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THE INDIVIDUAL PRACTITIONER AND COMMERCIALISM IN THE PROFESSION: HOW CAN THE INDIVIDUAL SURVIVE?

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I do not intend to expand upon the reasons why the practice of law is where it now is, although that is an interesting question to which not enough thought has been given. I intend instead to describe the current impact of commercialism on the practitioner, on current trends in the practice, on ethical rules, and on the loss of public and client goodwill. I will also suggest a path which will allow a return to a more professional and less commercial perspective.

Individual lawyers—whether partners, associates, or sole practitioners—are continuing to slide down the slippery slope of commercialism at an ever-increasing rate. The focus today is primarily upon the bottom line, and the question most often asked is: “What’s in it for me?” Focus on the client either never existed, has been lost, or is, at best, secondary. Decisions within firms and by sole practitioners are guided principally by economic results, actual or anticipated. Decisions to merge (or to break up), to spin off a department, to expand or enter (or to constrict or terminate) a particular field of specialization, or to become a sole practitioner (or to join a firm) are based on perceived economic benefits—or in some cases the best available option—for the individual lawyer or group of lawyers. The focus is on economic concerns. The client has largely become lost as a focal point. Ethical rules are being subverted. The public, and legislatures in turn, are demanding change.

THE CURRENT CLIMATE

Historically, a law school graduate who chose to enter the practice either became a sole practitioner or member of a firm, or obtained work with a business or governmental entity. These external patterns remain unchanged. However, the internal structures are different. If the graduate chose to enter a large firm rather than become a sole practitioner or member of a small firm, he (and occasionally she) anticipated becoming a partner in the firm and, if successful in doing so, retiring from the practice as a senior member of that firm. The criteria for becoming a partner were to work hard, fit in with the firm culture, and be a “good guy.” Today, firms perceive the above criteria

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as insufficient. Another attribute, currently the most important one, has been added to the list. A partner now must also either be able to bring in a "book of business" or have the potential of doing so. This change, this focus on economic considerations, has resulted in major changes in the internal structures of firms¹ and on the external relationships between the firms, their clients, and the legal profession.

As I will later explain, this changed focus, resulting in the commercialization of the practice, has had a substantial impact upon the practice of law—not only for the larger firm, but also for small firms and sole practitioners, particularly in metropolitan areas.

RULES OF PROFESSIONAL RESPONSIBILITY AND COMMERCIALISM

This change in focus, the need to be able to relate one's activities to economic results, is having a traumatic impact on the rules of professional responsibility. These rules are looked upon as stumbling blocks to be circumvented. The rules are now often considered either as economic impediments to be surmounted or as swords to be used in advancing client interests. If the rules do not fall into either of the above categories, they are considered irrelevant to today's practice, except of course to the extent that court or administrative actions may impact upon firm profitability and partner compensation.

The Kaye Scholer matter with the OTS is an example. No matter on which side of the fence you may be with respect to this case, it certainly was driven by economic considerations, with the underlying ethical rules being of secondary importance. Cases abound in which attorneys use existing conflict-of-interest rules to oust counsel from pending litigation or prevent them from undertaking new matters. There is a growing body of case law dealing with attempts by lawyers to enforce anti-competition restrictions found in their partnership agreements. Some of the changes are impacting internal firm organizational structures, and others are having a very profound impact externally.

INTERNAL FIRM STRUCTURAL CHANGES

What are the changes in the internal structure of the law firm? Fewer associates make partner; different classes of attorneys develop, such as nonequity partners, permanent associates, or nonvoting partners. Many

1. See Ward Bower, *The Changing Face of Partnership*, in *YOUR NEW LAWYER: THE LEGAL EMPLOYER'S COMPLETE GUIDE TO RECRUITMENT, DEVELOPMENT, AND MANAGEMENT* 279 (Michael K. Magness & Carolyn M. Wehmann eds., 2d ed. 1992). Mr. Bower is a principal in the legal management consulting firm of Altman Weil Pensa, Inc.

associates who fail to make partner become sole practitioners, form small firms with other associates specializing in narrow areas of the law, or leave the profession altogether. The cost of this impact is just now beginning to be realized, and suggestions are being made to change the internal structure of law firms to accommodate the above-described impact of commercialism and the resulting focus on the book of business.

