INTERVIEW WITH SHERWIN P. SIMMONS

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SHERWIN P. **SIMMONS**

INTRODUCTION: Sherwin P. Simmons received the Tax Section's Distinguished Service Award for 2001. Mr. Simmons, a partner at the law firm of Steel, Hector & Davis in Miami, Florida, has had a long and distinguished career, which includes serving as section Chair in 1975-76, teaching at two law schools, and writing a variety of books and articles.

Q Mr. Simmons, you were chair of the ABA's Multidisciplinary Practice Commission, whose recommendations were rejected by the House of Delegates last year. Have any developments since that time confirmed or affected your views about the desirability of allowing multidisciplinary practice?

A Yes. Taking them in time order, following the House action, several states moved ahead and studied the issue. As a result, many have completed their studies and are taking action or non-action depending on their perspectives. Several are moving ahead to the point of actually drafting rules to effect changes. I would predict that by the end of this year or early next year there will be three, four, or five states that will soon allow multidisciplinary practice. All those states, indeed all those that have recommended change or found change not to be a bad thing for the bar and the public, recommend that the lawyers control the practice of law. They have a common theme. They vary in implementation.

The Canadian Bar Association, at its meeting last August, adopted in large part the Commission's first recommendation. You recall, that was the more radical recommendation in which we allowed fully integrated multidisciplinary practices. Again, all of these recommendations were designed to protect the core values of the profession and the public, so let's make that a given. The Canadian Bar Association's action is the most broad-reaching. In early winter of this year there were some minor changes, but for all practical purposes, the Canadian Bar Association has approved multidisciplinary practice. Now, the CBA is very much like the ABA. It has no rule-making authority but the various provinces will now move in or not as they see fit. That's the significant development with our neighbors to the north.

Perhaps the most dramatic event, only because we base our legal system on that of England, was the action of the Office of Fair Trading (the U.K. equivalent of the Federal Trade Commission). In March it announced that the legal profession should not be exempted from the Competition Act. The OFT set a 12-month ultimatum for the Law Society of England and Wales to change some of its professional rules, including those banning fee sharing partnerships.

The Law Society had been warned about that risk and they were studying the issue, but, apparently, they didn't move fast enough. The Law Society obviously finds the ruling offensive and is now trying to work with the governmental agency to reach some accommodation. I met with the representatives of the Law Society last August and at that time they were trying to work out rules which would allow solicitors to practice with non-lawyers, and if that worked out, the plan would allow some latitude forbarristers. How this governmental intervention will affect that, I'm not sure. But, my guess is that it will speed it up somehow.

Australia, (New South Wales in particular), has always been at the forefront of multidisciplinary practice. They are now going to allow passive ownership of law firms, which means public ownership of law firms, including the listing of law firms on the stock exchange, so long as lawyers control the practice. There are some other things going on in other parts of the world, but the point is that the MDP movement has not stopped, and certainly the growth of de facto MDPs in the United States has not slowed down.

Q What are the major ethical issues you see tax lawyers facing today in practice?

A I suppose there are two beyond those usually encountered and they probably vary depending on the part of the country in which you practice. For example, in South Florida where I practice, there are all kinds of tax savings schemes or techniques that are promoted. Some of them are legitimate. Most of them

are not. But they all have a semblance of truth. So an unsophisticated taxpayer, and in some cases sophisticated taxpayers, bite on these programs and as a result they quickly get themselves into tax trouble. Often they lose their investments. Sometimes they get themselves into criminal trouble.

The lawyers for these taxpayers frequently are limited by their clients as to what they can do to investigate the proposed investment or to test the assumptions, etc. If that is the case, the lawyer faces the ethical dilemma of not being able to provide effective counsel as a result of the client's own constraints. This is a terrible situation for the lawyer and he or she must choose whether to continue the representation or to determine whether effective representation can be rendered within the limits imposed by the client.

A related issue comes about where the lawyer is not permitted to learn the details of a proposed transaction on which his advice is sought without first signing a confidentiality agreement provided by the program's promoter. That puts the lawyer in a very difficult spot, implicating firm policies about confidentiality agreements and raising ethical considerations. My firm, like others, has a policy prohibiting the signing of confidentiality agreements except in special circumstances and then only with management approval.

Putting aside firm policies, clients frequently say, "Well, if you are not going to help me on this I will find somebody else who will." The lawyer who signs the agreement is put in an awkward spot if the proposal involves a technique about which he had knowledge and perhaps used in the past for another client. Is the lawyer limited now in the use of the technique? What if the lawyer violates the agreement? I have given speeches on this subject and as a result I have tried to find from the sponsors of these programs whether they have ever sued anybody for violating the confidentiality agreement. So far, I have not been able to find anybody who has.

