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Senior Lawyer News

[Editor's Note: *Mortimer M. Caplin is a distinguished member of the Senior Lawyers Conference of the Virginia State Bar. He is a member of the law firm of Caplin & Drysdale and is Professor Emeritus of the University of Virginia School of Law. His remarks on "The State of Lawyering" were made on April 12, 2001 at the University of Virginia School of Law, on the occasion of his being presented The Thomas Jefferson Foundation Medal in Law, the University of Virginia's highest honor. A tribute to Mortimer Caplin appears in the Congressional Record of Monday, July 16, 2001.]*

The Thomas Jefferson Memorial Foundation Medal in Law

University of Virginia School of Law,

Thursday, April 12, 2001 (3:30 p.m.)

Mortimer M. Caplin

"The State of Lawyering"

Let me first say what a treat it is to be back at the Law School again.

And what a pleasure I experience every time I visit the Law Grounds—the rare sense of tradition, the remarkably tasteful design, the convenience and usability for students, the simple beauty.

Years ago when I held seminars here at Withers-Brown Hall, it seems that my room assignments were in venues much smaller -- lighting dimmer and, of course, ceilings much lower. My how things have changed!

My very first contact with the Law School was at Clark Hall, just off the Lawn, when I began as a law student in 1937. Clark, famous for its daring murals, was the Law School's home for over 40 years--from 1932, newly constructed, until our 1974 move to the North Grounds.

Now we find the Law School comfortably and fittingly ensconced in these handsome Law Grounds-- for which there is no equal. And I can say that after having visited just about every leading law school in the country.

At our dedication ceremonies in November 1997, Chief Justice William H. Rehnquist, Stanford Law School Class of 1952, highly praised the Law School-- saying we could well take pride in our national reputation among our "competitors" and in our number one rank among public law schools. "There is something more to be said for the students who come out of the University of Virginia Law School," he added, "in my experience the best of them combine first-rate legal skills with a well-rounded outlook on life in a way which is second to none."

How true that still is today.

I.

But Justice Rehnquist's kudos were not given without an exceedingly candid evaluation and criticism of the way law is being both practiced and taught nationwide. Spoken only 3 _ years ago, his criticisms are very much at one with what we've heard from bench and bar for the past decade right up to the present. They address:

> --Sheer bigness, with heavy emphasis on "billable hours" and making money.
>
> --Practice of law tilting more from a profession to a business. (I believe it was Justice Oliver Wendell Holmes who said that all law--he could have said "all life"--"depends upon differences of degree.")
>
> --Poor communications and impersonal relations.
>
> --Reduced mentoring and training.
>
> --Increased mobility and weakening of loyalties.
>
> --Decline in civility, particularly among litigators.
>
> --Lessened focus on public service and pro bono publico commitments.
>
> --Large pockets of dissatisfaction among practicing lawyers.

Finally, as pointed to again and again by Chief Judge Harry T. Edwards, United States Court of Appeals for the District of Columbia, there is the continuing "disjunction" between legal education and the legal profession.

In this vein, Dean Bob Scott, when announcing his return to full-time teaching, made a particularly incisive suggestion to his successor:

> "One of the issues in law that the new dean should pay attention to is the increasing separation between practicing and academic lawyers ... A leading law school should have an obligation to understand that situation and bridge the gap [between academic law and how it is actually practiced]."

Dean Scott, we all know, has been the driving force behind the Law School's highly regarded Principles and Practice seminars, each team-taught by a practicing lawyer and a law

professor. His views on teaching tie in closely with this Law School's long-held reputation of placing emphasis on preparing students for the practice of the profession.

The late Professor John Ritchie, in his history of the Law School, The First Hundred Years, noted that "a hallmark of legal education in the University of Virginia since its inception [1826] had been concurrent education in legal theory and practical know-how." This was true when I was a student here; and it was the extra spark that gave me a decided leg up when I began practice in New York City in tandem with a cadre of very bright Yale, Harvard and Columbia graduates.

I might also add: it would be hard at that time to find anyone graduating from this Law School without a well-developed ethic of public service--right in line with the deeply established Jeffersonian tradition.

II.

Today, the organized bar finds itself in the midst of a high degree of introspection and soul-searching on the status and welfare of the legal profession.

Two current developments are the primary cause: ancillary business activities and multidisciplinary practice.

The first-- "ancillary business activities" or "law-related services"--refers to the growing involvement of law firms in activities related to law practice, but not technically treated as the practice of law. Sometimes organized as separate businesses or as subsidiaries, these arrangements allow nonlawyers to own part or even control the enterprise, share profits and join lawyers in providing these nonlegal services to "customers" who at times may also be the lawyers' clients.