One of the problems created by reason of having added the additional book-of-business criterion for making partner is that a significant portion of existing partners know that they would not qualify as partners under the new criteria. Thus, within the partnership there exists a situation in which a few of the existing partners qualify and many do not. The result is added stress within the partnership group since it is now comprised of a few "qualified" and many "unqualified" partners. This impacts upon the firm in at least three ways:

1. Partnerships are trying to attract more qualified lawyers meeting the new partnership criteria since each partnership recognizes that its continued success depends upon increasing the pool of qualified partners.
2. Unqualified partners experience increased discomfort as they become more and more aware of their inability to meet current partnership standards. These unqualified partners become increasingly aware of peer pressure from within the firm to become qualified or, if unable or unwilling to do so, to either reduce their compensation and fringe benefits or ship out.
3. Qualified partners are identified by other firms who make lucrative offers—directly or through headhunters—in order to attract them, and a bidding war ensues between firms.

Peer pressure builds against the unqualified partner, forcing a choice between early retirement, moving out of the firm into solo practice or a small firm with other unqualified attorneys from the same firm or other firms, or staying on at substantially reduced income and status. The pool of small-firm and sole practitioners is thus expanding with those who are being forced out of the larger firms. There are very few exceptions to this model, such as lawyers with unique expertise filling very special existing needs of a firm's clients. In these exceptional circumstances, an otherwise unqualified lawyer is treated as if he or she were qualified, at least as long as the client remains with the firm.

The economic cost, not to speak of the emotional one, to the firm resulting from the loss of partners and well-trained senior associates is very substantial. The cost in loss of prestige is even more significant. The

resulting impact upon the profession—the change in clients’ perception of their attorneys and the impact upon lawyers’ public image—has been considerable, and negative. Lawyers, whether they intend to or not, are telling their clients and the public that money is driving the practice.

A proposal addressing the economic waste of training associates who will not become partners, the “up or out” syndrome, was made by Charles Ehrlich, a litigation partner at Pettit & Martin, in a recent article published in *Legal Times*.² Mr. Martin suggested that many well-trained associates who do not meet current partnership criteria are being forced to leave firms because, although competent under the old standards, they do not meet current partnership criteria. The firms replace the departing associates with new associates who have just graduated from law school or who have limited experience. The new associates must then be trained and molded into practicing attorneys meeting the firms’ criteria and needs. The cost of this training is increasingly borne by the firms since, more and more, clients are refusing to underwrite this expense. Thus, the firms lose capable attorneys, find others who have little or no experience, and substantially underwrite the cost of their training—only to lose them later because of their failure to meet partnership criteria.

Ehrlich suggested that it would make more sense for a firm to change its structure by doing away with partners as such and reorganizing as a professional corporation. The firm could then issue shares to associates based upon performance, giving them proprietary interests in the firm and thus not having to force the associates out. Ehrlich’s model would also allow for distinguishing between different partnership classes—qualified, unqualified, and shades in between—by distributing varying numbers of shares. The ego problems inherent in this proposal I leave to the reader’s imagination.

Added to the pool of unqualified former partners come the unqualified associates, enlarging even further the number of small-firm and sole practitioners. A further disquieting note is the pressure within the bar for specialization. Lawyers, regardless of the sizes of their firms, find themselves becoming more and more knowledgeable in narrower and narrower areas of the law. The bar itself is sponsoring programs resulting in the designation of attorneys as having specialized legal skills. Some of this pressure to limit the scope of practice is due to client demand; however, much of it can be attributed to the perception that specialists earn more money. This tendency is further exacerbated by the fact that many of the new players in the small firm-sole practitioner arena are lawyers coming from the larger firms with highly specialized practice niches. As lawyers become more specialized, they tend to narrow their focus to the intricate and intellectually fascinating legal

2. Charles Ehrlich, *A New Law-Firm Structure for the '90s: In Tough Times, Old Partner-Associate System Is Becoming Outdated*, LEGAL TIMES, Jan. 18, 1993, at S37.

issues involved in the client matter, and in that process are even more prone than are nonspecialists to lose sight of the needs of the client (like the surgeon who said, "The operation was a success but the patient died."). Thus, specialization, its perceived economic benefits, and the influx of unqualified attorneys into this milieu have resulted in the loss of focus on clients' needs. The client has simply become the means to an end: the economic enhancement of the practitioner.

