

Comment

Criticism and Legal Analysis

hearsay

What, Before Dialing 911?

☪ If I shot somebody, Jim Collins would be the first person I'd call.

— S.F. Superior Court Judge Anne Bouliane, delivering the highest praise for the former cop turned criminal defender

Why Are We Not Surprised?

☪ That's so mangled I can't even comment.

— Deputy AG Morris Beatus, reacting to DA Terence Hallinan's claim that courts have found that challenger William Fazio concealed exculpatory evidence from the defense in a homicide case

The First Thing We Do, Let's Control All the Lawyers!

☪ Congress said it would be ... your job to run this litigation. Now, Mr. Lerach may not like that, but that's the — that's what Congress said. That's why we're having this whole hearing, to find somebody who can control the lawyers.

— U.S. District Judge William Alsup, explaining the Private Securities Litigation Reform Act to William Lerach client Raymond Moore

The Accountants Are Coming, The Accountants Are Coming!

If you can't beat 'em, regulate 'em

By CAROL M. LANGFORD and RICHARD ZITRIN

Big Five accounting firm Ernst & Young has launched the first direct multidisciplinary missile at the Good Ship ABA with its announcement of plans to open a Washington, D.C., law firm called McKee, Nelson, Ernst & Young.

This is by no means the first effort by accounting firms to poach on legal territory. The Big Five have been gobbling up lawyers for years; and several months ago, KPMG and Morrison & Foerster formally created a strategic alliance. But it's the first time that an accounting firm has unmasked its ambitions. For while Ernst & Young claims its plan is just another strategic alliance, it is directly financing the law firm's launch. It claims it's not actually sharing profits, but Ernst & Young is hardly doing this out of pro bono spirit. And there's no getting around that firm name.

That Ernst & Young has become so emboldened should come as no surprise to a legal community that has simultaneously created the broadest possible definition of the unauthorized practice of law while fostering lawyers' ancillary businesses and repeatedly failing to enforce the UPL rules except when it's convenient. The legal establishment has long been in denial about the reality that accountants give legal advice. Case law makes semantic distinctions in order to allow accountants to do what they do, and the organized bar has often been complicit by covering in fear when it has had the opportunity to enforce UPL rules on accountants in the past.

Let's face it: The camel has had its nose under the law tent for years, and now it wants to sleep there. And the question lawyers should be asking is not whether the camel will enter the tent, but whether it can act as a well-behaved guest.

Given the difference in their core values, lawyers and accountants frankly make strange bedfellows. A lawyer's duty of confidentiality to a client is plainly inconsistent with an accountant's performing an

audit of that same client. Accountants use what they call firewalls to waive off any conflict-of-interest problems behind an allegedly impenetrable wall. Attorneys know that under their ethical rules, it's not that easy. They have nothing more than flimsy and problematic ethical screens — and even these are only permitted in just a few states or under limited circumstances. Even when screening is allowed, lawyers

still must fulfill their ethical and fiduciary duties to each client. Finally, an accounting firm's broad self-

what the House of Delegates did not: The MDP train has left the station. And now, as we sit and wait, we can hear the final boarding call for the enforcement train. If that train also leaves, it may be too late not only for lawyers who want to stop multidisciplinary practices, but for those of us who'd be satisfied just to regulate it.

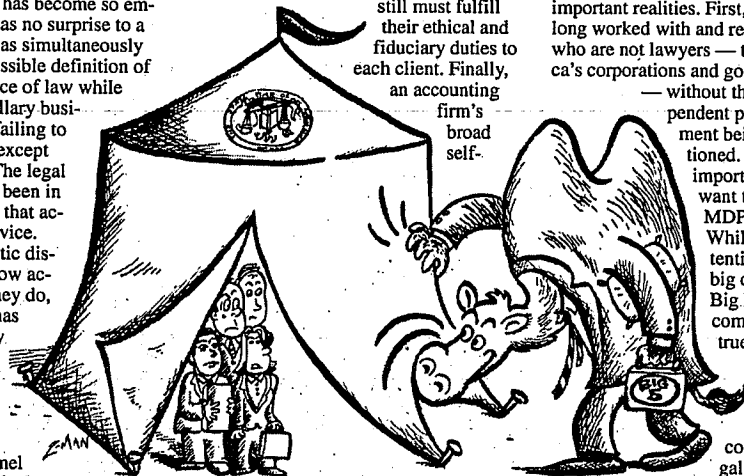
In addition to those chugging trains, the MDP Commission recognized two other important realities. First, lawyers have long worked with and reported to superiors who are not lawyers — throughout America's corporations and government agencies — without the lawyers' independent professional judgment being seriously questioned. Second and more important, consumers want the services that MDPs can provide.

While the focus of attention has been on big corporations using Big Five/law firm combos, the same is true at the other end of the consumer spectrum. Advocates of low- and middle-income delivery of legal services have long talked about unbundling, which is really nothing more than MDPs for the less well-to-do.