Briskly being advertised today, for example, are such enticing offerings as: trust management and investment services; real estate investment and insurance; health care consulting; public relations and lobbying; translation and private investigations -- one even touting a former FBI agent as the principal in charge. The law firm of Bingham Dana has gone one step further merging its money-management practice with an investment house, Legg Mason. The tune of the day seems to be: "We've got everything!"

Over the years, many objections had been raised in the American Bar Association House of Delegates. But, finally in 1994, after a series of flip-flops, the ABA amended its Model Rules of Professional Conduct (Rule 5.7) to allow "law-related services," so long as the lawyers took "reasonable measures" to make clear to customers -- "purchasers" or "users"--that they were not receiving legal services nor were they getting any of the protections of the client-lawyer relationship. On the other hand, if a customer happens to be an existing client, the lawyers may find themselves still subject to all ethical requirements.

As can be seen, these activities tend to place law firms side-by-side with others in the commercial world--with lines often being blurred between law and business, and the public at times left uncertain on what lawyers really are, and what the differences are.

III.

Of even greater significance to the profession is the second development: "multidisciplinary practice" (MDP)--described as "the most important issue facing the legal profession in the past 100 years."

Involved here is a sustained campaign to allow lawyers and nonlawyers to join together in partnerships, provide mixed professional services and share in the resulting fees. This is not ethically allowed today-- at least not in the form of total business integration-- for the ABA Model Rules, the template for state ethical rules, flatly prohibit lawyers from (a) maintaining partnerships with nonlawyers where law practice is included, (b) sharing fees with nonlawyers, or (c) permitting nonlawyers to supervise or control their professional judgment. (Model Rule 5.4.) These prohibitions are strongly defended as serving the best interests of the public and the profession--protecting the public against inadequate or improperly focused representation. Critics, in contrast, loudly cry that this is simply "economic protectionism."

Nevertheless, intense efforts are in high gear today to change these ABA model rules, led primarily by the Big Five accounting firms--Arthur Andersen, Deloitte & Touche, Ernst & Young, KPMG and PricewaterhouseCoopers--powerful organizations with tens of thousands of employees, offices throughout the world and possessing huge resources.

Ever on the alert to expand markets and attain larger market shares, these firms continue on the lookout for law associates, law partners and even entire law firms. They flatly maintain that their lawyers--at least in the United States--rather than practicing law, are merely offering "consulting services," outside the ambit of lawyers' professional conduct rules or bar discipline. Yet, the accounting firms' ultimate aim is quite clear: to form dual-practice, "full service" partnerships, working together as a team to provide "a seamless web of services"--accounting, consulting, law, you name it. One-stop-shopping, if you will, supplying all the products you need!

Not that the accountants are alone in this effort. For within the bar itself, there are parallel forces fully supporting removal of the ethical barriers. For them, the competitive and commercial advantages of such multifaceted marketing are obvious. Too late, they say, to resist the change: "The horse is out of the barn"; many forms of MDPs already exist, at home and abroad.

In sharp opposition, though, is another body of determined lawyers who completely back the existing bans, stoutly manning the barricades. They regard our profession as unique, "indispensable to the functioning of civilized society," and take special pride in being lawyers.

They harken back to our history, our traditions, our training--our special responsibilities relating to the proper functioning of government, upholding the rule of law and providing service to the community.

As "officers of the court," they emphasize, we are committed to strengthening the judicial process, to assure that it is working effectively and that access is available to all our citizens.

Of similar importance are our traditions of higher ethical and fiduciary conduct, integrity, our pro bono commitments and continuing concern for the public interest--our profession's "spirit of public service."

Will all this be eroded, watered down, if lawyers and law firms are combined in partnership with

other professions?

What about the differences in our rules on confidentiality and lawyer-client privilege, conflicts of interest and client loyalty?

And what about "independence of professional judgment"? What happens when nonlawyer partners play leading roles in firm management and firm policy--bottom-line responsibilities; and when at stake is the retention of wealthy clients, with major businesses and the source of huge fees?

Some point to lawyers already practicing in settings where they have no ownership and the supervisors at the top are nonlawyers--for example, corporate in-house law departments, government law offices, prepaid legal services, legal aid organizations. The differences in these analogies are obvious. Further, the ABA Model Rules oblige these organizations to structure their internal relationships so that the lawyers' exercise of independent judgment on behalf of their client is without restriction.

