

**TESTIMONY OF STEFAN F. TUCKER,
CHAIR, SECTION OF TAXATION,
BEFORE THE ABA COMMISSION ON
MULTIDISCIPLINARY PRACTICE,
LOS ANGELES, CALIFORNIA**

FEBRUARY 4, 1999

I. INTRODUCTION

Thank you for the invitation and opportunity to appear before you today in my capacity as Chair of the American Bar Association Tax Section. As you may be aware, the Tax Section is one of the largest Sections of the ABA, with about 20,000 members. Our Mission Statement identifies the Tax Section as "the national representative of the legal profession with regard to the tax system." We believe that, as a whole, the ABA and its Sections, Divisions and Committees, as well as state and local bar associations; the AICPA and other national, as well as state and local, accounting groups; the Treasury Department, Internal Revenue Service and other Federal government agencies; and the key Congressional Committees, their Staffs and the Joint Committee on Taxation likewise all see the Tax Section in the same light.

The Tax Section membership itself represents a broad cross-section of lawyers — including those in private law practice, ranging from persons in American firms with multinational offices to solo practitioners, and those in practice in non-U.S. firms; those in accounting firms, ranging from persons at the Big Five to those in smaller regional or local firms; those who teach full-time at law and business schools; those who work at corporate, tax-exempt and investment firm legal departments; and those who are general practitioners, business lawyers or specialists in other legal or non-legal practices who feel the need to keep up-to-date on one more or more areas of the tax law, and see the Tax Section and its publications and continuing legal education facilities as the very best means to do so, at the lowest effective cost.

Interestingly enough, many of our most active and productive members are not practicing in law firms at this time, but, rather, are at accounting firms. We find that the accounting firms are doing a far better job of encouraging their personnel to participate in outside activities, such as the Tax Section. In contrast, many, if not most, law firms — both big and small — are driving their attorneys to work more and more billable hours, effectively precluding these lawyers from participating in outside activities, which do not translate immediately into gross receipts. (To quote Walt Kelly's *Pogo*, "We have met the enemy, and it is us.")

By way of illustration, one of our Council Members is a member of a Big Five accounting firm. Moreover, we have approximately fifty Committees and Task Forces; of these, ten are chaired by persons at Big Five accounting firms, six are chaired by persons on in-house corporate legal staffs, five are chaired by full-time law professors, one by a person at a trade association and one by a person at a lobbying firm.

Thus, when I speak as Chair of the Tax Section, I believe that I am representing my Section's views as a whole, although I am the first to admit that there is no comprehensive agreement on the issue of multidisciplinary practice within our Section, even among those who practice law in "traditional" arenas. Certainly, by this time, our members have had the time truly to think about multidisciplinary practice, rather than simply to flail about in reaction to the same.

We recognize that the phenomenon of multidisciplinary practice now extends far beyond the tax world, into areas such as employee benefits, environmental law, real estate and, like it or not, litigation (and, certainly, alternative dispute resolution). However, my emphasis today will, perforce, be on the practice of tax law.

The ABA itself had an excellent showcase program on "The Ends of the Profession" at its Annual Meeting in Toronto last August. Unfortunately, that program was neither well attended nor taped. The views of Mr. Feather, the futurist who gave an overview, Professor Ogletree of Harvard Law School, who moderated, and the excellent panelists, from a variety of backgrounds and current activities, would have been highly beneficial to the members of the Commission.

The Tax Section, at my urging, had its own program, likewise labeled "The Ends of the Legal Profession," at its Midyear Meeting in Orlando last month. The program was designed to take a critical look at the future of the legal profession, with particular emphasis on the future of tax lawyers.

The participants on that program were: Phillip Mann, our Immediate Past Chair, who acted as moderator; Sherwin Simmons, a former Chair of the Tax Section, former Delegate from the Tax Section to the ABA Board of Governors, and the Chair of this Commission; Irwin Treiger, a former Chair of the Tax Section, former Delegate from the Tax Section to the ABA House of Delegates, current Chair of the Tax Section's Goal II Task Force and Co-Chair of the National Conference of Lawyers and Certified Public Accountants; Paul Sax, our incoming Chair, who has, throughout his membership in the Tax Section, placed a genuine focus on legal ethics, conflicts and multidisciplinary practice; and Charles Robinson, an elder law specialist from Clearwater, Florida, a consultant to law firms, and a panelist in the Toronto Showcase Program. I have given a tape of that program to Sherwin Simmons and would be more than pleased to furnish the same to any member of the Commission. (Others may purchase the tape through Tax Section headquarters.)

In preparation for this Hearing, I have carefully reviewed the comments of those who have already appeared before the Commission. In formulating my views, I have also reviewed a number of articles and treatises, including *The Legislative History of the Model Rules of Professional Conduct*.*

*See Center for Professional Responsibility, American Bar Ass'n, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* (1987).