But, the lawyer faced with the signing of a confidentiality agreement has a basic ethical problem. This is demonstrated best by the opinion of the Illinois State Bar which came out earlier this year. This opinion says that the lawyer who signs a confidentiality agreement is violating his or her duty to other clients because his or her ability to represent other clients is being limited, a limitation which is prohibited by the rules of professional responsibility. So the Illinois State Bar opinion, I think, is very good for the bar and offers a very good guide for the lawyer who is asked to sign confidentiality agreements.

Q Estate planning has been one of your primary areas of practice. How do you see the repeal of the estate tax affecting that practice area?

A First, I don't see a repeal. I heard somebody the other day call it a "hollow repeal." In a press interview recently, I called it a hoax. That may be unkind, but it is clear that what the public was told it was getting is not what was ultimately delivered. We were told that the "death tax" would be repealed. We all know that there is no such thing as a death tax. There are two taxes—the estate and generation skipping transfer tax—that affect deathtime transfers. These two taxes were restructured through 2010. Their companion —the gift tax—was not repealed but continued on after the so-called 2010 repeal in the company of a new carryover basis rule.

We now have the present law with increased exemption equivalents and reduced rates and a limited number of substantive changes and an uncertain future for carryover basis and the gift tax. It is misleading to suggest that the whole "death tax" regimen will go out the window in 2010 after a phase-down period.

In truth we have repeal for one year—2010. Then in 2011 the present law with some changes comes back into effect. So I don't call that a repeal. What the new law does is put an incredible burden on taxpayers to try to plan their affairs because they now have three periods of time to consider: (1) between now and 2010; (2) 2010, and (3) 2011 and beyond. There are two presidential elections and at least five congressional elections between now and 2010, and, my guess, and this is purely a guess, is that we will never see repeal—not in the absolute sense. Even in 2010 the gift tax is maintained, although the top rate goes to 35 percent and there is an exemption of $1 million. Then you have this carryover basis problem with respect to spouses and non-spouses, so that's why I call this a hoax. Repeal in the true sense just doesn't exist.

I am concerned that taxpayer costs will be increased in trying to deal with the new law. At the least, it will increase uncertainty. We are going to have to start looking at the impact of the changes right now.

Q How would you see the current legislation as affecting charitable and spousal giving?

A Perhaps that is the most significant question of all because there is no doubt in my mind that taxes influence giving. This is going to be particularly true in second marriage situations, and also in first marriage situations. If taxes did not require giving to spouses to postpone, at least, taxes at the first death, a lot more would go to children and grandchildren. There will always be charitable gifts by those who are charitably motivated. Those who are largely tax motivated will likely make fewer and smaller charitable gifts. That is sad about this legislation. But then again, that is why it is complicated, because if you are not going to have any estate tax in 2010, are you going to leave anything to charity at all? Some may give to the church back home and maybe to their college but likely many taxpayers are

not going to make the big gifts to the performing arts center and the like unless they are really wealthy and are really trying to do something for the community. The inter-family dynamics and shifting of wealth will really cover the front, and then charitable giving will probably, unfortunately, take a second chair.

Q You have long been a leader in continuing legal education. Do you see the one-to-three-day, one location, programs as a thing of the past that must be replaced by a desktop computer, or on demand access; or what other changes do you foresee in CLE?

A Well, as you know, I have been on the ALI-ABA Committee for a long time and in 1985 we started the American Law Network. The American Law Network is not a provider of legal education. It is like a utility. We opted to offer a utility to connect the American Bar, ALI-ABA, PLI, and other CLE sponsors to a telecommunications satellite. The network, or ALN as it is known, facilitates the transmission of CLE by satellite to remote locations. The purpose of ALN, the reason we started, was to provide CLE in a more economical way, to serve the more remote locations and to provide CLE to the under-served. We started off relatively small with 25 or 30 locations. Now we have 100 or so. Some of them are private viewing sites. We now have more than 25,000 participants a year, which I think is very good attendance.

