1. Because the new rules consider independence impaired, as a general matter, if accountants provide services for which they must be admitted to practice before a court, it is unclear whether representation in Tax Court is permissible. Stuart Harden, *Will All the Pieces Fit? Accounting and Auditing Rules*, CALIF. CPA, Sept. 1, 2001, at 44; Tom Purcell & David Lifson, *Auditor Independence and Tax Practitioners*, J. ACCT., June 2001, at 7174, available at 2001 WL 11637254.

23. Nonlegal organizations are generally prohibited from practicing law, even if licensed attorneys provide the services. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 840 (1986); Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1510-14 (2000) (describing the history of proscriptions against practice of law by “lay intermediaries”); see also Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000).

24. In a New York ethics opinion, an attorney proposed forming a professional relationship with an accountant for the purpose of providing clients with tax-related legal and accounting services. The Opinion concluded, *inter alia*, that an attorney in such a relationship would be aiding the accountant in UPL. While the Opinion acknowledged that the accountant was legally authorized to provide tax services, it nonetheless ruled that the relationship would create a danger that the accountant would direct or control the lawyer's judgment. N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 557 (1984), available at 1984 WL 50012.

being engaged in the unauthorized practice of law.²⁵ Thus, if a lawyer's second occupation is so law-related that her work will necessarily or inseparably involve the practice of law, then the lawyer is considered to be engaged in the practice of law while conducting that second occupation and is held to the standards of the bar with respect thereto. While ABA Formal Opinion 328 addresses only the applicability of lawyers' ethics rules to lawyers who simultaneously practice law and another related profession out of the same office, and, therefore, does not technically apply to lawyers who practice only a law-related profession and do not explicitly hold themselves out as offering legal services,²⁶ the reasoning of the Opinion applies equally in both contexts. If the services rendered by a licensed attorney through an MDP are the type of services that would be considered law practice if rendered through a traditional law office, the lawyer should be required to comply with the rules of the bar in rendering those services. It is on this issue, rather than on UPL, that the bar should be focusing its anti-MDP endeavors.

2. UPL Actions Will Fail on Policy Grounds

UPL actions with respect to nonlawyer-controlled entities in which lawyers render the legal services are likely to fail on policy grounds. Historically, of course, UPL cases have generally been brought against nonlawyers. Resolution of these cases usually turns on answering questions like: do clients really need a lawyer to provide the service in question, and is the public interest served by requiring that seekers of services obtain them only from lawyers?²⁷ Restricting the practice of law to lawyers is thought to provide benefits to the public: competent representation by trained professionals, commitment to ethical obligations enforced by disciplinary regulations,

25. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 328 (1972). Numerous state bar ethics committees have opined similarly. *See, e.g.*, Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1999-154 (1999), *available at* 1999 WL 692059 (stating that attorney offering investment advisory services is subject to California Rules of Professional Conduct); Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 01-06 (2001), *available at* 2001 WL 694587 (practicing lawyer engaging in the dual practice of law and financial planning services is subject to Connecticut Rules of Professional Conduct in both professions); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 90-157, *available at* 1990 WL 709670 (stating that lawyer engaged in law and accounting practices must conduct nonlegal practice in compliance with lawyers' professional rules when second occupation involves law-related activities); Utah State Bar Ethics Advisory Op. Comm., Op. 01-05 (2001), *available at* 2001 WL 829237 (lawyer functioning as a real estate agent or broker is subject to lawyers' professional rules *even where the lawyer is an inactive member of the state bar*); *cf.* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 83-1497 (1983) (indicating Model Code does not prohibit lawyer/physician from practicing both law and medicine, even from same office, or from serving same client/patient as both lawyer and physician, if distinction between services as a lawyer and physician is made clear and lawyer/physician otherwise complies with Model Code with respect to furnishing legal advice).

26. It is difficult to conceive that clients do not regard MDP legal services providers as lawyers, particularly where the clients are aware of the providers' educational and experiential credentials.

27. *See generally* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2588-89 (1999).

and protection of confidential information.²⁸ In specific instances, however, courts have found that the public interest is served by permitting nonlawyers to act. For example, some courts have found that the public interest justifies permitting nonlawyers to prepare real estate contracts or to conduct residential real estate closings.

