

2001 ERWIN N. GRISWOLD LECTURE BEFORE THE AMERICAN COLLEGE OF TAX COUNSEL: IS THE TAX BAR GOING CASUAL—ETHICALLY?

*Randolph W. Thrower**

At times, Margaret and I have asked ourselves, “Why are people so nice to us?” This is one of those times. I appreciate the confidence shown, and the risk taken, in giving me the opportunity to deliver this annual address before this illustrious group. I should warn you now. My partner, Jerry Cohen, encouraged me to reminisce a bit, which can be a dangerous license to give to an octogenarian, especially one in the upper octo. This invitation will lead to a number of personal references which I hope you will forgive.

I hold in highest regard the outstanding legal educators, lawyers and the late Tax Court Judge Ted Tannenwald who have preceded me in undertaking this assignment. I learned that I would receive a \$2,500 honorarium which may be directed to the charity of my choice. I am pleased to direct it to the Theodore Tannenwald, Jr. Foundation, formed by the American College of Tax Counsel, to recognize outstanding work in federal taxation. The list of annual speakers on this occasion begins with Erwin N. Griswold, still known affectionately by thousands of Harvard and non-Harvard lawyers as “The Dean.”

I greatly admired Erwin Griswold for his keen intellect, his uncompromising intellectual honesty, and even for his sometimes blunt way of expressing his honesty. Back in what some old-timers call the “good old days” of the Tax Section, every legislative proposal was presented for a vote, up or down, at a meeting of the entire Section and sometimes was heatedly debated. A cadre from the law schools and private practice stood by to pounce on any proposal that seemed taxpayer biased and against the public interest. This group included some of the brightest minds in the tax field. On one occasion, I presented what I thought was a fairly innocuous, but novel, procedural proposal. Dean Griswold immediately took the floor. He decimated what he understood the proposal to be and excoriated my committee for even suggesting it. I again explained the proposal. The Dean promptly responded, saying the proposal, as he now understood it, was a good one which he would support. It passed the Tax Section, the ABA House of Delegates and the Congress. Of course, he did not apologize for skinning us alive but this was not expected in those rough and tumble, free-swinging debates on the floor of the Section in the 1950’s.

Later as the Commissioner of Internal Revenue, I conferred with Erwin Griswold, then Solicitor General of the United States, to learn confidentially whether he could support, before the United States Supreme Court, the position we were developing in the Service. The developing position was that a pervasively discriminatory private school was against the well-established policies of

*Partner, Sutherland, Asbill & Brennan, L.L.P., Atlanta, Georgia. Emory University, B.Ph. 1934, J.D. 1936, LL.D. 1984.

the United States. Therefore, under the Statutes of Elizabeth of 1606 and subsequently developed common law, the private school should not be recognized as “charitable.” He assured me that he would support it. Knowing that the proposed change of position was being challenged in the White House, Griswold said he would welcome being called upon for an opinion on the subject. I made the suggestion, but no one took the bait. For the record, it took pressure from the “Black Caucus” in Congress to overcome the opposition and finally win the President’s approval. I was in no way responsible for the part played by the Black Caucus. Later, the United States Supreme Court approved the decision.¹ I always admired the devotion shown between Erwin and Mrs. Griswold and the attention he gave to overcoming her limitations of confinement to a wheel chair. Despite repeated corrections by me, she persisted in referring to me as a graduate of the Harvard Law School. I treated it as a high compliment that she could not accept the fact that I was educated at one of the law schools out in the territories to the south.

It is appropriate that this lecture series bear Erwin Griswold’s name. I hope that the qualities and attainments of the man will never be forgotten.

You may wonder why I selected such an oddly stated subject, “Is the Tax Bar Going Casual – Ethically?”. I have wondered that myself. I do have some deeply felt concerns about the legal profession and the practice of tax law. However, it did not take long for me to realize that I had gotten into a quagmire with little hope of crossing it successfully. In addition, I could not think of any subject in the tax field on which I could presume to be better informed than this distinguished group. So, a discussion of my concerns about the tax practice and the legal profession as a whole may be the wisest course to take.

