

What Would Bob MacCrate Think?

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There is more than a touch of irony in the so-called Futures Commission launching another one of its draft reports and recommendations, masquerading as a call for comments,² within days of the death of Robert MacCrate, the man who led the charge as ABA President, saving our profession from its flirtation with the prospect that Arthur Andersen would soon become the biggest law firm in the United States, core values be damned. But we know it will be the leadership Robert MacCrate provided,³ the lessons the demise of Arthur Andersen taught us, the examples described below and so many disasters that would follow such a revolution that assure us that the House of Delegates will reject this latest salvo out of hand as, not just an assault on core values, but an attempt to end the profession of law, rendering us just another set of peddlers – insurance sales people or financial consultants or discount store employees – serving two or more masters, compromising independence, loyalty and confidentiality, the clients be damned.

For me this initiative comes at a particularly propitious time. Recently, I was asked to provide the mandated, dreaded, but necessary “ethics hour” to a large assemblage of lawyers. The topic was multidisciplinary practice, and a proponent of this unfortunate idea explained, in considerable detail and quite proudly, how it worked. This lawyer has a practice representing the elderly. Not satisfied with the income that enterprise provides, and because the purchase of insurance is so integral to his practice, this lawyer decided that he would secure his insurance

¹ These remarks are mine alone. My goal is they will be endorsed by others, including the Commission.

² The deadline for comments is May 2, 2016. The deadline for filing is May 10, 2016. Not much time.

³ Mr. MacCrate’s family called for contributions in his memory to The MacCrate Fund for the Preservation of the Core Values of the Legal Profession. The Commission has made quite a contribution.

license, establish a one-stop shop for the “convenience” of his customer/clients, and then reap the commissions the insurance companies gleefully paid him for sending his clients their way.

When asked whether he rebated the commissions to the clients, the answer was of course not.

He asserted that he earned that commission and, if the client had not used him, any other salesman who sold the client/customer this policy would have received and kept it.

The professional responsibility disaster caused by this simple example of multidisciplinary practice speaks volumes. The lawyer cum insurance salesman has a conflict in deciding whether it is in the client’s interest to buy any insurance, another conflict if there is any judgment to be made in how much insurance is really needed, and yet another if there is any judgment to be made as to which is the best insurance company’s product to purchase.

Then there is the commission to consider. Does it not belong to the client? The lawyer already charged the client a fee for the legal services here. And just like the litigator who might receive a rebate from a court stenographer for sending depositions the reporter’s way, the refund belongs to the client. The lawyer was the client’s agent in hiring the reporter. So too was the lawyer the client’s agent in purchasing the life insurance. But this lawyer clearly lost his way, viewing himself, with respect to the big “sale,” as an agent of CIGNA or AIG, ignoring the professional requirement that the client’s interests come first. For there was nothing about the size of this purchase that had anything to do with the complexity of the legal work.

Moreover lawyers should only receive contingent fees – “reasonable” contingent fees – when the lawyer contributes to a result that was contingent on the lawyer’s contribution to the enterprise, for example, helping the client receive a larger judgment in litigation, securing a zoning change that enabled the sale of a house for far more than if the zoning challenge had failed, or undertaking a corporate reorganization that resulted in the securing of financing for the

purchase of a property that was in a greater amount or at a lower interest rate than otherwise would have been expected. But collecting a commission on how much your client spends for a readily available, enthusiastically offered, heavily marketed product cannot be consistent with our fiduciary duties. Rather it is just one of thousands of examples of the bad things that will befall the profession as we go down the Futures path.

I guess I should not be surprised that this topic has returned. Not soon after the idea of multidisciplinary practice was given its first respectful burial in the House of Delegates, Arthur Andersen mixed up its role as auditor with that of high-priced consultant for many of its clients, including Enron, forgot its independent role – independence that is very different from and inconsistent with lawyer independence – and got in bed with its clients to promote all kinds of adventures that proved the undoing of Enron and the death of the greatest auditing firm in the world. As a result, I thought our profession learned the lesson for all time that our professional birthright would be the first casualty of the idea of a department store of services, including stock brokers, insurance salesmen and realtors.