The problem with UPL actions against MDPs in which lawyers provide the legal services is that it is difficult to imagine justifying arguments that representation was not competent where the person who rendered the services complied with all of the training and licensure requirements imposed by the legal profession. If it were alleged that representation was competent but not ethical, it likewise would be doubtful that a court would impose UPL sanctions. (A more direct avenue to deal with ethical lapses, of course, would be disciplinary proceedings with respect to alleged violations of lawyers' practice rules.) If there is client demand for MDP and the clients understand the limitations, if any, of the professional firms from which services are requested, how can the legal profession persuade courts that UPL restrictions are in the best interests of those clients? Indeed, too much success in UPL actions could increase the risk that state legislatures would be called upon to amend UPL laws to permit certain types of services to be rendered by lawyers employed by nonlawyers, or even by nonlawyers.²⁹

3. Lack of Resources

As a practical matter, UPL actions will not succeed. The bar traditionally has been unwilling to commit substantial funds³⁰ or time to UPL claims and there is little reason to expect a change. Moreover, a memorable UPL action in Texas several years ago suggests that the bar would refrain from pursuing large firms for fear that antagonizing them would have significant financial consequences to lawyers and law firms.

28. *Id.* at 2581; *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. b (2000) ("The primary justification given for unauthorized practice limitations was that of consumer protection—to protect consumers of unauthorized practitioner services against the significant risk of harm believed to be threatened by the nonlawyer practitioner's incompetence or lack of ethical constraints.").

29. In an analogous situation, a federal district in Texas ruled in 1999 that publication and sale of certain legal self-help software, Quicken Family Lawyer, violated Texas' unauthorized practice statute, and issued an injunction banning further sales of the software. *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. 3:97CV-2859-H, 1999 WL 47235 (N.D. Tex., Jan. 22, 1999). The Texas Legislature responded by amending the statutory definition of "practice of law" to exclude "the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney." TEX. GOV'T CODE ANN. § 81.101(c) (West 2002). The district court decision was vacated and remanded in light of the amended statute. *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1999).

30. For example, in her 1981 survey of UPL policies and practices among the fifty states, Professor Deborah Rhode noted that the UPL committees in virtually every state were headed by part-time practitioners. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 23 (1981).

In June 1997, long before ABA activities in the MDP area had commenced, a complaint was filed with the State of Texas' Unauthorized Practice of Law Committee alleging that Arthur Andersen engaged in the practice of law in Texas by undertaking the following acts:

1. Employing persons with law degrees and who are admitted to the bar of the state of Texas and elsewhere and who offer legal services to the public without the firm having a law license or otherwise permitted to offer legal service,
2. Forming legal entities and drafting documents for clients without the appropriate use of licensed attorneys,
3. Drafting estate planning documents, including trusts, for clients, as well as documents for organization of corporations and partnerships,
4. Preparing and filing court pleadings, especially in the U.S. Tax Court, and
5. Holding itself out to the public as offering legal services.³¹

The complaint attracted considerable attention. Many observers believed that the outcome of the ensuing investigation would influence the direction of the issue of accountants practicing law throughout the United States.³²

The Texas UPL Committee was small and consisted of only a few volunteer lawyers. Its annual budget was a mere \$40,000.³³ Arthur Andersen hired three top law firms to defend against the proceedings. Their defense has been characterized as "tough" and as a "hardball litigation approach." For example, the firms were accused of being "not overly forthcoming in producing documents" and as "narrowly interpret[ing] document requests, respond[ing] only to precisely and narrowly drawn questions and so on."³⁴

The Texas committee ultimately decided to terminate its investigation because it had no proof of unauthorized practice violations.³⁵ The committee reportedly was frustrated because no one in the organized bar could be found who would talk about Arthur Andersen on the record. One former State Bar of Texas Tax Section leader asserted that: ex-employees were reluctant to speak publicly about Andersen's practices; law firms were afraid to have their names used publicly; in-house counsels of publicly traded corporations would talk privately about the firm's practices, but not publicly; and few were interested in antagonizing Arthur Andersen. He also contended that large law firms were unwilling to step in to prosecute the action on a *pro bono* or volunteer basis in large part because conflicts of interest were present or because the firms would be unable to get Arthur Andersen work in the future because of conflicts of interest created as a result of participating in this action.