These concerns have nothing to do with clothes, or, at least, very little. Margaret provided the observation that little boys and little girls behave better when they are “all dressed up.” That’s worth a passing thought. I am not a “die-hard” on the subject of casual office attire, though I will confess that on one occasion, as I met a casually dressed younger partner in the office—and they are all younger . . . I was compelled to say, “You don’t look to me as if your services could possibly be worth \$300 per hour.” He reminded me that his basic rate had gone up to \$350.

I have not always been viewed as being so formal. On graduating from law school, I found myself in a very inactive buyer’s market for young law graduates in Atlanta. Sutherland Tuttle & Brennan, my first choice, was quite indifferent. I was fortunate to have a good offer from a distinguished family firm in Macon, Georgia. Macon sits at the fall line of the muddy Ocmulgee River which winds its way on down to the ocean. Macon had not been visited by General Sherman and was proud of its handsome antebellum homes. In the spring and summer the fragrance of magnolia blossoms filled the air. I found the law firm to be very

¹Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff’d mem. sub nom.*, Coit v. Green, 404 U.S. 997 (1971); *see* Bob Jones University v. United States, 461 U.S. 574 (1983).

formal and highly regimented. All walked in at 9 a.m. and walked out at 6 p.m., that is, all but me.

Macon in the summer was hot, especially on the top floor of the building where the firm had its offices. You can imagine—heat coming from the roof exposed all day to the sun and rising from the floors below, with all windows in the building closed and, of course, no air conditioning. The office of the principal partner with whom I worked had two attractions for me. First, being one of the more progressive partners, he had an oscillating electric fan. Second, he kept a clean desk, so I could easily move my law books and papers into his office for evening work. One such evening when I was working at his desk, and as usual, had taken off my coat and tie. . . it was dreadfully hot, even with the windows open and the fan turned on. The cleaning crew had finished its chores so I felt safe in slipping off my pants. Later my concentration was broken when I heard the front door of the office open. I looked longingly at my trousers, but they were too far away to be retrieved. A moment later one of the younger partners, a family member, appeared at my door. We exchanged greetings. All seemed well, but before I could stop him, he then turned and called, “Come here, dear. I want you to meet the young man in the office I’ve been telling you about.” In response to his introduction, I half rose from my chair in recognition and then sat down. After we conversed briefly, he said to his wife and me, “Continue talking while I look at something on my desk.” She and I carried on an animated conversation to the point where I was inwardly congratulating myself on such sophistication. Then she said, “It looks like he’s going to take all night. I think I’ll sit down.” She headed for a chair behind the line of sight of my desk. I could not think of any suitable way to divert her. All my feigned sophistication disappeared and I threw up my hands like a traffic officer and said, “Stop.” She looked startled. Then I confessed, “I don’t have my pants on.” She recoiled to the door as if shot out of a cannon. We carried on a chilly conversation until, what seemed ages later, her husband returned. Two days after this, the firm’s very nice, but very proper, office and personnel manager asked me in hushed tones, “Is it true what I’ve heard?” I said, “Yes.” Her only response was a deep sigh. That is all I ever heard from anybody about the incident. About two months after this, I received through an emissary a warm invitation to visit again with Mr. Sutherland and Mr. Tuttle. I did and soon thereafter left Macon. I still have great admiration for the firm and strong ties with Macon. Plus, I have a useful learning experience: keep your wits about you and don’t be too casual in your dress.

What is of deep concern to me is that we may be getting casual about the ethics of our profession. This is not a reference to a set of rules found in a code book telling us what to do and not to do. Ideally, and in its highest and best sense, the ethics of our profession amounts to a positive moral quality that pervades the profession of law. This positive moral quality justifies the reference to law as an “honored profession” and lawyers being given preferred positions and responsibilities in society. Ethics are a spirit and a culture. It is from this spirit that the codes are drawn.

Is this an unrealistic concept viewing today's practice of law and administration of justice? Of course not. Words of Robert Browning are relevant here. "Ah, but a man's reach should exceed his grasp, or what's a heaven for."² Our ethical standards may not always be met but they should never be lowered.