It is my perception that the above process, or set of factors, has had little impact upon practitioners in rural settings. Small firms and sole practitioners outside the ambit of large-firm influence have remained largely unaffected. They may be able to successfully escape the major impact of commercialism on the practice and continue to remain focused on client needs and rendering services meeting those needs. However, those sole and small-firm practitioners located within metropolitan areas are impacted by what happens in the larger firms. As outlined above, increased growth in the number of sole practitioners and small firms comprised of unqualified attorneys, both former partners and associates, is changing the character of the practice for small-firm and sole practitioners. These groups, instead of being comprised of individuals who had little interest in being members of large firms or who could not qualify under then-existing standards but who had the necessary entrepreneurial drive to be self-employed, are now being joined by a new group comprised of large-firm rejects—the unqualified former partners or associates. The result is a changing focus away from clients, their needs, and meeting those needs.

I suggest that if sole practitioners and small-firm lawyers were to refocus on their clients rather than focusing so intently on themselves, there would be a shift away from the current atmosphere and its inherent scorched-earth mentality to a more professional and civilized culture. Such a change in focus would reduce the overall cost of legal services and address in a more meaningful and productive manner the current lack of civility, integrity, and professionalism of the bar. The key is the client: the solution is to refocus on the client.

Lawyers, having forgotten the importance of clients, have forced clients to find alternative ways of bringing the attorney-client relationship back into some semblance of balance. As clients become more and more disenchanted with attorneys, legislatures respond by imposing more restrictions on practitioners. How these restrictions tend to impact more adversely on sole practitioners and small firms than on large firms will be explored more fully below.

THE CLIENT

How is the practice of law changing as a result of these forces? What do clients demand from their attorneys? After making that determination, what can you do—how can you restructure your practice—to meet these client

expectations? Once we determine the answers to these questions, we then must restructure our approach to clients, change our internal systems or create new systems, and train ourselves and our staffs to produce the necessary services in accordance with client expectations. Our ability to do so will determine how our clients measure our level of competence as attorneys and will ultimately determine our financial and professional success.

ARE YOU COMPETENT?

A competent lawyer is one who can deliver a legal service to a client that solves the client's problem or meets the client's concerns—within the client's reasonable economic parameters. Law schools do not graduate competent practicing lawyers. Law schools graduate persons who have the necessary technical-competency skills, but have not yet acquired performance-competency skills. Mastery of substantive law principles—how to “think like a lawyer” and how to find the law—is only part of the equation. The other part, not taught in law school but of equal importance, is the ability to communicate adequately with the client and to meet the resulting client expectations. Adequate communication includes establishing reasonable client goals and then performing the agreed-upon services for the client so that client expectations—including economic expectations, once established—are met. The ability to bring together both technical-competency and performance-competency skills identifies a competent lawyer. Clients, by and large, assume that all lawyers have the necessary technical-competency skills. Therefore, clients primarily focus upon performance-competency skills, measuring competency primarily on that basis and thereby differentiating one lawyer from another. It is interesting to note parenthetically that most attorney malpractice claims also involve the inability of an attorney to perform competently.³

As an aside, I suggest that the current movement within the bar to promulgate mandatory continuing legal education programs, litigation-skills courses, and development of specialization criteria as means of increasing lawyer competence are largely misdirected. Few, if any, programs focus on the major reason for lawyer incompetence: the inability of a lawyer to manage self and practice in a manner which meets client needs and expectations—performance competency.

3. STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, AMERICAN BAR ASS'N, PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST ATTORNEYS (1986) is very instructive, particularly pages 7 and 21.

WHAT ARE CLIENTS LOOKING FOR?