Given these realities, the MDP Commission's derailed report got a lot of things right: Regulate lawyers who work in MDPs by requiring that (1) they maintain their professional independence of judgment at all times; (2) both attorney-client confidentiality and the privilege should be fully protected; and (3) all clients of an MDP should be treated as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm.

See LANGFORD/ZITRIN page 7

Carol M. Langford and Richard Zitrin are in private practice in the San Francisco Bay Area and are co-authors of *The Moral Compass of the American Lawyer*, published this spring by Balantine Books. Both teach legal ethics at the University of San Francisco and Hastings College of the Law.



designation as a consultant — while insisting on the semantic distinction that its consulting does not constitute legal services — often offends lawyers who provide the same kind of advice — but call it legal.

Still, opposites attract. So McKee, Nelson, Ernst & Young may end up like a bad first marriage — in divorce court. But a marriage it is, and neither our state bars nor the American Bar Association can afford to ignore it. In August, the ABA House of Delegates tabled a decision on multidisciplinary practices, despite an MDP Commission that apparently appreciated the importance of acting quickly and presented a report to the ABA in near-record time.

The commission seemed to recognize

Comment

SCHELLHASE: Chainsaw

Continued from page 5

delighted to be allowed by Dunlap to test his theories in practice. The third was put on the board by Mike Price, the company's largest stockholder, to look after the interests of Price and the holders of his Mutual Series funds, which were not always congruent with the interests of all the stockholders.

Sunbeam's general counsel, David Fannin, gets mixed reviews from Byrne. Clearly well-intentioned and long-suffer-

put on his executives: Facing bet-the-company judgment calls about public disclosure matters for Sunbeam, Fannin diverts a critical afternoon to negotiate a dispute with a country club on Dunlap's behalf.

The book contains other lessons about corporate issues that we face every day in the Valley. There are stories about the fiduciary duty owed to stockholders versus the duties of the company to its employees, customers and communities.

And there are lessons about personal principle versus corporate survival. One of the few heroes of the book is an internal auditor who finally resigns, with neither a cushy job nor a fancy severance package awaiting her, when she cannot stomach the illegal accounting practices she has detected and the CFO's unwillingness to rectify them.

Byrne leaves the reader to speculate whether the various conflicts of interest of the lawyers on the board clouded their judgment. Each, it seems, had his own agenda.

And then there is the constant conflict between long-term goals and short-term performance, highlighted by a CFO who refused to authorize work related to Year 2000 issues — because he knew he wouldn't be at Sunbeam when they came a cropper — and a securities analyst who thinks that long-term "investing" is about a year and a half.

As the screws were coming loose at Sunbeam and his attorneys and bankers were forcing him to preannounce poor quarterly results, Dunlap began screaming, "Fuck the lawyers!" in the lobby of New York's Palace Hotel. His general counsel was there, along with his CFO.

This should have been a watershed moment for any employee. But unfortunately it was nothing more than another day working for Chainsaw. ■

ing, he tries to mitigate some of Chainsaw's worst behavior. Still, his decisions often seem influenced by the fat pay package Dunlap wins for him from the board. And he is clearly not immune to the intense pressure the often irrational Dunlap

LANGFORD/ZITRIN: MDPs

Continued from page 4

This language, from paragraph 8 of its Recommendations, is perhaps the strongest stand taken by the commission.

Yet the commission's relatively realistic proposal was still short on reality checks. First, it lacked specific language to protect confidentiality and require lawyers to bind their non-lawyer colleagues in the same way that law firms do now with non-lawyer staff.

The commission's soft language — lawyers should be required to make reasonable efforts to ensure that the MDP has in effect measures to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer — simply doesn't cut it. Reasonable efforts aren't good enough; attorneys can and should be required to get this job done, period, or suffer the consequences.

Second, the commission blithely states that non-lawyers in an MDP, or otherwise, should not be permitted to deliver legal services. But saying it doesn't make it so. You can't count on accountants to be accountable merely by telling them to behave — particularly when they've been giving legal advice for years.

Given the difference in their core values, lawyers and accountants frankly make strange bedfellows.

So let's admit that the train has left the station and get our bars to throw their efforts behind regulating lawyers who work with MDPs, unbundled legal services, and other non-lawyer entities. There's still enough time — barely — to regulate MDPs by closely regulating the lawyers within them, before those attorneys start calling themselves accountants or agents — anything but lawyers — and thus try to cast themselves beyond the regulation of the organized bar. ■

THE REAL DEC

LEGAL SE

PARAL

PROFESSION

COURT R

Finally a quarterly exclusively for you *California Law Week*

A FIRST FOR

California Legal Pro will world of legal secrets administrative staffers v ticking. Our premiere iss legal secretaries, their cc useful new technologies in the workplace. Fut salaries, personalities, p and more.

Bonus Distribution:

- Legal Secretaries Inc
- SFALA (San Francisco Assistants)
- NFPA (National Fed Association)
- BASF (Bar Associatic)
- AALL (American As)
- SFPA (San Francisco)

Space Reservation Material Deadline

Please
Gina P

415.7.
for more :

Subscribe to
The Recorder
415.749.5406

www.callaw.com