In sum, all of these issues relate to core values–core principles, if you will-- seen as marking the difference between being a member of the bar and a member of another profession: competence, independence of professional judgment, protection of confidential client information, loyalty to the client through avoidance of conflicts of interest, and pro bono publico obligations--all reaffirmed recently in probing studies by the American Law Institute in its Restatement of Law Governing Lawyers, and by the ABA Ethics 2000 Commission in its Report on the Evaluation the Model Rules of Professional Conduct.

In this environment, and by resolution specifically upholding these core values, the ABA House of Delegates this past summer brought the MDP debate to an end--at least for the time being. By an overwhelming vote of nearly three to one (314-106), the delegates flatly rejected the recommended MDP paradigm along with the ethical changes proposed by its Commission on Multidisciplinary Practice.

But let us be clear: the MDP issue is not dead--not by a long shot. It has many supporters, and the ball is now in the state bars' court. ABA ethics actions are only recommendations to the individual state bars, each being the arbiter on the rule in its own state, subject only to final approval by its supreme court.

In this regard, mention should be made of the District of Columbia rule--the single jurisdiction in the country which, in a very limited way, already permits nonlawyers to join law partnerships and share in their fees. But here the law firm must be engaged "solely" in the practice of law, with nonlawyer partners allowed to perform professional services only to assist the firm in the representation of its clients. (D.C. Rule 5.4.)

This exception applies to D.C. bar members alone--and only when legal services are provided in the District. But it did catch the eye of the ABA Multidisciplinary Commission. Some minority members supported a variation of the D.C. rule as a way to resolve the controversy: that is, require that "there be a lawyer majority ownership of an MDP (or a supermajority, as any individual state might determine) and that a primary purpose of the MDP be the delivery of legal services."

But for the majority members this was not sufficient, for they quickly saw its inadequacies from

the standpoint of the Big Five. The accounting firms clearly want 100 percent ownership for themselves or at least substantial control; and they prefer unfettered discretion in deciding how much and what kind of work they will conduct--the Securities and Exchange Commission permitting.

They and others are not standing still. Many forms of accountant/lawyer experimentation are under way--far beyond the traditional referrals and coordinated undertakings on behalf of a common client.

Instead, new types of long-term alliances are being structured under flexible non-exclusive contractual arrangements, with efforts made to avoid ethical or unauthorized-practice-of-law questions. For example, PricewaterhouseCoopers (PwC) and Miller & Chevalier have widely publicized their contractual working arrangement on primarily litigation matters. KPMG has created a strategic alliance with certain law firms that are members of "Saltnet," a network of state and local tax lawyers, with Morrison & Foerster and Horwood Marcus & Berk as part of the group.

Most controversial to date is the action of lawyers Bill McKee and Will Nelson who left a large law firm to establish a D.C. law firm under the trade name "McKee Nelson Ernst & Young," to engage in "integrated professional services" with E&Y, a major Big Five accounting firm. The new organization--still identifying itself as an independent law firm, and stating that it is in full compliance with the D.C. ethics rules--announced that inclusion of the "Ernst & Young brand in the firm's name demonstrates our commitment to making a success out of this new venture."

The accounting firm (E&;Y) has agreed to furnish a significant amount of start-up capital to the law firm (McKee Nelson Ernst & Young), to lease it space in a building owned and occupied by E&;Y, and to share E&Y computer and other services, all at reasonable costs to the law firm. Both firms assert that they are separate entities; although some commentators characterize the arrangement as forming "a captive law firm ... a virtual MDP." Others regard it as a first step towards fully integrated multidisciplinary partnerships that include legal services. And with no legal challenge to date, this arrangement is predicted by some to become "a blueprint for other major U.S. accounting and law firms eager to join forces ... ."

Whether this will happen depends in large part on the attitude and actions of the oncoming generation of lawyers--which includes many in this room today.

IV.

As a final matter: Any overview of the state of lawyering needs to take into account the extent of the demand for legal services, the expanding size of law firms, and alternatives open to lawyers mulling over change.

Despite economic uncertainties periodically arising here and in different parts of the world, the demand for legal services has continued to grow at a remarkably rapid pace. The dramatic advances--in computers, software, communications, internet and other technologies--reach far beyond the boundaries of any one country; and we see a gradual globalization of our entire economy. This broad reach has brought corresponding growth of businesses, with increasing and more complex legal problems, and a heightened demand for large numbers of competent and specially-trained lawyers.

In step with this quest for legal talent has come an explosion in the size of law firms. Both within and outside the United States, pressures are being felt to open new offices-- branch out, franchise, merge or affiliate in one form or another. Transatlantic mergers are beginning to take place, too, with the highly publicized amalgamation of New York's Rogers & Wells and London's Clifford Chance.

