

When Lawyers Work For Accounting Firms

BY PROFESSOR LINDA GALLER

Large American accounting firms are following the lead of their counterparts in Europe by expanding the range of services offered to the public into areas traditionally served by law firms. The American Bar Association has created a Commission on Multidisciplinary Practice to study how professional service firms operated by accountants and other nonlawyers are seeking to provide legal services to the public. Although the tax consulting practices of “Big Five” accounting firms are the primary focus of the Commission, other types of legal services are targeted, as well.

Throughout the last decade, Big Five accounting firms have stepped up recruiting efforts directed at both recent law school graduates and experienced attorneys. These firms now employ thousands of lawyers in the United States and worldwide, to conduct practices that are remarkably similar to those conducted by law firms. In addition to rendering tax planning advice, attorneys employed by accounting firms engage in estate planning, litigation support, employee benefits consulting, and business planning. Indeed, it has been reported that Arthur Andersen regularly files United States Tax Court petitions on behalf of its clients and may represent these clients as litigation progresses.

Are They Practicing Law

However, accounting firms claim not to engage in the practice of law. Despite legal training, admission to the bar, work experience in law firms, and the nature of professional services provided, lawyers employed by accounting firms also claim that they do not practice law but rather act as consultants. These claims are thought to liberate these individuals from potentially troubling ethical precepts, including obligations to maintain client confidentiality, conflict of interest rules, and proscriptions against sharing legal fees with nonlawyers. But these claims seem inconsistent with ABA Informal Opinion 328, which states that a lawyer who engages in a second occupation that is law-related and involves some practice of law is held to the standards of the bar in that second occupation.

These claims also are meant to deflect charges of unauthorized practice of law on the part of the accounting firms themselves. However, by expanding their consulting practices beyond traditional areas of tax return preparation and related advice, which are generally thought not to constitute law practice, and by representing clients before the Internal Revenue Service, which is permitted by federal law, accounting firms may well be engaging in the practice of law. The ABA Commission report is expected next summer. The report will provide a basis for discussing and formulating the ABA’s official response or position with respect to the practices of multidisciplinary firms. Although the report will likely recommend changes to the ABA Model Rules, the Commission has not yet reached any conclusions on what these changes ought to be. Model Rules that are most likely to be affected are: 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest), and 5.4 (Professional Independence of a Lawyer). In these areas, ethical rules for lawyers are more stringent than the rules for accountants.

Incompatible Standards On Confidentiality

Model Rule 1.6 prohibits disclosure of information relating to representation of a client, with limited exceptions. The duty of confidentiality generally applies to matters communicated in confidence by the client and to all information relating to the representation, whatever its source. The lawyer's duty of confidentiality is incompatible, however, with the accountant's duty to disclose. An accountant or firm that acts as an auditor of financial statements has a public duty to disclose certain matters. A key issue for the Commission to consider is how an auditor's duty to disclose can coexist within a single firm with a lawyer's duty of confidentiality.

Recent federal legislation creating a tax adviser privilege complicates the confidentiality question. It appears to provide tax clients of lawyers and nonlawyers with similar levels of protection, but its scope is very limited. The new privilege applies to certain communications between a client and a nonlawyer tax adviser (including an attorney who happens to be employed by an accounting firm that claims not to engage in the practice of law) in circumstances where the attorney-client privilege would apply if the tax adviser were practicing as an attorney. However, this privilege applies only in federal civil litigation — and then only when legal (as opposed to business) advice is rendered. It does not apply to communications made in connection with advice on so-called 'corporate tax shelters.'"

Different Standards On Conflicts Of Interest

Model Rule 1.7 sets forth the general rule on attorney conflicts of interest. Subsequent provisions provide guidance on prohibited transactions and conflicts with former clients. Model Rule 1.10 disqualifies from representation in a client matter all lawyers practicing in a firm in which any one attorney has a conflict. Accountants, in contrast, are permitted to represent two or more clients at the same time in situations where lawyers are not. So long as the accountant believes that she can professionally serve both clients with objectivity, simultaneous representation is permitted, although disclosure and client consent are required. The ABA Commission will consider whether the legal profession's conflict of interest rules should be relaxed. For example, it may consider permitting clients to waive conflicts now thought to be non-waivable, or may recommend the use of screens within firms as a substitute for client consent to conflicts. This is perhaps the most difficult issue faced by the Commission. The duty of loyalty to client lies at the heart of the legal profession.

Fee Sharing Prohibited

Model Rule 5.4 prohibits lawyers from sharing legal fees with nonlawyers, forming partnerships with nonlawyers for the practice of law, and providing legal- services under the control of a nonlawyer. This rule is clearly inconsistent with multidisciplinary practices in which legal services are rendered. It's difficult to see how this Rule can escape modification if lawyers are to compete on an equal footing with multidisciplinary accounting firms.

Circular 230 Controls Practice Before IRS

All tax professionals, including lawyers and accountants, are subject to federal professional standards as well as state rules. Practitioners before the Internal Revenue Service are governed by federal regulations commonly referred to as Circular 230. The IRS Director of Practice has the authority to suspend or disbar from practice before the IRS any practitioner who fails to comply with Circular 230. Circular 230 is taken seriously by practitioners, perhaps because the IRS actively enforces its rules and reports the names of

transgressors to the public. Indeed, the level of IRS activity plainly differs from that of state bar disciplinary authorities, who rarely report instances of disciplinary action on United States Tax Court has adopted the ABA Model Rules, so that any person (lawyer or nonlawyer) practicing before that court violates a court rule if she violates a Model Rule.

ABA Commission Wants Comments

The ABA Commission is interested in hearing from those with specific experience and information on the issues surrounding multidisciplinary practice. Hearings were held in November; twenty-one persons testified. Another hearing will be held in Los Angeles in February. Anyone interested in more information is directed to the Commission's website, <http://www.abanet.org/cpr/multicom.html>.

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