The most important question is: What are clients looking for from their lawyers? Favorable results—winning the lawsuit?—yes and no. What are client expectations? A joint undertaking by the American Bar Association and the American Bar Foundation directed by Barbara A. Curran⁴ studied, among other issues, public experience with lawyers and public opinions and perceptions about lawyers and their work. Over 2,000 persons were interviewed, and the survey's results run counter to some widely held lawyer perceptions.

The study indicates that the four most frequently mentioned qualities that adults look for in selecting a lawyer are, in order of importance: commitment, integrity, competence, and fairness of fee. Over fifty percent of the respondents wanted lawyers who would be committed—concerned about them and interested in their particular problem. Next in importance, at forty-six percent, was the lawyer's reputation for integrity, followed by the lawyer's competence, cited by forty-two percent of the respondents. A distant fourth was client concern about the fairness of the fee a lawyer is likely to charge, cited by only thirty percent of those surveyed. These four characteristics, upon which attorney selection is based, are more fully explored in the following four points.

1. Commitment relates to the potential client's need for assurance that the lawyer will attempt to understand the client's needs and serve those needs conscientiously. Clients ask themselves: Is the attorney interested in my problem or my case rather than preoccupied with fees? Is the lawyer attentive, responsive, and an effective communicator?
2. By integrity, the potential client is looking for a lawyer who has both professional and personal standards for honesty, trustworthiness, and high ethics. Underhanded methods, illegal practices, and "dirty tricks" are negatives. Also, being truthful, "above board", and able to keep confidences are standards used by potential clients to measure the acceptability of their lawyers.
3. Potential clients also are interested in the lawyer's competence: What are the lawyer's professional skills and qualifications? The emphasis is on the lawyer's knowledge and experience: Does the attorney have specialized knowledge or previous experience?

4. See BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977).

4. As to fees, potential clients are looking for a lawyer who will be fair and reasonable in the amount of fees charged. This is not to say that Curran's study indicates that only thirty percent of the people are interested in the amount of fees charged, merely that the other three characteristics are more important considerations than the amount being charged for legal services.

Is there a change in the qualities a client looks for in an attorney after having used an attorney's services? The survey indicates that clients list lawyer characteristics as follows, in order of importance:

1. Promptness in taking care of matters
2. Interest and concern about client problem
3. Honesty in dealing with client
4. Explaining fully to client
5. Keeping client informed of progress
6. Paying attention to what client has to say
7. Fair and reasonable fee

Actual experience with lawyers does not change the order of importance of the public's concerns after becoming clients. It is clear that clients are looking for lawyers who provide timely service, act with integrity, and listen to them and communicate well. Just as did members of the public with no previous experience with attorneys, former clients enumerated fees as the least important concern of those concerns listed by the interviewers. Thus, both potential clients and clients who have had actual experience with attorneys are interested in the same qualities. The Curran study sets forth what clients want and defines for the practitioner what is necessary in order to provide high-quality legal services for the client. Interestingly, not mentioned in either list is the result obtained by the lawyer's services. Most lawyers probably feel that the result obtained for the client would be one of the most important, if not *the* most important, concerns of the client.

So much for how well lawyers understand their clients. What is needed in addition to understanding client needs? Lawyers must be sure that they have systems in place that assist them and their immediate support staffs to perform in a manner that meets reasonable client expectations. One of the ways in which an attorney can establish reasonable client expectations is to enter into a value billing paradigm with the client. In so doing the client controls the legal services—their scope, their timing, and, thereby, their costs. Thus, the client understands what is happening and why certain actions are being taken, or not being taken, as the case may be.

VALUE BILLING

The concept of value billing is based on two principles. The first is that

the value of legal services is, in large part, determined by the client rather than the lawyer, after the client is placed in a position to make informed decisions concerning the type and scope of legal services to be rendered. The other principle is that the attorney shares with the client the economic risk of bearing the expense of the legal services being rendered.

What is the perceived value, from the client's perspective, of the services being rendered by the attorney? Currently, lawyers value their legal services based upon other criteria. They base their fees on hourly billing rates that are determined by what other lawyers charge or by projecting their own economic needs or expectations for the coming year and dividing that figure by the number of billable hours they expect to record and collect. Some attorneys may base their fees upon their own perception of the value of the legal services rendered to the client. Little or no concern is evidenced for the client's perception of the value of the legal services.