During my 65 years as a member of the Bar, the standards of the profession have faced many challenges, with many pressures from outside forces. It is disappointing that at times past some substantial segments of the Bar did not perform admirably. Every lawyer in the South was not an Atticus Finch of "To Kill a Mocking Bird," to refer to one blemish of the past. Throughout the nation, we have allowed too many low income people facing serious legal problems to be unrepresented or underrepresented. At times the pressures on the ethics of the Bar and its challenges have been greater, or seemed greater, than at other times. Some of these pressures have required mere adaptation to a growing society and expanding economy. Others have necessitated an examination of ourselves as professionals. Yet, I cannot recall any period in which the practice of law as a self-contained profession has faced the serious challenges that it confronts today.

All of you are familiar with today's rapid movement of non-lawyer organizations into the performance of services formally deemed to be reserved exclusively or largely for lawyers. You have also seen the employment of many able lawyers by non-legal service organizations of various types enabling these organizations to compete with lawyers in the service of clients. At issue are the very structures through which we have traditionally practiced law. This is what Phillip Anderson, then president of the American Bar Association, referred to in 1998 when he appointed the much beleaguered Multidisciplinary Practice Commission ("Commission" or "Simmons Commission"), headed by our good friend and member of the College, Sherwin Simmons. President Anderson stated that they may be "the most important practice issues that our profession will face in its lifetime." The challenge is made more complex because lawyers themselves are a great part of the active forces that have joined in launching these challenges. Before examining our challenges, our question at this time and, indeed, at any time, should be: Is the legal profession prepared to meet great challenges?

As a profession, are we weakened and ill prepared to face such challenges? This is the occasion for the question in my title. Have we become casual with respect to our professional ethics in the tax bar and throughout the practice? Are we carrying on our practice in ways that are incompatible with maintaining the highest and best in the profession. Have we fallen into these ways without ever realizing how we are weakening the moral fiber of our profession? Is it the problems we face or our preparation to face them that should concern us? This calls to mind the words of Shakespeare's Cassius, the lean and hungry one, in commiserating with Brutus: "The fault, dear Brutus, is not in the stars but in ourselves that we are underlings."³ Pogo might say, "We have met the enemy and it is us."

²Robert Browning, *Andrea del Sarto*, 1.97.

³WILLIAM SHAKESPEARE, *JULIUS CAESAR* I, ii, 134.

It seems undeniable that if we allow the pillars supporting our profession's envied position to be weakened, as if by termites, then we cannot rely upon them to support us when, as a profession, we find ourselves most in need. Ask yourself, "Are there termite-like actions and attitudes working their way into the ethical supports of our profession's preferred position? Are they injecting themselves into the practice of tax lawyers?" I fear the correct answer to both questions is, "Yes."

Leading my list of termites is the "bottom line." As law firms grow in size by the hundreds and offices are placed in numerous cities, the bottom line can easily become the one common measure of value. It is a very practical common denominator that all within a firm can recognize. An attractive bottom line helps to keep partners together and to attract associates at increasingly skyrocketing salaries. The danger is that it can move beyond being merely a common denominator and become an uncompromising dominator controlling all of our important decisions. Unswerving dedication to the bottom line is a threat to our ethical standards and can be against the interests of our clients, the public interest, and, in the long run, our own interests.

A prominent hand maiden of the bottom line is "billable hours." Lawyers provide for their clients a mixture of time and talent. Keeping an accurate record of time is essential for fair billing to a client and for analysis by a firm of its own operations. However, firm pressures, competitive conditions among lawyers, and financial stimuli can cause an unconscionable increase in a lawyer's working hours. The dominant pressure can be to build hours rather than to serve clients. Slavish obeisance to high billable hours can become an addiction affecting the individual, the firm, and the profession.