31. The complaint is quoted in William D. Elliot, *Unauthorized Practice of Law: Failure of Proof or Failure of Will?*, 81 TAX NOTES 517 (1998). Arthur Andersen's website described the "Legal Services" offered by the firm. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Tom Herman, *Tax Report*, WALL ST. J., July 29, 1998, at A1; *see also* Arthur S. Hayes, *Bean Counters Win; Accountants vs. Lawyers*, NAT'L L.J., Aug. 10, 1998, at A4.

In addition, they were afraid, he said, that other Big Five accounting firms would retaliate by withholding work.³⁶

Arthur Andersen hailed the resolution of the Texas matter as a success.³⁷ Indeed, shortly after the Texas investigation ended, two other Big Five accounting firms publicly announced that they would begin representing firm clients in litigation before the U.S. Tax Court,³⁸ an act thought, in large measure, to have precipitated the Texas proceedings in the first place because it so brazenly reflected a stride into the domain traditionally reserved only for lawyers in traditional law firms.³⁹

B. Narrowing the Definition of "Practice of Law" Will Not Benefit the Public

Efforts to refine the definition of the "practice of law" in the context of UPL, generally, could lead to a narrow definition, excluding what traditionally have been regarded as legal services. The unintended result could be that lawyers might not consider themselves subject to legal ethics rules when they render services that fall outside of the definition. Such a narrowing would not serve either the legal profession's or the public's interests in ensuring the broadest application of the core values of the legal profession. Any regulatory framework should provide for the broadest possible definition of legal practice, so as to bring activities of legal professionals within the ambit of the ethical guidelines, yet provide opportunities for nonlawyers to provide services in areas which the courts deem would serve the public interest.

Reconsideration of the definition of the "practice of law" must take into account the needs or demands of nonlawyers who already provide what they believe are lawful services and the sentiments of those who advocate the inclusion, for public policy reasons, of lay-provided services which they believe should be lawful. A general definition along the lines of some states' current statutes, for example, "the doing of any act for another person usually done by attorneys at law in the course of their profession,"⁴⁰ could subsume many of these activities. A definition of law practice for UPL purposes, therefore, must make allowance for situations in which nonlawyers may provide services that would be considered the "practice of law" if rendered by a lawyer.

The definition of the "practice of law" for purposes of UPL (i.e., preventing nonlawyers from providing legal services) need not be the same as for professional regulatory purposes (i.e., regulating the conduct of lawyers). If there is only one

36. Elliot, *supra* note 31; see also Sheryl Stratton, *Unauthorized Practice Complaint Against Arthur Andersen Dismissed*, 80 TAX NOTES 765 (1998).

37. Press Release, Arthur Andersen, Texas Panel Dismisses Complaint Against Arthur Andersen (July 29, 1998), available at LexisNexis, PR Newswire; see also John Niemann, *The Real Story: A Participant's View of the Texas UPL Proceeding*, 81 TAX NOTES 1015 (1998).

38. In *Peoplefeeders, Inc. v. Comm'r*, 77 T.C.M. (CCH) 1349 (1999), the court specifically noted that Arthur Andersen had prepared and filed the taxpayer's petition.

39. See Stratton, *supra* note 22, at 23-6; see also KPMG Peat Marwick, LLP, *KPMG Release on Providing Tax Litigation Services*, 1999 TAX NOTES TODAY 23-26 (press release announcing KPMG's decision to begin representing clients in Tax Court litigation).