One law firm is said to have 3,000 lawyers worldwide; two others, more than 2,000; some twelve, over 1,000. And recently reported are two firms aiming at the monstrous number of 5,000 lawyers each. Talk about cloning!

However, as London's The Guardian said some time ago: "Any intelligent fool can make things bigger, more complex, and more violent. It takes a touch of genius--and a lot of courage--to move in the opposite direction."

I always thought it was Thomas Jefferson--one of Virginia's most distinguished lawyers of his time--who put 150 as the absolute, uppermost limit for any aggregation of lawyers. While waiting at the Continental Congress in Annapolis for representatives of two more colonies to ratify the Paris Peace Treaty ending the Revolutionary War (November 1783), Mr. Jefferson, in his Autobiography, bitterly complains of days wasted "on the most unimportant questions":

"If the present Congress errs in too much talking, how can it be otherwise in a body to which the people send 150 lawyers, whose trade is to question everything, yield nothing, & talk by the hour. That 150 lawyers should do business together ought not to be expected."

Note should be taken that, at the Constitutional Convention held not long thereafter, a most extraordinary job was in fact done of it with but a mere 33 lawyers out of the 55 delegates in attendance--far less than Mr. Jefferson's 150 maximum.

Justice Rehnquist, when here, pointed to the many young lawyers disenchanted with modern law practice in firms of hundreds of partners and associates, fleeing after only a short stay what they call the "rat race". Later, Justice Stephen Breyer--strongly stressing appealing alternatives found in full or part time public service--also underscored the continuing concerns about the "big firm 'treadmill': 2,100 or more hours billed to clients each year (that's about 65 or 70 hours in the office each week); work that is too narrow, too tedious, leading to incivility and job dissatisfaction."

Many of the large firms are making sincere efforts to alleviate some of these negative conditions. But young lawyers shouldn't overlook alternative routes available to them offering more flexible working environments-- more time for family, community, professional activities and some form of public service.

Big isn't necessarily beautiful, and many rewards are found in smaller firms and in specialty boutiques like my own. This was brought home to me poignantly in a letter I recently received from a former partner who had moved to another city in a larger setting:

"One good thing that I learned, or at least had reinforced, was the vitality of C&D [Caplin &; Drysdale]--the professionalism, the collegiality, the openness, the emphasis on quality, the ethics, the culture, and so on. I had hoped to transfer some of that vitality to where I went, but that proved to be impossible. I want to be in a position to make that happen."

You can see why I remain an optimist about the practice of law and believe that lawyers can achieve balance in their lifestyles, with meaning and a sense of fulfillment.

To lead the good professional life, one basic need must be satisfied at the outset: that is, attaining the highest possible degree of excellence in what we do; honing sharply all the analytical skills, the critical thinking, the broad fact-gathering techniques, the art of communicating effectively--all that we heard so much about in law school. What great joy to be on the top of your game!

But beyond this, there is so much more we want from our life in the law--far more than technical skills alone. Sir Walter Scott, reaching for this sentiment, once opined: "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."; And, indeed, in our better moments, we lawyers have been called "architects of society."

Mr. Jefferson's entire life mirrored the full scope of that outlook and philosophy; they were the moving force behind his entreaty to members of the bar to "aspire to be a public citizen"--a citizen lawyer with concern about the society in which you live.

I stress here the importance of lawyers giving of their time to serve the public good--whether it be pro bono publico representation, activities with bar groups, writing, teaching, testifying or service to the community. Yes, young lawyers, in their early years, are hard pressed for time to fill this need--as they try to learn their craft, meet office targets, live their lives. But these broader goals--this "spirit of public service"-- must ever be kept in mind, with efforts made continuously to try to satisfy them.

I hope lawyers will remember, too, that they wear two hats--aware always of the need to keep them in proper balance: One, as loyal advocates and counselors of their clients; the other, as responsible citizens in our democratic society--making their voices heard as individuals, and lending their skills to the strengthening of our government and the sound administration of its laws.

As lawyers, we are particularly equipped to contribute to the public life and thought of our times. Only in this way can we reach for Holmes's ideal to "live greatly in the law."

Let me not end, please, on too serious a note. For, I assure you, there are as many moments of pleasurable satisfaction in the law as there are of intense work and heavy responsibility. A good lawyer, after all, is simply a good human being--with specialized knowledge, training and experience, particularly in human behavior.

You might like what an eminent lawyer, Harrison Tweed, once said of his peers:

"I have a high opinion of lawyers ... They are better to work with or play with or fight with or drink with than most other varieties of mankind."

And I think that a pretty fair and honorable note on which to close.

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