By the attorney's focusing on the client, educating the client as to the necessary steps which need to be taken to solve, or at least address, the client's problem, the client learns of the complexities and dimensions of the legal problem. The attorney advises the client of the ability of the law to address those issues or problems, the scope of services available, the necessity for particular services, and the risk in not taking certain actions, and allows the client to join in the decision-making process. Thus, with the advice of the attorney, the client fashions a course of action for solving the problem that is within the ability of the client to pay for and that meets the client's objectives and risk-tolerance levels.

In addition, value billing creates a sharing of economic risk between the lawyer and client. The client, in order to make an intelligent choice on an appropriate course of action, must be able to determine the costs of alternative courses of action. It is necessary for the client to be in a position to make a meaningful cost/benefit analysis to be able to choose among alternative courses of action based upon their respective costs. In this process, the lawyer must be able to make reasonably accurate estimates of how much each facet or piece of the legal solution will cost the client. The risk of error will rest with the lawyer. Gone is the concept that the client pays for all of the time it takes the lawyer to perform the services, no matter how long it takes. The economic burden of the lawyer's inefficiency; lack of knowledge; or failure to properly analyze the legal issues, obtain the necessary information, or control costs rests with the lawyer.

The failure to focus on the client, forgetting that the value of the services rendered is measured by the client and not the lawyer, has resulted in clients' perceiving lawyers as being interested only in making money, not meeting client needs. The result of this perception has been a growing resentment of lawyers, a desire to control their activities and limit their ability to charge fees perceived as outrageous. Enter the legislators, responding to their constituencies, and the courts—with a very disturbing nod to the consumerism movement.

CONSUMERISM

The consumerism movement is having a disconcerting and growing impact upon the practice of law in two countervailing respects. On the one hand, there is the proliferation of information made available to the public through lawyer advertising and marketing, and the resulting confusion to the public. On the other hand, there are attempts to limit the practice or control how lawyers practice. I use the term "consumerism" to mean both (1) the growing marketing and advertising activities of practitioners in the name of public information and (2) the introduction of restrictions upon the practice by state legislative acts, judicial pronouncements, and amendments to disciplinary rules—all of which are perceived to be in the best interests of the consumer of legal services—particularly as they impact upon the attorney-client relationship. The focus of these initiatives is on the relatively unsophisticated consumer, the noncorporate client. The result of this consumerism trend is that the lawyer is losing control over the practice. Control is shifting, either directly or indirectly, to legislators responding to public demand; courts, through changes in disciplinary rules brought about by public pressure; and clients trying to control attorney fees.

The United States Supreme Court has made it fairly clear that any marketing or advertising by lawyers that is not inherently false or misleading is to be permitted. Attempts by various states to impose limits on the scope of such marketing or advertising have failed, although many states continue to try. Now lawyers market. Now lawyers advertise. The public is inundated with information, some of which is accurate and some of which needs to be viewed with a great deal of care. I am not in a position to decide if the public is thus better served; I do know that the lawyer is now viewed differently as a result of the flood of lawyer marketing and advertising. Sunday papers seem to invite lawyer advertising. An example is the firm that advertises in the Sunday paper: "LAWYER MALPRACTICE: Are you unhappy with the way the attorney handled your case?" followed by the name of the law office and a phone number to call for a free consultation. Another example is a law firm which has run a very small advertisement in the business section every Sunday for the last several years: "DIVORCE for men only" followed by the firm's name, address, and telephone number. These advertisements do inform the public and may be filling a public need. The latter advertisement must be especially successful since it has been running for several years.

I will use the California legislature to illustrate several instances of legislative involvement in the practice of law.