Yet as recently as 2013, the ABA Ethics 20-20 Commission threatened to promote what it euphemistically labeled ALPS, or alternative legal practice structures. Immediately we recognized ALPS as MDP in sheep's clothing and, demonstrating the ABA's disdain for this assault on our professional values, the House of Delegates preempted that endeavor with Report 10A, sponsored by several courageous state bars, reaffirming our commitment to saving the profession as a sacred calling, lawyers as officers of the court, and clients as the sole beneficiaries of our fiduciary duties, not just another free enterprise free-for-all of public companies, nonlawyer owners, and multidisciplinary practices, compromising all for which we

stand. The message could not have been clearer. There is no place for MDP's, nonlawyer ownership of law firms, sharing legal fees with nonlawyers and nonlawyers practicing law.

Nonetheless, here we are again facing down the idea that would destroy our profession as we know it. Another Commission that cannot resist the temptation to have law firms "go public" or join forces with PriceWaterhouse or allow nonlawyers to practice law. One can tell this initiative is going down the wrong track by reading the Commission's report. It attempts to present a balanced view, but you can tell that is not what it has done when you realize not a single critic of all of this is cited; as a result, so many of the key arguments why ALPS is a mountain too far are not even mentioned. Fair and balanced like Fox News. So bland you would think the issue was what wine we should drink. But lest we forget what is at stake here, let us state yet again the evils that lurk in the darkness of the brave New Futures Commission world.

First and foremost is the loss of professional independence. This is not the auditors' independence from the client. This is independence for the client, which means the lawyer is not beholden to shareholders or public company owners, AIG employed insurance sales folks, stock broker financial advisors from Goldman Sachs, or conflicting clients and former clients.

Next is loyalty to the client. No other service provider does it the American lawyer way. How well we early combatants remember the accountants' trying to sidle up to our profession by arguing, "We are just like you. We have rules regarding conflicts of interest." But we quickly learned that if there is any loyalty at all in the world of commerce or the Final Four accounting megafirms, it is limited to the loyalty of the individuals providing the service, with no imputation of conflicts to anyone else, a principle totally unlike our lawyer standards. Lawyers can never take a position adverse to a present client of the firm, regardless of who is performing the service, unless the client waives the conflict on informed consent. Here the accountants can be

adverse to a client, just so long as the firm sets up different teams, while everyone gleefully shares in the fees generated from all the clients.

There certainly are those in our profession who would love to jettison those strict loyalty rules in the name of enhancing revenues (not realizing that would be a zero sum game because they would lose as many clients as they would gain). But the courts have held firm in their dedication to the loyalty principle, a principle of which we can surely boast, while those who would do our IPO's and sit on our public company law firm boards unload onto their loyal customers investment vehicles they themselves are selling short and complain bitterly about any proposal that would require them to owe fiduciary duties to their customers.

The other attempt by the accountants to prove that they worshipped at the same church as lawyers, allegedly acting under the "same rules," focused on our duty of confidentiality. "We keep secrets too," they proclaimed. But there was one little difference: accountants owe duties to the public and actually are required to disclose to the public and the SEC much, if not all, of what they learned. And this says nothing about the fact that the presence of accountants in the delivery of legal services will destroy any opportunity the client would have for claiming the attorney-client privilege. And, in the exact same way, the privilege would be lost because of the presence and participation of insurance salesmen, stock brokers, realtors or any other service provider in a firm offering multidisciplinary services.