Many, many states offer a lot of CLE—from the local bar association to the state bars to profit making ventures. We have in Florida, for example, all kinds of profit CLE providers coming into the market because it is a good CLE state. So you have a lot of drain from the national programs. A one-day program on immigration in Miami will draw comfortably 50 to 100 or 150 registrants. But, in the absence of special circumstances, it would not draw sufficient registrants to justify a three-day course. On the other hand, some courses do very well live. Heckerling, a week-long estate planning institute, is probably the largest institute in the country. I think they had 2,600 registrants this year. Its attraction is that it gets top name lecturers to discuss cutting edge topics and it has the added advantage of having become a tradition among estate planners who come to be with old friends and to network with new ones. The week-plus tax programs of NYU are no longer. Southern Federal is three days. The bottom line is that time out of the office, the cost of travel and lodging, and the availability of local CLE offerings, work against a three day or longer live program, particularly a national program.

In my view, the future of mainstream CLE delivery (as opposed to the special event programs) is in satellite transmission, desktop delivery and the internet. ALI-ABA, ABA and PLI are all looking at the internet delivery of CLE which can be viewed at the convenience of the practitioner. I think the future is here. Admittedly, these new delivery mechanisms do not present the opportunity to interact with the speakers and networking is lost. But convenience and cost savings are gained. Over the past few years, particularly where currency of the CLE subject was not critical, audio tapes and video tapes have provided good CLE at affordable prices with the added benefit of convenience. So many practitioners are already used to these alternative delivery mechanisms. It will be just a short step to desktop and home viewing.

Q You have been very active in bar association work for many years. How has the level of participation of attorneys in the voluntary bar associations changed over those years and do you have concerns about the future of the associations?

A There are 900,000 or more lawyers in the United States. There are about 400,000 members of the American Bar Association, and that includes law students and young lawyers. When many of us got out of law school and worked with firms or elected to enter government service, we were encouraged to participate in bar activities. I don't see that today. I think that is the fault of the seniors. I think that with the emphasis on billable hours, bar work is pictured in many law firms as irrelevant, maybe irrelevant is too strong, but not as relevant as it once was. Pro bono work is looked upon the same way. Until the seniors, particularly the seniors in large law firms, start mentoring their juniors about the value to the profession and to the lawyers themselves, lessening of participation in bar work will continue. That is very regrettable because I think everybody loses—the public, the bar, the community and the law firms, but particularly the lawyers.

When I made my Distinguished Service Award acceptance speech before the ABA Tax Section, one of the things I said was that I have met people, learned things, and gone places I would never have had the opportunity to go, had I not been active in the bar. I'm not saying that billable hours are not important. We all have to pay the rent. I'm afraid that work in the profession and the community has suffered. And I'm not just talking about bar work, I'm talking about the Red Cross, the United Way Fund and the like. These activities don't seem to be getting the participation that they deserve or once did.

Q You have taught law at the University of Miami Law School since 1995 and before that you taught for more than 15 years at Stetson University College of Law. What tax issues do you find interest or motivate your students the most today?

A Let me compare the two times. I finished my work at Stetson in the early '70s and I commenced my work at Miami in the mid-'90s. In the early '70s, the students were interested in what I would call the "bread and butter" topics that tax law was based on, and at that time you recall that tax law was one of the dominant specialties for students to go into. Now I see, this may be the result of law firms' demands, I see a great emphasis on graduate studies. The student who goes through law school and gets a job today may be very fortunate because so many law firms, particularly in tax, want that LL.M.

At the University of Miami we have graduate programs. We have three: one in estate planning, one in tax and the other in international tax. I think those three graduate programs reflect the current interests of the students. International tax is a big item and particularly if you are bi-lingual or tri-lingual or multi-lingual you have a great opportunity. I see a good number of the students going into international tax. There are always people going into estate planning, and general tax seems to be still popular among the students who are interested in tax. Some students go into employee benefits, which is a specialty too often overlooked by students.

The bottom line is that I see fewer and fewer students interested in tax today. The new specialties—employment law, intellectual property, and the like, and, of course, litigation in all of its forms—are of great interest to students. Corporate practice is up and down, depending on the economy. These specialties drain off students who might otherwise be interested in tax. Likely with the change brought about by the new law, there will an increased interest in estate planning, and maybe with general tax. But, unfortunately, at least from the tax practitioner's perspective, I see fewer students going into tax.

Q What advice do you offer for your young students who are starting tax careers?

A Well, I try to share with them the areas that I think are of interest. I just mentioned that international tax clearly has to be one. Estate planning is obviously going to be hot. But many law firms, as you are aware, particularly large law firms, are de-emphasizing estate planning and are actually closing down some of their estate planning departments. Their partners are going to small firms. So there is a shift in the firms where estate planning is going to be practiced. I think that is wrong because estate planning is so closely tied to corporate planning and benefit planning and so forth, but I am not running these law firms. Young lawyers who have an interest in estate planning must understand this change in the philosophy of some firms.