To digress a moment, I have always felt that a young lawyer, genuinely interested in both public service and advancement in the private practice, should share with his or her law firm the burden of the time spent in pro bono activities. This may be too idealistic, but something is taken away if the burden of all of the time is placed on the firm by giving associates full credit against the firm's goal of billable hours for pro bono work. The young lawyer is seeing first-hand the need for the services, but the contribution of the services is entirely by the firm. Some ethical strengthening is lost in the process. It is a bit like being reimbursed for your contribution to United Way. But this imposition of a personal burden on a young lawyer providing pro bono services can be carried too far. At the least, the burden should be a shared. Recently, I read of a national award given to an associate in one of our well known firms for rendering 800 hours of pro bono services during the past year. Great, and well deserved. However, the article went on to say that the associate also piled up 2500 hours of billable time. I was stunned and could not resist this calculation. Assuming a minimum of 200 hours during the year for general administrative matters, with no time for reading and general study of the law, his 2500 billable hours, 800 pro bono hours, and 200 hours for administration would total 3500 hours. This could be achieved by working 10 hours a day, seven days a week, for 350 days, leaving the associate 12 days for a vacation with his wife, perhaps at a rest

home. Here billable hours and pro bono time got out of hand. I am sure the firm was pleased with the associate's dedication to public service, but was caught unaware of the totality of what he was doing. Much more of this and the U.N. may launch an inquiry into sweat-shop conditions in United States law firms.

"Specialization" is another practice within tax firms, and the Bar as a whole, that can weaken one's grasp of the broad majesty of the law. It is understandable that a lawyer giving all of his or her time to a single relatively narrow field, pressed by reminders of the bottom line and billable hours, will have difficulty in developing an appreciation for the wholeness of the practice of law and the administration of justice. Specialization itself is an established condition in the practice of law today required in the interest of clients and no lessening of its intensity seems possible. The best that can be done to counter-balance specialization is to increase the commendable steps now being taken by the Bar, law firms, and the specialists themselves, to keep specialists attuned to their entire responsibility as members of the legal profession. I should say "*our* entire responsibility" for are we all not specialists?

I have always considered myself somewhat of a generalist, ready to take anything that washed up on the beach. However, experience has introduced some modesty into the self-evaluation of my own talents. Three or four years ago, I volunteered to take a case for the Atlanta Legal Aid Society involving the extended confinement of a 52 year old marginally mentally retarded man in a State mental hospital. After all, I had been the president of the Georgia Mental Health Association, and expected to seek relief under Georgia's Bill of Rights for the Mentally Ill that one of my law partners and I drafted 30 years earlier. I thought I knew the law, but soon found I needed assistance from a true specialist on the staff of the Atlanta Legal Aid Society to understand the factual nuances of my client's situation. I needed the assistance of a specialist in talking to the doctors and others on whom we would have to depend for willing or unwilling testimony as to my client's ability to live in a controlled environment outside an institution and then in finding such a location. As we were preparing to file suit, settlement was reached and my client was placed in the location we recommended. It was an enlightening and humbling experience for me. It convinced me that I was not the generalist I had thought myself to be. I thanked my stars for the privilege of working with this specialist for whom I developed great admiration. Incidentally, not long after this, this specialist and one of my partners, working with others, prevailed in a landmark case in the United States Supreme Court raising many of the same issues raised in my case.

Furthermore, how can a young specialist lawyer, honestly recording 2200 or more chargeable hours a year on client matters, develop a satisfying home life and relationships with friends, and exercise for good health? How can he give any meaningful part of his time to broad study of the law, much less pro bono representation of the poor or other public causes for which lawyers are so well prepared? Pressed by income incentives and peer competition to do more, how can the young specialist be expected to gain the broadening experience of working to relieve the plight of a low income, uneducated head of a one parent family

entangled in the meshes of law she doesn't understand and with which she cannot cope? Can this lawyer know the deep satisfaction of working an unlimited number of hours overcoming great odds to save a life that should not be taken by the State? I witnessed this in my own office a short time ago in a habeas corpus case taken to the Supreme Court of Georgia four times, and three times to a jury before a fourth jury agreed upon a lesser penalty than death. The satisfaction of this victory will be a stimulant to these lawyers for the rest of their lives. On the other hand, there may not always be a victory to celebrate. A lawyer can have seared upon the mind the experience of having a client executed when, under law, the life should not have been taken. This happened to me in the fourth and fifth year of my practice. For the past 60 years, no case has kept me awake at night as much as this, wondering what else I might have done to save the life of this young man. These are not the sort of experiences that can be put on the scales and weighed against billable hours and the bottom line.