II. SUMMARY

Multidisciplinary practice has not developed in a vacuum. It is the product of a rapidly growing, consumer-driven, global economy. We see ever more sophisticated clients seeking advice on increasingly complex matters, often involving an inextricable mix of finance, accounting, law, and other disciplines.

The Model Rules fail to reflect the marketplace realities imposed upon the modern law practice irrespective of size or scope. Moreover, the protections the Model Rules once afforded our clients are now in many respects unnecessary from a consumer point-of-view, and therefore inappropriate. These Model Rules have hampered the ability of lawyers to assimilate into this multidisciplinary world. If the legal profession is to progress and compete in the 21st Century, rather than becoming merely an adjunct or a footnote in the real world, certain aspects of our self-regulatory system must be overhauled. Only in that manner will the best interests of the public, and therefore the legal profession, ultimately be served.

III. OVERVIEW

The Tax Section believes that a rapid response by the ABA is absolutely necessary. Because any response will, in all events, be occurring well after the train has left the station and headed down the track, the Bar's response ought to be focused on the direction and configuration of the tracks ahead. Multidisciplinary practice is here. We cannot be, or be perceived in the minds of lawyers, other professionals or the public as, tilting at windmills on the Plains of La Mancha. If we do not attune ourselves to client- (or, to use a term that reflects reality, even if it may sound more crass) "customer"-driven realities, then we lawyers will simply be left behind.

We believe that the efforts of the organized bar to protect the ramparts against what it defines as the "unauthorized practice of law" are, in many instances, viewed as, simply, the lawyers protecting their pocketbooks, rather than protecting the interests of the public. To reiterate, consumers are seeking other sources of service and product because of their need to save dollars. When large and small businesses alike are using cost-cutting as a means to offset the inability to increase profits, in a highly competitive business world, it is wholly logical that cutting the costs of what we would like to say are "legal services" is a necessary component of business survival.

We can analogize to other professions which, in seeking to maintain their guild rules under changing national or global circumstances, ultimately lost their institutional respect as professionals. With the exception of certain boutique-type practices, particularly in architecture and engineering, one-time "professionals" are now largely viewed as individuals encapsulated in larger organizations. Anecdotal evidence suggests that the engineering profession is dominated by engineers on the payrolls of employers, with fewer and fewer independent concerns. Medicine is rapidly mirroring that change, with more and more doctors functioning as employees of, or beholden for their billings and the scopes of their practices to, large medical service providers or health maintenance (or

similar) organizations. We need always to remember Santayana's warning: "Those who cannot remember the past are condemned to repeat it."

As we see prepaid legal plans spread (and, mark my words, we will see the same, as the public and its elected representatives, on the Federal, state and local levels, all react to the extraordinary legal fees in the asbestos cases, the tobacco litigation, stratospheric tort verdicts and the upcoming gun cases), we will see even more subordination of the traditional lawyer roles to client- or consumer-driven demands.

Among other things, this means we must rethink, and then rewrite, certain of our Model Rules of Professional Conduct (the "Model Rules"). It is very hard to say who these Model Rules are really protecting these days. Frankly, we see the key Model Rules that block multidisciplinary practices involving lawyers as guild rules, not client-oriented canons. If clients want a particular lawyer and are willing to waive conflict (or even forget the issue of conflict where that lawyer's firm is representing another entity against the client, or one of the client's subsidiaries, affiliates, co-venturers, officers or directors), who do we lawyers believe we are protecting? Furthermore, if a lawyer cannot share fees with non-lawyers or engage in ancillary services, how does the lawyer compete in a multidisciplinary practice world?

When I grew up during the late '40s, '50s, and early '60s, in a small midwestern city, the lawyers did the legal work, the real estate title work, insurance brokerage and, very often, tax returns. They simply identified what they were being paid for each time. In-house counsel are paid by their corporate employers, and the continuity of their jobs is, in no small part, dependent upon corporate earnings. They own stock or stock options, and therefore share in the fortunes of the corporation. How do these situations differ from the concept of a multidisciplinary practice, with the sharing of fees and the rendering of ancillary services?

IV. ANSWERING THE COMMISSION'S SPECIFIC QUESTIONS

We believe that amending the Model Rules — and, in particular, Rule 5.4 — to permit lawyers to enter into partnerships or other fee-sharing arrangements with non-lawyers would not harm clients, so long as clients understand the facts. Such understanding can be engendered and enhanced by appropriate public relations and media communications by the legal profession, through the American Bar Association and similar state and local groups, rather than causing each separate entity, on its own and through its own resources, to do so.

The ongoing proliferation of multidisciplinary practices is, in and of itself, plain testimony to the fact that clients believe that they benefit from "one-stop shopping," from looking to one source, as they can with the Big Five, American Express, Century Business Systems or their own in-house staffs. It is, moreover, quite clear that the client base that shares this belief may have begun with the Fortune 1000, but now reaches down into small businesses and entrepreneurs at virtually every local level, for all are cost- and fee- conscious today.