1. In California, legislation sets forth when fee agreements must be in

writing and what provisions must be included in the agreement.⁵ In certain types of matters such as medical malpractice, the statute limits the maximum contingent fee a plaintiff's attorney can charge.⁶ Contingent fee agreements also must disclose when the attorney does not carry errors and omissions insurance or otherwise guarantee payment of malpractice awards.⁷ Similar legislation covers situations in which the legal fees and costs can be expected to exceed \$1,000, except that corporate clients are exempt from those provisions.⁸

2. Another area in which the legislature has directly intruded involves the requirement that fee disputes between lawyers and clients be subject to fee arbitration at the option of the client.⁹ Three-member arbitration panels must include a nonlawyer. Suits to collect fees are stayed by the filing of a request for arbitration. If the client institutes arbitration proceedings the lawyer *must* arbitrate the fee dispute, and, if both parties agree, the arbitration award can be binding on the parties.
3. A final example is to be found in a new state law which requires lawyers (and other state-licensed individuals) to be suspended from practice if they are delinquent in payment of family support orders.¹⁰ The list of supposedly delinquent attorneys is supplied to the bar by the state Department of Social Services.

Pressure from nonlawyers is growing for legislation to permit what has heretofore been considered the unauthorized practice of law. These nonlawyers are attempting to have legislation passed to insure that they can render legal services without fear of prosecution. In the real world, lawyers have little to fear since prosecution for the unauthorized practice of law is already nonexistent as a practical matter. The pressure groups include paralegals who are attempting to establish legislative licensing schemes to allow them to do bankruptcies, marital dissolutions, simple wills, etc. Another very active group is "Help Abolish Legal Tyranny" (HALT), which advocates the use of nonlawyers to render legal services in "routine legal matters" in an effort to make legal services available to middle-class America at a reasonable price. Even without legislation, there exist "typing services" that prepare dissolution

5. See CAL. BUS. & PROF. CODE § 6147 (West 1990 & Supp. 1994).

6. See *id.* § 6146 (West 1990).

7. See *id.* § 6147(a)(6) (West Supp. 1994).

8. See *id.* § 6148 (West Supp. 1994).

9. See *id.* §§ 6200-06 (West 1990 & Supp. 1994).

10. See CAL. WELF. & INST. CODE § 11350.6 (West Supp. 1994).

forms, estate planning documents, deeds and homesteads, and bankruptcy petitions, and perform other services that traditionally have been perceived by lawyers as being legal services. Requests from consumer groups, disenchanted clients, and others for help in circumventing, controlling, or limiting the historically accepted practice of law are finding the ears of legislators.

Courts also have been caught up in this consumerism movement. To illustrate, New York has decided that nonrefundable attorney's fees are unethical and that a lawyer using such fees is subject to discipline.¹¹ The logic seems to be that fees charged should only be based upon time expended. Federal courts' use of Rule 11 sanctions and state courts' use of parallel rules are additional evidence of attempts to regulate the way in which law is practiced. This need for control may be attributable to the lawyer's need to engage in activities which increase billings to clients for legal services of questionable benefit!

Even clients are becoming more active in controlling the scope of lawyers' activities and the related fees. Although law firms currently feel the greatest impact, individual practitioners must also be sensitive to what is happening. Illustrative of current activities limiting the lawyer's traditional control over the case or client matter are: conducting fee audits; dictating which lawyers in a firm will be doing work and what work will be done on a particular client matter; setting standards for billing procedures; fixing which costs will be paid by the client and which will be considered firm overhead; controlling the litigation directly or approving case litigation plans before work is commenced by the firm; and fixing the timing of the billing cycle.

Also to be considered is the growing supply of do-it-yourself books and pamphlets instructing people on how to handle their own legal matters. Books tell people how to draft their own estate plans, file their own bankruptcies, and form their own corporations. In fact, not to be outdone by the commercial book publishers, the State Bar of California publishes and sells to the public for nominal fees form wills and simple trusts for people to fill in the blanks and create their own estate plans!! Even disciplinary or ethics rules are being used (or misused, depending on your perspective) in an effort to impose "needed reforms" upon the practitioner.

Considerable pressure has also been brought to bear on the bar by the public and sympathetic members of the legislature to use disciplinary rules as a means of imposing added responsibilities on lawyers. Again, I will use California for illustrative purposes.