To continue, another set of termites eating at the supports of our ethical standards is that range of activities we call "marketing." Marketing is a useful term but has dangerous implications. Classically, a market is for tradesmen, not professionals. The market is not governed by the finely tuned principles of the legal profession. Caveat emptor is not an acceptable guide for relations with our clients. A threat to our profession is that, as we feel compelled to do more and more self-promotion, we may be tempted to adopt standards of the commercial environment into which we are projecting ourselves. On the other hand, fair and honest self-promotion carried on in a way consistent with professionalism can assist members of the public in making informed choices.

It contributes something to the moral fiber of a lawyer and, beyond this, to the legal profession for every lawyer, whether in private practice, government service, corporate law, or other legal pursuit—including teaching law, to give some significant part of his or her time and interest to public service. In private practice the bottom line, billable hours, specialization, and marketing create contrary pressures that must be overcome.

The American Bar, state and local associations and their leaders, together with many law firms, recognize the danger of a general decline in a lawyer's sense of public responsibility and have sought to offset it. The Section of Taxation, and its leaders, have played a prominent part in this, supplemented by the organized activities of the American College of Tax Counsel. They have contributed much to improving the tax laws and procedures in the public interest. Of late, special note should be taken of the assistance given to the Congress, the Treasury Department, and the Internal Revenue Service to bring under control the use of abusive tax shelters by corporations and others in the 1990's.

Some lawyers forgot the lesson learned from the abusive tax shelter craze of the early 1980's. The lesson is that if it has no real business purpose and cannot pass the "smell test," have nothing to do with it. These lawyers' forgotten lesson weakens confidence in our broad ethical standards. Furthermore, there are a number of troubling ethical questions involved in some of the tax savings plans marketed for a fee by accounting firms and others to purchasers. For example,

the deal may require a confidentiality agreement that would prohibit the purchaser and the purchaser's lawyer from ever disclosing the package of ideas to other persons, including clients represented by the lawyer whom the plan might benefit. If we assume that the tax savings package consists of interpretations and applications of the tax laws, does it create a conflict of interest for a lawyer to agree on behalf of client A not to disclose the plan to clients B, C, and D whom it would benefit? If nothing else, it would certainly put the lawyer in a most uncomfortable position if his advice to clients B, C, and D, included tax planning. In an advisory opinion issued in October, 2000, the Illinois State Bar Association concluded that the signing of such a confidentiality agreement could create a conflict of interest and violate the Illinois rules of professional conduct. This is only a single illustration of the pitfalls that could result from the attempt to unify the practice of law and the business of accounting. We must assume that the participating accounting firms do not see a conflict of interest in this practice, while thoughtful lawyers find its ethical aspects very troubling.

As we view the present scene, how can there be threats to the Bar of the magnitude stated by Phil Anderson? The demand for legal services is at an all time high. Lawyers in private practice in this country are generally busier and earning more than ever before. Doesn't this indicate client satisfaction? So, how can there be threats to the Bar such as those pictured by Phil Anderson? The problem has been very plainly set forth in numerous bar association hearings and reports, including specifically the hearings held and the two reports issued by the Commission on Multidisciplinary Practice. Although the Commission's recommendations were not accepted by the ABA House of Delegates, the full hearings conducted by the Commission and its reports greatly advanced the Bar's understanding of the subject. Among other studies of MDP is that of the New York State Bar Association. The New York Bar, with four other state bar associations, took the lead in sponsoring a resolution which was adopted by the ABA House of Delegates in place of a modified proposal of the Simmons Commission. The critical difference between the Commission proposal and the proposal approved by the House of Delegates is that the former would sanction partnerships with other professional groups, and the approved proposal would recognize alliances, but not partnerships. Control of lawyers and legal decisions is basic, but I fear this will ultimately be determined more by the economics of the relationship than by a written agreement. To those of you who have spent untold hours studying and debating these questions, I apologize for my oversimplification of the issues.