This client base exists not only in the large law firms, but with small firms and even solo practitioners. All lawyers face the reality that "one-stop shopping"

is here to stay, and so they will lose more and more business to the mega-service providers and the specialists, who are furnishing — more efficiently, with a broader base of experience and information, and for significantly lower costs — those services and products traditionally provided by lawyers. Again, cost savings truly drive today's consumer-oriented economy.

We cannot identify any specific instances of harm to a client as a result of such a change to the Model Rules. In fact, without fear of being redundant, we can see only benefit — not just to the Fortune 1000 and “multi-national” companies, but also to our usual, everyday “bread and butter” practice clients, who cross city, county, state, and national borders every day and in every way.

Moreover, the desire of states to protect their licensed practitioners from competitive incursions by those in other states or nations is arguably protectionist and chauvinistic. Take, for example, the absurd case of a California court upholding a California-based client's refusal to pay a New York-based law firm for legal services provided by that law firm in connection with a California matter, where all the legal work was done in New York or outside of California. Take it as granted that certain areas of practice — civil and criminal litigation in the state and local courts, real estate title and similar matters, domestic relations and wills, trusts and probate matters, and state and local taxation — require local practitioners; over and above that, there is so much more that does not require the same, and clients should be able to make their own business decisions as to who they will call upon for advice and assistance, wherever that advisor is located.

In our view, changing the Model Rules would pose absolutely no risk of impairment to a lawyer's independent professional judgment. In today's world, lawyers receive contingent fees, or success bonuses, from clients. Some receive interests in their clients' entities in consideration for their services. Others are offered preferential acquisition opportunities, or preferential terms on the acquisition of such interests, by or on behalf of clients. Any of these existing and established practices poses, in my view, far more of a threat to independent professional judgment than does fee sharing with non-lawyers; yet, they are clearly accepted and appear to have no impact whatsoever on attorney-client relations.

We must recognize that there is often little, if any, real distinction or variance between business or financial advice and legal advice, and, in fact, the two are inextricably intertwined, along with the continuous impact of interpersonal relations between lawyers and their clients.

In her testimony (on November 13, 1998), Professor Linda Galler, of Hofstra University, addressed the differences in the standards of professional conduct that apply to accountants and lawyers. In the interests of time, I would add only that Treasury Circular 230 is a somewhat effective regulator in terms of its application of uniform standards to both lawyers and non-lawyers. As members of the Tax Section's Tax Shelter Task Force have agreed, it is evident that Circular 230 needs far more teeth in it today when we are facing the proliferation of investment firm-formulated tax shelters for multinational corporations

utilizing the interplay of Internal Revenue Code Sections intended to apply, independently, to quite different facts and circumstances.

No changes need be made to Rule 1.6 to protect client confidentiality. It is, quite simply, a matter of disclosure to the client and informed client consent. Clearly, the client's level of sophistication will dictate the nature and quantity of disclosure (that is, explanation of the issues, facts and ramifications) necessary to assure a truly "informed" consent. But, this is not a revelation; we all know this today. Remember that the Preamble to our Model Rules states: "In all professional functions a lawyer should be competent, prompt and diligent. A lawyer *should maintain communication with a client* concerning the representation." (Emphasis added.) Too many of our problems with clients are *not* attributable to perceived breaches of the protection of client confidentiality or conflict of interest, but, rather, to failures of communication, whether due to incompetence, lack of promptness, lack of diligence or just plain arrogance, or any combination of the same.

The reality is that, notwithstanding the proscriptions of Model Rules, it is almost impossible, and certainly unrealistic, to say that perceived conflicts of interest can readily be avoided in today's multi-jurisdictional world. The geographic reach and substantive breadth of law practice today has, as a practical matter, outgrown the Model Rules. It can almost always be argued that a lawyer has a conflict; this is a "virtual reality." A lawyer in the Houston office of a national law firm may have no knowledge of work being done by his partner or an associate in New York City, Washington, Brussels, Budapest, or Tokyo. The notion of imputed knowledge of facts was developed during a time when law firms were small and self-contained, in one city or, at most, two cities in one state. We should not be governed by antiquated Rules.

For this very reason, the general rule on imputed disqualification should be revised in a wholesale manner to take into account the realities of practice. All of the clients of a multi-office professional practice need not suffer the impracticalities of imputed disqualification, simply because two lawyers in two different offices, who may not even know each other, are working for the client in one matter and against the client (or its subsidiary, parent, affiliate, co-venturer, officer, director or employee) in another matter. The client is more likely to know about the situation than either lawyer, and, if the client does not object, why do the Model Rules do so?

