Burying the Lede

First the Commission on Future of Legal Services treated us to speeches by those who would repeal statutes prohibiting the unauthorized practice of law, by those who would make the world safe for law firms to be listed on the NASDAQ, their lawyers owing conflicting fiduciary duties to shareholders and clients, and by those who would establish multi-disciplinary practices in which lawyers are just one set of service providers, along with insurance salesmen and stockbrokers. That left some of us apoplectic. Serving pork to a convention of rabbis comes to mind.

Now they are thinking about bringing the ABA House of Delegates another spectacle. But this one is so quiet one might think its purpose is benign, a mere recitation of professional nostrums we can all embrace. It is called Model Regulatory Objectives, the first hint that we might be in trouble. Regulatory objectives? What does that mean? We have regulations already. Lots of them. Covering everything that already matters. We regulate professional responsibility, legal education, character and fitness, bar admission, bar discipline, continuing legal education, civil procedure, criminal procedure, standards for various practices (e.g. criminal defense, tax practice etc.), and other standards, best practices and guidelines covering all aspects of lawyer practice.

Could there be something we missed? Surely the answer lies in the details of the Resolution. What do we find there? A tight list of ten objectives, whose Biblical symbolism does not go unnoticed. One can hardly wait to learn what they are.

The first, "protection of the public," sets the right tone. Who can argue with that? But what does it mean? Nothing. Nothing at all. We already do (or do not) protect the public through enforcement of the rules of professional conduct, the discipline system, defining the

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lawyer as a fiduciary and in myriad other ways. By stating this as an objective are we improving anything the profession has not already accomplished in a process that certainly could always be improved, but not by adopting these four meaningless words.

The subsequent objectives offer no more. For example, the second "Advancement of the administration of justice and the rule of law," is another no brainer. I can hear the ABA flag snapping the breeze. But have we not embraced this already? I think of CEELI and its progeny, the ABA policy on legal services for the poor, and dozens of others. What does this objective add?

Following are in order, "advancing the public's understanding of law, legal issues and justice systems," and "transparency regarding the nature and scope of legal services, the credentials of the lawyers and the availability of regulatory protections," all topics already addressed in the rules of professional conduct and the rules of disciplinary enforcement.

These four are joined by "delivery of affordable and accessible legal services," "efficient, competent and ethical delivery of legal services," "protection of confidential information," "independence of professional judgment," "disciplinary sanctions for incompetence, misconduct and negligence"[1] and, finally, "diversity and inclusion among legal service providers and no discrimination in the delivery of legal services."

Well, it is redundant of existing ABA goals, though hardly as elegant. But with a little editing it could become a harmless catalogue of desirable goals, all of which the ABA has sought to achieve in myriad ways and will continue to pursue far into the future, without ever having these ten commandments adopted by the House of Delegates. So why bother?

To find out why the Commission bothered, one has to read the accompanying Report, a document that will NOT be adopted by the House of Delegates, but one that will trouble – deeply

[1] Really. Negligence results in discipline? I do not think so.

trouble – everyone who cares about our profession and one that we can be sure will be quoted and relied upon well after the ten Objectives have been long forgotten. Talk about burying the lede! For it is here that one learns that the Model Regulatory Objectives will be "useful to guide the regulation of an increasingly wide array of legal service providers." Yikes. Did I read that right? We already regulate all legal service providers. Of course, we call them lawyers. And for them, the rules of professional conduct do quite well, thank you very much. Moreover, if anyone other than lawyers provides legal services, that is a crime, one we call the unauthorized practice of law. Moreover, if lawyers get involved with the provision of legal services by non-lawyers, we have Model Rule 5.5, a rule in effect in every state, making it a disciplinary violation to "aid and abet the unauthorized practice of law."

Despite that, the Commission, itself, in effect violates Rule 5.5 by seeking an endorsement of a set of objectives whose entire premise is embracing this "wide array" of criminals who could not possibly provide legal services without violating the most fundamental existing ABA principles and standards, not one of which is repealed by this Resolution. But what is worse is the Commission's intellectually dishonest approach, hoping we would not notice the real purpose of the Regulatory Objectives is to be a stalking horse for non-lawyers practicing law, non-lawyers owning law firms and multi-disciplinary practices, the end of lawyer loyalty (note its absence from the ten), compounding that by not even nodding at the existing policies of the ABA that would have to be repealed to make that possible.

A Look At No UPL

In any event, since the Futures Commission of the ABA has launched this heretical assault, maybe we all need a refresher course on the fundamentals of our profession and why the Resolution and Report should be rejected out of hand.