The Simmons Commission has been terminated. Other segments of the ABA will continue to study the question. Normally, this is a slow process. None of these bar association actions will cause the problems to go away or put them in suspense in the rest of the economy until the Bar formulates its recommendations.

All of the Bar related reports and hearings on this subject have demonstrated beyond question that non-legal organizations have moved into the active marketing of legal services, or those which we lawyers had considered legal services,

and have relied heavily upon lawyers in their employ to service clients. Predominant in this have been the major accounting firms. Judging by worldwide trends, one must conclude that the climate of major tax and corporate practice in the United States, along with our legal structures and standards of professionalism, is seriously threatened.

Let me emphasize, so that there can be no doubt about it, this is not a criticism of the major accounting firms who have made breathtaking advances in the use of lawyers in providing services to their clients. I know of no obligation that accountants have to protect the legal profession or the structures within which law firms practice law. It serves no good purpose for lawyers to deplore what has occurred in the past, except as a basis for judging the future. Our concern should be directed to future trends.

Within the remaining time that I have, let me use a few examples to underscore the reality of the problems realized by Phil Anderson and the Simmons Commission.

Last year our largest and financially most successful law firm in Atlanta was shocked by the announcement of two leaders in its tax practice in Atlanta and Washington that they were leaving, with a few other lawyers in the firm, to start a law firm in conjunction with one of the "Big 5" accounting firms to be known as McKee Nelson, Ernst and Young. The operating agreement between the two firms, or the two parts of the one firm, has not been made public, and I know of no obligation that it be made public. However, a few things were disclosed. The operating expenses and earnings of the law firm are, in effect, underwritten for a five-year period by Ernst and Young. Although Messrs. Nelson and McKee are noted tax lawyers, it is intended that the practice of the new firm extend into corporate law, litigation, and other fields. Will this be challenged on the grounds that it constitutes, in effect, participation by Ernst and Young in the unauthorized practice of law? I understand that representatives of Ernst and Young have indicated they would welcome such challenges and intend to "push the envelope" as far as they can. The objective apparently is to operate along the lines of the so-called "European Model" where law, accounting, and consulting are organized as several divisions under one roof with unified control. Although the details of the announced alliance between the old line tax firm of Miller & Chevalier and PricewaterhouseCoopers have not been made public, the alliance appears to come within the permissible guidelines approved by the House of Delegates. A lawyer acquainted with the agreement described it as being a glorified referral service. However, it would take one of the great optimists of the 21st Century to forecast that the Big 5 accounting giants will be content to stop with a mere alliance or even with multi-disciplinary practice in which lawyers retain the control prescribed by the Simmons Commission. I fear these are merely way-stations to the more unified organization provided by the European Model.

Collectively, the major accounting firms already have thousands of lawyers in their employ. Use of the European Model to assemble them in one operating division of a single firm might suit a firm's interests very well. We can picture

their acquisition, not of just one or a few lawyers at a time, but of large full service law firms. In fact, there is word that one of the largest of the Big 5 international accounting firms, with several thousand lawyers in its employ worldwide, is now looking for a large, well-established full service law firm. Tax practice had been the first objective in this wide-spread invasion into what has been considered the practice of law but the challenge is by no means to the tax bar alone. From the standpoint of the accounting profession, why not? If there is to be an answer to that, it must come from the legal profession.

There are many lawyers, including some of us, who would not disapprove of Multidisciplinary Practice, *provided* the important principles of legal ethics could be preserved. The proviso may be a telling concession. It may be comparable to saying oil and water can be combined, provided they make a good mix. There are important standards of each profession that seem to me to be incompatible with each other, or, at the least, difficult to merge.