40. R.I. GEN. LAWS § 11-27-2 (2001).

definition, lawyers could claim that some services performed by them do not amount to the practice of law and, therefore, are not subject to professional regulation. If the profession's core values are to have meaning, however, lawyers must be expected to comply with ethical principles set forth in regulatory codes whenever they provide professional services to clients. Therefore, the legal profession and, by extension, the public benefit when law practice is defined broadly.⁴¹

The approach taken by the state of Washington, which recently adopted a definition of the "practice of law,"⁴² attempts to reconcile the competing interests of the bar in having a broad definition with the interests of nonlegal professionals in having a narrow one. (A similar definition is currently under consideration in Texas.)⁴³ The Washington rule contains a broad, general definition of the practice of law and then designates which persons or professions, other than lawyers, are entitled to engage in specific conduct that falls within the practice of law and the circumstances under which they may do so. Thus, lawyers providing certain types of services presumably would be subject to the rules of lawyers' ethics, but a nonlawyer providing similar services would not be considered as engaged in unauthorized practice.

While the Washington/Texas approach reflects constructive movement, it raises two further issues. Despite the Texas drafters' description of their goal "to illuminate where the legal profession is heading and should head," their definition depicts professional services as they exist today. The catalog of circumstances in which nonlawyers are permitted to practice law reflects only areas in which nonlawyers presently practice; these areas are already settled, either as a legal or a practical matter. The definitions do not anticipate that new areas of law practice might appropriately be opened to nonlawyers because, for example, there arises a public need or because nonlawyers perceive a business opportunity that serves a public good.⁴⁴ Who could have anticipated ten or fifteen years ago, for example, that the list of permitted practices would include distribution of computer software incorporating legal advice? The Washington and Texas definitions resolve matters only in the present tense. Although they provide a framework for analyzing future UPL claims,

41. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 328 (1972), and state ethics opinions that follow its reasoning, could be invoked to address this problem. See *supra* text accompanying notes 25–26.

42. WASH. CT. R. GEN. R. 24 (2001).

43. STATE BAR OF TEX. TASK FORCE, RECOMMENDATION OF A NEW STATUTORY DEFINITION FOR THE UNAUTHORIZED PRACTICE OF LAW (Apr. 2001), at <http://www.texasbar.com/newsinfo/newsevents/uplrf.pdf> (last visited Mar. 19, 2002). A similar approach has been proposed in Arizona. See STATE BAR OF ARIZONA, CHANGES PROPOSED BY THE STATE BAR OF ARIZONA CONSUMER PROTECTION COMMITTEE, at http://www.azbar.org/AttorneyResources/revised_rule_3.pdf (last visited Mar. 19, 2002); STATE BAR OF ARIZONA, CHANGES PROPOSED BY THE STATE BAR OF ARIZONA TASK FORCE ON THE FUTURE OF THE PROFESSION (Mar. 2001), at http://www.azbar.org/AttorneyResources/prop_31.pdf (last visited Mar. 19, 2002).

44. Others have already argued that professionals from other disciplines should be permitted to provide limited legal services to underserved populations. *E.g.*, Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15 (1998) (social workers serving at settlement houses and community centers); Margaret F. Brown, *Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law*, 34 COLUM. J.L. & SOC. PROBS. 279 (2001).

the definitions are likely to stifle innovation in the future because creativity outside of the areas listed in today's definition risks UPL sanctions. And, any new practices that do manage to emerge will once again be subjected to case-by-case litigation against the backdrop of the same policy considerations that have guided UPL litigation to date.

Another problem with the Texas approach is that it subjects nonlawyer service providers to the same "standard of care and ethics as would be applicable to members of the state bar in similar circumstances." Does this mean that nonlawyers are subject to conflicts rules? And if so, how can a real estate broker,⁴⁵ who represents the seller and whose commission depends upon the consummation of a sale, rightfully advise a purchaser of real estate regarding a real estate contract?⁴⁶ Does this mean that accountants who provide tax advice or opinions are subject to lawyers' confidentiality and conflicts rules?

An alternative approach would be to maintain two separate definitions of the practice of law, one for lawyers and one for nonlawyers. A states' legal ethics code could define the practice of law for purposes of assuring that lawyers are subject to those rules whenever they provide legal services in the practice of law, regardless of the type of firm for which they work and regardless of self-styled claims regarding the nature of their practices. UPL actions with respect to nonlawyers could be governed by another definition, which would provide exceptions appropriate in light of public policy concerns. A one-size-fits-all definition ultimately is not workable.