Think back to the true story with which I opened. Does anyone think the privilege will hold up for the lawyer-client relationship once it is learned that the primary topic was the lawyer's sale of a \$20,000,000 life insurance policy? Any time these other service providers are hanging around, or present at meetings or on telephone calls, or copied on correspondence, the

privilege which we have fought so hard to protect will be jettisoned, failing to provide the customer the protection the customer would have enjoyed if the customer were just a client.

Which brings us to yet another disaster waiting to happen. Directors of public companies owe fiduciary duty to the shareholders. Lawyers owe fiduciary duty to clients. When push comes to shove, one can be sure that those duties cannot be interpreted consistently. Just look at the bankruptcy of Slater & Gordon, a publicly owned Australian law firm. It was supposed to prove what a great idea public ownership was. Instead it is the poster child for ending the experiment. The duty of loyalty, the duty of confidentiality and the hallowed availability of the attorney-client privilege will all be casualties of the Futures Commission proposal.

Still another casualty of the grim future envisioned by the ABA “futurists” is the delivery of *pro bono* services. When law firms with nonlawyer shareholders are all incorporated in Delaware and most become public companies listed on NASDAQ and controlled by investment banks and hedge funds, the best interests of shareholders, a corporate law mandate, will require maximizing profits. Then ask yourself how much *pro bono* service will our most successful firms undertake? As little as possible.

And forget *pro bono* on behalf of unpopular causes. I have spent half a lifetime recruiting law firms to take habeas cases on behalf of those on death row. That task is difficult enough. But it has proved impossible to recruit in-house lawyers in the Fortune 500 to help with those cases at all. “What would our shareholders think?” they exclaim. “Don’t you have some cases representing kids?”

The issue of overall control of these enterprises is also at stake. There is no such thing as a passive investor. You invest money in a business, you want to maximize your return and, when management fails to do so, you replace management. Some have urged that the solution to

non-lawyer control of law firms is some cap on the percentage that nonlawyers can own. I have seen suggestions of one-third as a solution. But anyone who knows anything about corporate power knows that one can control a public company with far less than one-third. Five per cent ownership can give one complete control over most enterprises.

Moreover, the availability of stock ownership among the lawyers will have its own effect on lawyer independence. When the value of a publicly traded share becomes the great motivator for the lawyers who work at the publicly owned firm, you can be sure the lawyers themselves will become part of the problem. It is one thing to accumulate billable hours; it is quite another to want to make your stock options turn you into a multimillionaire, but only if “the market” sees enough growth and uncompromised focus on earnings per share.

One need only look at AVVO to see how quickly matters can deteriorate. In every state in the country we have a rule that prohibits lawyers from sharing fees with nonlawyers. So AVVO sets up a business in which its customers can secure legal services for a fixed fee (itself problematic and in many cases certainly unethical). How does AVVO benefit from this arrangement? The lawyer who undertakes the fixed fee engagement rebates part of her fee to AVVO. The more the legal fee, the greater the sharing. Should we be worried about this arrangement? Of course we should. AVVO is no more than the dreaded runner (perhaps better dressed) soliciting business for lawyers in return for a part of the fee, a clear violation of Rule 5.4. But wait, AVVO has an opinion from its own General Counsel that this is ethical. You see, AVVO is not receiving part of the lawyer’s fee; to the contrary, it is receiving a “marketing fee” from the lawyer for AVVO’s solicitation of the client. And if you put lipstick on a pig . . . ?

Finally, the Commission’s attempt to tie these proposals to expanded legal services for the poor is meritless. There is no evidence anywhere this has been tried and that has been the

result. And it won't occur here. But Goldman Sachs and Price Waterhouse will get richer, not exactly why I tell my students they should become lawyers. We are a profession, a noble profession. We better preserve it, not for ourselves, but for our clients. Please do not put the House of Delegates through another bruising battle. It will only result in the American Bar Association enduring yet another decline in membership as our profession views the ABA as having lost its way, losing the respect it once had when giants like Robert MacCrate defended our eternal values and principles and lawyers proudly displayed their ABA membership certificate on their office walls.