Essential tenets in a lawyer's relationship with a client include COMMITMENT and CONFIDENTIALITY. On the other hand, an accountant is often referred to as a *public* accountant. In performing the basic function of auditing, the accountant's uncompromisable requirement is to disclose significant adverse information. The primary duty is to report all material information to lenders, stockholders, investors, managers, directors, and, for public companies, to the public. The accountant must be INDEPENDENT and not committed to the client. Often the most satisfactory relationship of lawyer and client is based upon a long-time commitment of one to the other. The commitment of the lawyer to the client encompasses LOYALTY. In contrast, to establish independence, the accountant must be wary of any long range relationships with the audit client or any other influence that might tempt an accountant to withhold adverse information. This is admirable, but is located at the opposite pole from the best in a lawyer's relationship with a client.

Imputation, or the attribution of the knowledge of one lawyer to all lawyers in the firm, is another frequently applied rule of legal ethics observed by law firms. The larger the firm the more difficult the application of the rule becomes. With the consent of the clients involved, "chinese walls" or other barriers may sometimes be constructed to assure the clients that information on conflicting matters will not pass between lawyers in the firm representing the two interests. Even with this, the client may not be satisfied that unqualified loyalty in vigorously representing the client may not be affected by the law firm's desire to establish a good relationship with the other client. Avoidance of conflicts of interest requires self-denial and a substantial amount of checking and cross-checking in any law firm, and the larger the firm the more complex the system becomes. The complexity of conflicts of interest would be compounded in the combining of a law firm and an accounting firm. If you add to the accounting firm a large consulting service, where many of the participants are not trained in the ethics of either the law or accounting professions, maintaining regard for the ethical principles of both law and accounting seems unattainable as a practical matter.

Putting all this together, it is understandable that many lawyers, including a

majority in the House of Delegates, feel that in this instance oil and water do not mix. However, while the lawyers are engaged in study and deliberation, the accounting firms are moving into the legal domain with increasing speed. Where can lawyers and their bar associations look for a savior to rescue them from these inroads? What are the possibilities?

Lawyers should observe carefully what has been going on between the major accounting firms and the Securities and Exchange Commission (SEC). In a surprisingly frank address last September, the then Chairman of the Securities and Exchange Commission, Arthur Levitt, criticized the major accounting firms for neglecting their responsibility to maintain complete independence in conducting and reporting upon an audit, unaffected by other interests of the auditing firm. He feared that independence of the auditor to report information adverse to the audit client was being compromised. He pointed out that other financial pursuits have reduced revenue from auditing to 33% of total revenue and that auditing is being “dwarfed by the more lucrative consulting business.” He went on to say that for some “the audit responsibility becomes more a business line used to get a foot in the door for other, more profitable services.” Commissioner Levitt referred to public hearings that the SEC was holding. He recognized the accounting profession “must evolve in lockstep with a more innovative, globalized and technology driven marketplace.” He complained, however, that “some would rather focus on parochial, short-sighted interests rather than long term solutions.” He castigated the AICPA and some major accounting firms for blocking efforts to seek solutions that would preserve the independence of the audit and protect the public interest.

It is noteworthy that Chairman Levitt has also stated categorically that advocacy, among other things, is incompatible with auditing. Tax lawyers look upon the representation of clients in controversial tax cases as often requiring advocacy, both at the administrative levels and in litigation, sometimes on issues of law, sometimes on questions of fact, and often on both. These cases require a commitment to representation over a long period of time and may involve large amounts of money. Nevertheless, after hearing strong presentations from the accounting profession, the SEC effectively is excluding tax practice from its questioning of a mix of auditing and advocacy. And well it should. Any other course by the SEC could raise the near irresolvable question when a tax issue is dependent upon a mere presentation of facts supporting a position taken in a tax return prepared by the auditor, and when there are involved issues of law and fact requiring advocacy. Furthermore, lawyers with the accounting firms have long been active in representing the interests of their clients at the IRS and Treasury levels and in the Congress. They have also been strong contributors to the work of the Tax Section of the ABA. Their right to engage in tax practice has been recognized by the Treasury and the Tax Court. Regardless of the purity of the situation, we have all moved too far down that path to now turn back.

The oil and water relationship of auditing and consulting is by no means a newly discovered problem for the accounting firms. The first Public Board of Review of Arthur Andersen & Co., on which I served for five years during the

last half of the 1970's, saw this as one of the greatest problems affecting partner-to-partner and firm-to-client relationships facing the firm. Difficult adjustments have been made by the accounting firms, but the problem has not gone away. My guess is that there will have to be a wide-scale spin-off or other separation of auditing from consulting. This can produce its own problems which the experiences of Arthur Andersen demonstrate.