What would repeal of UPL look like? Anyone could practice law. In any state. Without regard to education. Without passing a bar exam. No character and fitness review. Without CLE mandatory or otherwise. Without rules of conduct. Without any privilege. Or obligation of confidentiality. Without loyalty obligations. Without supervision by the courts. Without law provider discipline. In any kind of organization. Public company. Price Waterhouse owned. Stockbroker or life insurance company or pawn brokers owned. The only guiding hand: the world of Adam Smith, capitalism in its rawest form.

We would end up with lawyers and schnoyers.[2] The lawyers are those elite, well-educated officers of the court for the fortunate. The schnoyers are the uneducated let-me-hang-a-shingle-out-and-see-who-drops-in service providers for the poor and underserved, a world in which the public company AVVO's of the world swashbuckle around practicing law without a license, ignoring their violations of the Court ordered rules, justifying their illegal conduct, their criminal conduct, by wrapping themselves in the unmet legal needs flag.

Make no mistake. There are unmet legal needs. They deserve our attention, more resources and innovative thinking. But I know four things we should never compromise in order to solve the problem. First and most important, letting schnoyers practice law, no more than we would accept the idea that it would be okay for open heart surgery for the poor to be performed by laymen or nurses or, even, non-cardiologists. Or to solve our teacher shortage by letting any college graduate, regardless of training, teach our children.

But there is a cynical idea that has become part of the Futures litany. Whole areas of the law, we are told, are so simple they can be handled by non-lawyers. Just listing the suggested topics where legal services are allegedly so straightforward that a legal education is unnecessary – immigration, government benefits, divorce, real estate transactions, trademarks and copyrights,

[2] The term is Professor Theodore Schneyer's invention.

tax and business formation – proves the reverse. We lawyers know that each of these areas of practice can challenge the most sophisticated practitioners. One need only catalogue the content of the CLE programs the ABA itself proudly sponsors on these very subjects to prove the point.

That our profession has been unable to mount the campaign that would be required to create a right to a lawyer with the same fervor and resources that the NRA has mustered to support gun ownership does not mean it is time to throw in the professional towel. It means we need to work harder, think bigger, prove we are the advocates we claim to be, earn our role as officers of the court title. Because the only people that can meet the legal needs of the underserved are lawyers and those who lawyers supervise.

Second, the prohibition of public ownership of law firms is a professional imperative. Little creates a greater compromise of our duties to our clients than (a) the layering onto lawyers a conflicting fiduciary duty to shareholders, (b) the control shareholders, even minority shareholders, will have over the operation of a law firm, (c) the conflicting duties of confidentiality and disclosure a publicly owned law firm creates, or (d) the conflicts of interest between shareholders and clients that will inevitably arise. Note again its absence from the list of ten.

Third, the prohibition on multidisciplinary practice must remain in place as well for many of the same reasons. Caldwell & Moore should never become a subsidiary of Deloitte or Wells Fargo. Mixing services sounds like a decent idea until one realizes that, just by way of example, accountants have duties of disclosure to the public while lawyers' duties are grounded in client confidentiality, that the accountants will undoubtedly control the operation, and that the mixing of services compromises the privilege and calls into question whether what we are talking about is the practice of law at all. This is to say nothing of the impossibility of addressing the conflicts

of interest generated by department stores of consulting services, stockbroker on 3, life insurance on 4, law in the cellar. Yet again, this critical issue is unmentioned.

Fourth, we cannot accept the end to imputation of conflicts of interest. It is imputation that is the measure of the loyalty we owe our clients. We cannot have lawyers in a law firm (or a group of firms practicing under the same name) taking on matters that create conflicts with the interests of present or former clients of the firm. But this is precisely what so many ordinary service providers do. Which is why lawyers are not considered just another set of fungible service providers, but rather officers of the courts and fiduciaries to our clients. But we do not see that issue addressed here.

What will happen if the House of Delegates adopts these objectives? It will be the end of our profession as we know it. Because, once ABA policy, the issue will become, not whether non-lawyers can practice law but how we have welcomed non-lawyers into the practice with open arms even to the point of establishing what is required to regulate them as if, mirabile dictu, these non-lawyers could somehow become competent enough to provide legal services, somehow independent enough to deliver legal services, somehow able to provide confidentiality and loyalty to their "clients" when we know all that is impossible for reasons too numerous to repeat.

Let us spare the ABA one more reason to alienate the practicing bar and strip clients of real lawyer protections by rejecting this Resolution and its Report.

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