III. CLOSING THOUGHTS

The newspapers these days are filled with stories of the demise of Enron. Both the media and government, at various levels, are attempting to determine whether Enron's auditor, Big Five accounting firm Andersen,⁴⁷ acted appropriately with respect to its knowledge of Enron's financial situation. In addition to having shredded Enron-related documents, Andersen has been accused of withholding information that it should have disclosed, and of having done so out of fear that it

45. The Texas proposal does not permit real estate brokers to complete real estate forms or contracts. In some states, however, preparation by nonlawyers of real estate transfer documents does not constitute the practice of law. *See, e.g., In re Opinion No. 26 of Comm. on Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995) (finding that the public interest justifies permitting activities that would be the practice of law if engaged in by lawyers, such as conducting residential real estate closings and settlements, without the presence of attorneys); *Cultum v. Heritage House Realtors, Inc.*, 694 P.2d 630 (Wash. 1985) (holding that the act of a licensed realtor in completing a form earnest money agreement constituted the practice of law, but was not unauthorized).

46. For an illuminating discussion of the debate on whether real estate brokers should be permitted to prepare residential real estate contracts, *see* Lowell Willinger & Christina Lee, *Debating Preparation of Contracts of Sale by Brokers*, N.Y. L.J., Aug. 20, 2001, at 4.

47. Arthur Andersen changed its name to Andersen in March 2001. According to the *Wall Street Journal*, "The change marks an attempt by the firm to reshape its image so the public will view it as a provider of a wide range of professional services, including consulting, rather than just as an audit and tax firm." Jonathan Weil, *Big Five Firm Will Alter Name To Andersen*, WALL ST. J., Mar. 5, 2001, at C10.

would lose the substantial fees it received for business consulting services rendered to Enron. Moreover, the newspapers are reporting that Enron paid no federal income tax for several years preceding its bankruptcy filing both because it took hefty deductions with respect to employee stock options when they were exercised and because Enron invested in corporate tax shelters.

The extent to which lawyers employed by Arthur Andersen rendered tax advice to Enron is not yet clear. But the Andersen/Enron situation highlights very clearly the importance of protecting the core values reflected in lawyers' ethics rules. If Andersen lawyers had information that should have been disclosed in Enron's financial statements, were they obliged to disclose or to maintain confidences? Was their first loyalty to Enron, their client, or to the public? If there are any public allegations against Andersen lawyers, they will raise the question of the lawyer's role and duties. UPL, however, will have no role in the discussion.

At the end of the day, the campaign to enforce UPL as an antidote to MDP will amount to nothing. Whether due to a mismatch in resources or a fear of losing, the bar will neither attempt to enforce UPL nor succeed in UPL actions against MDPs. Moreover, if it were easy to define the "practice of law" in the first instance, it would have already been done. UPL statutes and lawyers' ethics codes would be clear. UPL actions would not have been relegated to case-by-case deliberation. Indeed, the same lack of definitional clarity has coexisted in defining legal advice or services for purposes of the evidentiary attorney-client privilege, where communications in connection with legal advice or services are privileged while communications in connection with business advice or services are not.⁴⁸

Attempts to refine the definition of law practice undoubtedly will, and should, continue, whether inspired by the ABA House of Delegates directive or the movements in Washington and Texas. Tying those exercises to attempts at policing UPL, however, would be a mistake in the context of MDPs. The bar should concern itself with its own, to make sure that lawyers are meeting, and not ignoring, their ethical standards. If we are correct in believing that the public is served when lawyers apply their legal skills within the framework of professional regulations, then clients will continue to seek out the services of lawyers. If we can regulate the lawyers, we will have accomplished a great deal.

48. An extensive 1989 survey of judges in New York City revealed that whether a communication relates to legal advice or business advice is one of the most frequent and difficult issues before their courts. See Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 256, n.182 (1989). Notably, several courts have held that tax planning is legal advice. *In re Federated Dept. Stores, Inc.*, 170 B.R. 331 (S.D. Ohio 1994). In *United States v. Willis*, 565 F. Supp. 1186, 1190-93 (S.D. Iowa 1983), the court distinguished between tax planning and "after-the-fact services" and opined that pre-transactional tax planning is presumptively legal advice for purposes of the privilege.

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