Why should we expect the mix of law and auditing to have less impact on an auditor's independence than consulting and auditing? The Simmons Commission anticipated some of the potential conflicts by providing in its amended report that the legal segment of an MDP should not represent clients audited by the firm. In any event, lawyers should not depend upon the SEC or the guidelines of the accounting profession to preserve the ethics of the legal profession. We need to look beyond this.

These experiences of members of the accounting profession can be instructive to law firms contemplating some form of a permanent relationship with accounting firms. I fear that their adjustments to the new relationships may be no less difficult as the major accounting firms move aggressively toward the European Model.

What of the prohibitions against the unauthorized practice of law and the power of the courts to enforce them? Can this be our czar defending legal ethics as the SEC Chairman would defend the integrity of auditing? Some of you may have heard the Lecture on Ethics and Professional Responsibility given last year by Professor Thomas D. Morgan at the meeting of the Fellows of the American Bar Foundation in Dallas, Texas. The principal thrust of Professor Morgan's address was that the legal profession should not expect to rely upon the courts for a defense against changes occurring in the public interest. Professor Morgan pointed to cases where the U.S. Supreme Court declared that the determination of the question whether the changes at issue served the public interest must be answered by the public in the marketplace and not by bar committees or courts. Professor Morgan, a recognized authority in the field of legal ethics and professionalism, did provide these words of encouragement: "Lawyers' primary concerns should be values such as integrity, loyalty, competence and confidentiality. These values have not and will not go out of date." Charles Wolfram, acting dean at the law school of Cornell University, and also a student of legal ethics, put it rather bluntly in stating, the "ABA ought to get out of the way and let the market determine whether it wants MDP, and what kind it wants." I do not suggest that the Bar acquiesce in these discouraging forecasts. On the other hand, it would be shortsighted to ignore the possibility that the Bar may not be upheld by the courts in its efforts to stop these encroachments into the traditional practice of law.

If committees on unauthorized practice and the courts cannot be relied upon by the Bar as its main line of defense, where then can we lawyers go to protect first our ethical principles and, secondarily, our legal structures? The blunt answer is: "Go to the place where legal services are sold. Make our case there." In this arena any concern about the bottom line of practicing lawyers is wholly

irrelevant. If it had any impact at all, it could well be a prejudicial one. During the revolutionary changes occurring in the medical field, how much attention has been given to preserving the earnings of the private practitioners at levels to which they felt entitled? You know the answer: "None whatsoever." Lawyers can expect no more. Nor can lawyers expect to have any sympathy or support in resistance to conditions brought about by breathtaking changes in the needs of clients seeking to operate in today's global economy.

Lawyers are the foremost advocates in our society. This was demonstrated to the entire nation time and time again in the recent arguments over the proper course to take in appraising the Florida votes for the presidency. Why, then, should lawyers not be looked to as advocates of their own cause, not in any court, but in the arena where the final decisions will be made? Where is that? It is the marketplace where choices are made about when to purchase legal services and from whom.

Lawyers should not remain silent when, in their view, others seek to misdirect business leadership by promoting the value of so-called "one stop shopping," for law, accounting, consulting, financial advice, and other services. Lawyers, individually and through their bar associations, should use their skills as advocates to promote among clients, and potential clients, the irreplaceable value to the client of confidentiality, commitment to vigorous representation, loyalty, competence, and freedom from conflicts of interests. The aim should be to protect the interests of clients by informing them. I do not know what impact continued promotional efforts of this sort would have, but, if these principles have as much value to our clients as we tell ourselves they have, we should make the effort even if it fails. Should we not feel toward this like the Roman mother who told her son, "Come back from battle with your shield . . . or on it." In other words, "Don't drop your shield and run away from conflict." Lawyers, as advocates in the interests of our clients, should do as much. This is not the path to committees and courts, but it may be the ultimate road to success.