As a result of a compromise between the legislature and the State Bar, the California Supreme Court approved a rule of professional conduct subjecting attorneys to discipline if they engage in sexual conduct with their clients.¹²

11. See *In re Cooperman*, 83 N.Y.2d 465 (1994).

12. See CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-120 (1994).

Certain exceptions exist, viz., sexual relations between spouses and ongoing consensual sexual relationships which predate the initiation of the attorney-client relationship.

The disciplinary rules have become very burdensome to law firms, both large and small, as well as sole practitioners. For example, in California courts do not recognize the use of ethical walls to shield lawyers within firms for the purpose of protecting client confidences. The only exception is for former government-employed attorneys. Thus, it is very difficult for lawyers to move from one firm to another for firm mergers or breakups to occur without loss of clients due to conflicts of interest being created. It has also become necessary to consider conflicts checking when hiring paralegals, secretaries, or other staff members.

A further example of a burden thrust upon attorneys is California's recordkeeping requirements for trust accounts.¹³ The rule includes a set of standards requiring the following records to be kept for five years: (1) a written ledger for each client, (2) a written journal for each bank account, (3) all bank statements and cancelled checks for each account, and (4) monthly reconciliations of items (1), (2), and (3). This rule is particularly burdensome to sole and small-firm practitioners. Similar rules concerning trust accounting procedures are to be found in the proposed amendments to the *Model Rules for Lawyer Disciplinary Enforcement* currently being proposed by the ABA Standing Committee on Professional Discipline to be submitted to the ABA House of Delegates at this year's annual meeting in New York City.^a

Historically, disciplinary rules were used as a means of giving guidance to lawyers for the protection of clients with respect to the appropriate manner of handling a client matter or the professional relationship with the client. The object was to protect the client. Now, the rules are being expanded to include discipline of attorneys for personal acts of the attorney having nothing to do with the client matter for which the attorney was retained. In addition to the example above concerning trust account recordkeeping, examples exist of lawyers being disbarred for failure to file personal income tax returns.

There have been other bar proposals to use disciplinary rules to control or place limits on attorneys and their practices. There is the issue of collateral business activity of lawyers and their firms, as well as the flip side of that issue, the capability of nonlawyers to have proprietary interests in law firms (illustrated by the District of Columbia rule permitting such interests under certain conditions). If lawyers can integrate other disciplines into their practices and render services beyond traditional legal services to existing or new clients, then nonlawyers, such as accountants, should be able to integrate

13. See *id.* Rule 4-100.

a. *Editor's note:* The ABA adopted the provisions, which may be found in MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 29 (1993).

lawyers into their businesses so that they can render legal services to their clients in addition to their traditional services. Of greater impact on lawyers is the concept of nonlawyers' being able to develop law firms or referral services or simply hire lawyers to render legal services to the public on a salary or commission basis.

One last example is a proposed rule of professional conduct in California that will, in essence, subject a lawyer to discipline who, in the management of the lawyer's practice, either engages in sexual harassment or discriminatory conduct based upon race, sex, or ethnic origin, or is in a supervisory position within a firm and knowingly ignores such conduct.^b

The purpose of the Ethical Considerations ("ECs") of the *Model Code of Professional Responsibility* was to help guide attorneys toward a higher standard of conduct than the minimum necessary to avoid discipline in their dealings with one another, their clients, individual judges, and the judicial process. ECs are no longer used by states that have adopted the *Model Rules*—maybe this would be a proper use of the growing trend within the bar of creating "Codes of Professionalism." The pressure brought by the public and, subsequently, by the legislatures on the bar to impose controls over "commercialism" in practice results in the bar's response of changing rules of professional conduct to appease the critics. The result is a blurring of the distinction between conduct affecting a client and conduct reflecting adversely on the attorney as a private individual. The use of disciplinary rules for purposes beyond their original purpose of guiding attorneys in their relationships within the legal system brings confusion within the bar as to the appropriate use of disciplinary rules.