General tax can be tough. The opportunities for a general business tax practice are narrowing, unless you are going to go with a firm that has a money center practice with commercial transactions, mergers, acquisitions, corporate restructurings, partnerships and, of course, LLCs which seem to be currently in vogue. Those areas will be still important, but I think they will be less attractive to students because there are fewer opportunities.

I think it is also sad that so few students are interested in government service. In my day it was considered a plum to get a job with the Tax Court, IRS, Treasury or Justice. Those jobs offered great post-graduate study and many well-known practitioners started with the government. The students just do not find these jobs attractive now, perhaps because of the starting pay in private practice, the necessity to pay off student loans and the like. I think that is unfortunate.

Q You chaired the Special Committee on Project 2000 for eight years. Can you tell us a little about that committee and the results of its years of work?

A I was on the Board of Governors and chaired the Finance Committee and I was frustrated because we could not get the reports we needed. The more I looked into the situation, the more I found that the ABA, like many large organizations, particularly non-profits, had not updated its computer infrastructure in 20-25 years. We had people keeping financial and membership records of committees and sections at the staff level by hand or on outdated computers. Other than dues records and ABA membership data, a great deal was not centralized. There were information reports we would have liked but didn't have. Basically, the whole system was way behind the times. So I suggested that the problem be addressed both from a hardware and software infrastructure. And, like in many cases, if you open your mouth you end up as chair. I was appointed chair at the end of my term on the board, and we set about to redo the ABA infrastructure. And if you should go to the Section of Taxation headquarters this morning you will be able to communicate directly with Chicago without any difficulties. You have access to data not previously deliverable in an easy format or on a timely basis. This is now true throughout the ABA.

It was an interesting problem because when we set about trying to find software and hardware we went to the shelves looking for off-the-rack material, software particularly, for non-profits. We found that there was very little already existing for non-profits. We could buy a number of museum packages, but none were satisfactory for an organization with at that time (now even more) a $100 million or better budget and 300,000 or 400,000 members. So we hired a director of Information Technology, and the Committee

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GOVERNMENT SUBMISSIONS BOXSCORE

Since the last issue of this Newsletter, the Tax Section has coordinated the following Government Submissions, which can be viewed and downloaded free of charge from the Section's website at www.abanet.org/tax/pubpolicy.html. If you have any questions or need assistance in locating these documents please contact the Tax Section office at 202/662-1783.

I.R.C. §	DATE	TITLE	COMMITTEE	CONTACT
n/a	7/23/01	Supplemental Comments Concerning IRS Notice 2001-10	Employee Benefits, Insurance Companies, Estate & Gift Taxes, Small Law Firms and Closely Held Businesses	Andrew C. Liazos
368	7/26/01	Supplemental Comments Concerning Regulations Under Section 368 Regarding Mergers Involving Disregarded Entities	Corporate Tax	Benjamin G. Wells
355(e)	7/26/01	Comments Concerning Proposed Regulations Under Section 355(e) Defining a "Plan (or Series of Related Transactions)"	Corporate Tax	Donald B. Hensel M. Todd Prewett
various	7/31/01	Comments Concerning Current Language in Form 990 Regarding Reporting of Compensation Arrangements by Exempt Organizations	Exempt Organizations	Victoria B. Bjorklund
n/a	8/13/01	Administrative Recommendation Regarding Regulations Governing Practice Before IRS (Circular 230)	Tax Section	Richard M. Lipton Frederic L. Ballard, Jr.

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fortunately was comprised of attorneys who had some technical background and a couple of them were very experienced. It was a very active Committee and was very instrumental to our success. Then as today hardware changed every few months, so that by the time we would tentatively select something and almost get to final selection, the hardware or the deal would have been changed. So we experienced that frustration. The one thing I emphasized was that we wanted to stay in the middle of the road. We didn't want to be leading the pack in hardware or software developments. We started developing software for membership and dues billing because that was the largest problem the ABA experienced. Then we took the other areas of concern in sequence, obviously getting to accounting in due course.

Notwithstanding all the testing by the players who would utilize the systems, there were still some glitches. Sometimes we didn't bill everybody who should have been billed. Occasionally we gave free memberships to people who didn't deserve them—those kinds of glitches. So it was embarrassing and frustrating but we worked it through and I think now the system is pretty good. The Committee was always intended to sunset in 2000. I am very pleased that it worked out the way it did because I think the ABA now has a very good system and Bob Stein is dedicated to keeping it current. Of course, even with Bob's efforts he will only be able to keep it current so long as there is money to do it, so money will always be problem. ■