The Rules on the responsibilities of a partner or supervisory lawyer (Rule 5.1), the responsibilities of a subordinate lawyer (Rule 5.2), the supervision of nonlawyer assistants (Rule 5.3), the unauthorized practice of law (Rule 5.5(b)), the responsibilities regarding law-related services (Rules 5.7), and on advertising and solicitation (Rule 7.1-7.5) likewise need to be refocused on today's realities.

Furthermore, it must be noted that Rule 7.2(c) is out of touch with reality. A lawyer "shall not give anything of value to a person for recommending the lawyer's services . . ." Does that mean that a lawyer cannot send that person a gift, whether at the time or at Christmas, or treat the person and his or her spouse

or significant other to dinner or a show or both? Is this Rule even honored, or is it so impractical as to be ignored on a wholesale basis?

We must accept that the “unauthorized practice of law” is an increasing reality (and product of) our consumer-oriented society. If a consumer is happy to take a will form and seek the advice of a non-lawyer regarding filling in the blanks, why should we seek to disallow this? Today’s average consumer cannot afford the legal fees that start at about \$100 and go up into the \$600-\$700 range *per hour*. Recognizing differing individual needs and differing demographic needs, the consumer finds what best suits his or her needs and resources. In other words, water finds its own level.

The fact is that many of what were once considered “law-related services” are now provided outside the traditional law practice. This is not revolutionary; it is evolutionary. Only a generation ago, lawyers routinely performed title work, insurance brokerage and tax return preparation. As the world changes, likewise the practice. Even the concept of privilege is eroding in today’s world, and not just in the context of lawyer versus accountant in Federal tax practice. And, while we need not shift with every wave in the ocean, we must be aware of, and attuned to, its ebbs and flows. To paraphrase a song from Lerner and Loewe’s *Paint Your Wagon* — “Where are we going? We don’t know. When will we get there? We’re not certain. All that we know is that we’re on our way.”

We do not believe that the Model Rules should be amended to permit the discipline of law firms and/or multidisciplinary practices. As others have testified, client protection and public interest are the only legitimate grounds for regulation. Accordingly, the need for discipline should be focused on individual lawyers. In this context, when one reviews local bar disciplinary actions, the focus is most often on the misuse of trust accounts and client funds, missed court and filing deadlines, breaches of client confidences to the detriment of such clients, criminal conduct, and blatant conflicts of interest (using knowledge obtained when directly representing a client against that same client in another matter).

Law firms and multidisciplinary practices are, by virtue of today’s litigious world, truly regulated by external forces — client and customer demands and expectations. If a firm or multidisciplinary practice commits a moral or legal wrong, there will be consequences, either in the form of actual damages or impaired reputation (which, in the medium or long term, may well be far more detrimental to the firm and its members).

It is clear that the existing regulatory framework is broken, and needs fixing. It should be restructured by calling in a focus group of persons reflecting consumers of all levels — from the multi-national corporation to the local company, to the individual needing services personally, to lawyers and judges. Such regulation should be nationally based and Federally implemented, without the ability for state-to-state variance.

In his testimony before this Commission on November 12, 1998, James Holden, a former Chair of the Tax Section and a highly respected authority in legal ethics and conflict issues, suggested, as a point of discussion, the establishment of a

Federal-level commission to regulate professional service entities on an elective basis. This is an idealistic concept. What we need, ultimately, is the Federal government acknowledging that legal and other professional services are a matter of interstate commerce, governed by the Constitution. We are not suggesting, or even considering, Federal regulation of legal services. We are, rather, suggesting Federally imposed deregulation, with a focus on the realities of a consumer-oriented economy, not antiquated, unrealistic and ineffective guild rules.

Peter Moser, Chair of the ABA Standing Committee on Ethics and Professional Responsibility, urged (in his November 13, 1998 testimony) interstate agreement, so that attorneys could practice across state lines with some simple form of registration. In our view, even if states are allowed (as they will certainly insist) to retain their individual admission standards, the Federal government should affirmatively recognize — or impose — the absence of state borders, except in strictly local matters, such as wills, trusts and probate, real estate title, state and local business entities and the like.

We believe that the Federal government will not even consider stepping into this morass unless and until the ABA itself takes the lead by revising extensively its Model Rules. Furthermore, and importantly, until such time as the Model Rules are so revised, it is highly unreasonable to expect the states to act at all. The ABA needs to be the leader, and leadership entails immediacy—actions, not words.

V. CONCLUSION

Multidisciplinary practice is the reality and must, therefore, be the future of the legal profession. It has evolved in response to an increasingly consumer-driven, global economy, which presents fewer and fewer “pure legal issues.” A number of the Model Rules, in their antiquated form, limit the ability of lawyers, *qua* lawyers, effectively to respond to client needs, and therefore menace the very interests they were designed to protect.

Thank you for your time and consideration.