PREJUDICE AGAINST SOLE PRACTITIONERS

Unfortunately, there appears to be an institutional prejudice within the profession against small firms and sole practitioners, particularly against the latter. It is based upon the assumption that if you are a good lawyer you are a member of a firm. The better the lawyer, the bigger the firm in which the lawyer is a partner. Various statistics are assembled to support this unarticulated prejudice. For example, the average income of a sole practitioner is substantially less than that of a partner; the larger the partnership, the greater the remuneration. The conclusion reached is that bigger is better. A more accurate picture might emerge if a more careful analysis of sole practitioners and small firms were undertaken. For example, many small-firm and sole practitioners practice outside metropolitan areas, and their incomes, when measured against the incomes of larger firms located mostly in the metropoli-

b. *Editor's note:* California adopted the proposed rule, except for the prohibition of sexual harassment. See CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-400 (1994).

tan areas, would necessarily be lower. Another example that might be discovered is the competent sole practitioner who chooses to practice on a part-time basis.

The situation for sole practitioners is more invidious. The statistics not only fail to take into account the competent part-time sole practitioner, but also fail to take into account marginal sole practitioners who are practicing and are either unwilling or unable to devote the time necessary to maintain an adequate level of competency. Examples of these marginal practitioners abound: the part-time lawyer who is not serious about the practice (*i.e.*, dabbles), the government lawyer with a side practice, the semi-retired lawyer who fails to remain current with changes in the law, the lawyer with an emotional or mental problem, and the drug- or alcohol-dependent lawyer who cannot survive in a firm. Although I have no statistical evidence, I believe that if only full-time and responsible part-time sole practitioners were the source for information gathering, their incomes would be very close to those of partners in firms in the same economic settings.

I must also comment on the fact that disciplinary authorities perceive sole practitioners being more prone to violating disciplinary rules. My guess is that if you eliminate those marginal practitioners described above, you will find that the track record of sole practitioners will be comparable to that of attorneys practicing in the larger firms. Disciplinary authorities also tend to pick easy cases to enforce. If they can prove a trust violation, they do so—ignoring other potential defalcations which would form the basis for discipline. Also, bar disciplinary personnel find it easier to proceed against marginal practitioners and tend to concentrate their efforts against that class in order to make their statistics look good!! If one looks at harm to the public, there may be some justification for this focus; however, if one looks to developing in the profession a respect for the rules governing the practice, this enforcement bias is of little help. Most lawyers do not identify with the marginal practitioner. Few cases are pursued against nonmarginal sole practitioners. Although all responsible lawyers try to follow the rules, the rules are breached from time to time. Lawyers are human. Very little effort is expended by the disciplinary system on matters in which there has been no harm to the public (Is anything going to be done with Kaye Scholer by the disciplinary side of the bar?). For most of the larger firms, the firm and its insurance carrier make the client whole, and the disciplinary system does not get involved.

CONCLUSION

What am I suggesting? I am suggesting that the profession should be more careful in analyzing what is happening within the practice as a result of the current focus on economic concerns by the practitioner. The impact of advertising and marketing on the practice is little understood. As the character

of firms change by reason of their downsizing, the perception of the small-firm or sole practitioner will change for the better since more large-firm talent will find its way into those groups.

Most importantly, the profession needs to refocus on the client. As the profession focuses more on the client and client needs and gives control of matters back to the client, clients will become more satisfied with the profession. There will be less clamor from the public for change. This will result in legislatures becoming less active with their pronouncements.

Lawyers must educate clients so that they can knowingly make the basic policy decisions relating to their matters. The goal is to give control back to the client, for it is, after all, the client's matter. Once we are back to focusing on serving the client, I believe we will remove the commercialism stigma. As client needs change and lawyers respond to the changes, lawyers may have to rethink their role and expand it to meet the changing client needs, even if that means allowing some collateral business activities or nonlawyer proprietary interests in the practice. The profession must make the necessary internal structural changes to accomplish the goal of meeting reasonable client expectations. Both the profession and the client will be better served. The profession will achieve enhanced public goodwill.

This is not a panacea; it will not return us to Dr. Pangloss's perfect world in Voltaire's *Candide*. Lawyers have always had to deal with a tarnished public image. However, changing the primary focus of lawyers from "What's in it for me?," and the resulting commercialism of the profession, to fulfilling client need will be a major step in the right direction.