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Ancillary Business: Will the Profession and the Public Benefit?

by William I. Weston

Quietly, over the past four years, the American Bar Association (hereinafter the "ABA") has engaged in an ongoing study of the mercantile phenomenon called "ancillary business practices." Ancillary business practices are activities of a non-legal nature by a lawyer which are conducted contemporaneously to law practice and integrated with the practice of law. Such practices are illustrated by the law firm which has an engineering "department" or an accounting "department" to handle these non-legal matters for the law firm's client. The ancillary business might be in the form of a separate corporation located at the law firm, non-lawyer professionals employed by the law firm, or the merger of a non-lawyer professional practice and the law firm. Excluded from this discussion is the business owned by the lawyer as an investment or as a special business unrelated to his or her law practice.

Such a business practice is not new. For many years, lawyers have owned title companies, appraisal firms, and real estate businesses. Lawyers have also had dual practices, operating a law firm and an accounting firm or tax advice firm. For the solo practitioner, the opportunity to run a title company has often signaled the difference between success or failure of the practice, as the title company offers a supplement to a small practice.

Ancillary business practice is, in reality, quite different from the rural solo practitioner with a title company. Ancillary businesses involve a major economic step open to those firms with the resources available to develop such businesses. The purpose of ancillary business is to offer a broader measure of service to clients and to increase the economic income received by the law firm. Although the rural solo practitioner with the title company presents some ethical problems, the impact of that business arrangement is not the source of concern.

Currently, the ABA House of Delegates has adopted the position that all ancillary business practices should be prohibited. This is also the approach recommended by the ABA Litigation Section. The ABA General Practice Section suggested that the ABA take no position, but if the ABA Litigation Section's position were adopted, it should specifically exclude the solo practitioner. The ABA Special Coordinating Committee on Professionalism recommended to the ABA House of Delegates that ancillary businesses be accepted with modifications of the Model Rules of Professional Conduct.

Ancillary businesses for large firms will change the essence of how law is practiced by affording to the larger firm or the economically wealthier firm the opportunity to

develop a multi-service facility which will attract clients, as well as insure them a larger share of the pie. Ancillary business activities often resemble the athlete already competent in one area but driven by prestige or prize money to try a new sport. The athlete is forced to redirect muscles to the new sport to the detriment of the training and skills of the old one, all for the simple reason of greed.

A law firm with an ancillary business is in essence attempting to operate two professions simultaneously and allegedly in the best interests of the client. Thus, if the client has an environmental problem, the firm's engineers - as employees or subsidiaries of the firm - will render opinions and provide services on behalf of the client. All of this will be in the name of a "more efficient and effective" law practice.

It is difficult to see how a lawyer can be effective in practicing law while simultaneously supervising the activities of an ancillary business. As the practice of law has changed from a purely "learned profession" to a business/profession, there have been those critics who have suggested that law is nothing more than a business and that lawyers are business people. To suggest such would belie five hundred years of development in the practice of law. Lawyering is something

more than the conduct of business. That something more is memorialized by the fiduciary obligations of an attorney to his client, fiduciary obligations which clearly are not present between a business person and his customer.

The practice of law, despite its faults, remains the center of philosophical and moral change in this country; of thought, idealism, and commitment; of service to the community and to the public. To allow ancillary businesses will enable lawyers to abandon the historical and unique role of a lawyer as an advocate and as a developer of new and innovative legal theory. To replace this historical role with a purely business approach to the practice of law by providing a "full package" of services will not improve the delivery of legal services. As the business aspects of practice are allowed to develop - such as ancillary businesses - the adherence to the traditional roles of a lawyer and his or her obligation to society will be diminished. We already see this in the diminished involvement of lawyers in social causes, and in their unwillingness to take pro bono cases or difficult cases.

Furthermore, law practice is a monopoly which society awards to a group of individuals, not only as a source of income for them, but also to insure that the needs of society for order are furthered. That monopoly is premised on the view that lawyers are sequestered from the rest of citizenry to service the public's needs.

The argument raised in support of ancillary business is that it will render the practice of law more efficient and that this will in turn benefit society. However, there appears to be no evidence to support this view. In fact, ample evidence exists to support the view that the practice of law will suffer. For

instance, one individual cannot effectively and completely manage simultaneously both the rigors of law practice and those of a business enterprise. The demands are different, the qualifications are different, and the goals are different. To obtain a just and fair result for a client, a lawyer must give every ounce of his energy and knowledge to the case. By allowing a lawyer to simultaneously operate one or more business activities that are tied to the practice of law is to dilute the practice, to diminish the essence of his or her work, and to ultimately destroy the practice of law.

"By far the largest concern regarding ancillary business practice is the number of ethical issues it raises."

By far the largest concern regarding ancillary business practice is the number of ethical issues it raises. In fact, one has to wonder why a concept with so many ethical problems requiring modification of the Model Rules should be adopted when the Model Rules themselves have not been adopted by every state. Are the economic benefits so great as to warrant the ethical problems which this concept raises?

The first of these ethical concerns is the confusion created in the eyes of the client about the law firm, its organization, and its management. Further confusion is created by the lawyer's role both in the firm and in dealing with the client. Is the lawyer giving legal advice, engineering opinions, or accounting

opinions? What if the legal position of the client runs counter to that of the ancillary professional or vice versa? Who does the lawyer represent - his own firm and partners to whom he or she owes a fiduciary duty or the client to whom such a duty is also owed? Is advice which has this duality (legal and another profession) "legal advice" subject to ethical constraints, or advice within the parameters of that profession and subject to that profession's rules? Further, who is responsible for errors in the rendering of the opinion - the ancillary profession, the lawyer, or both? If both are responsible, how does the court measure the appropriate conduct? The result will be increased complexity, delay, and confusion in an area already beset with such problems.

The second major area of concern is with disclosure. Even if law firms were to adopt a hybrid form of informed consent, confusion on the part of the client will still be a likely result. The lawyer is the one disclosing, which often will not result in a detached and objective approach. The degree of disclosure, the type of disclosure, and context of disclosure are at the lawyer's option. There are, as yet, no protections afforded to the client to insure the quality, level, or degree of disclosure of the ancillary business and its relationship to the law firm and the client.

The third area of concern is confidentiality. Once information is revealed to a non-lawyer third party, is the concept of confidentiality deemed waived? Can the engineer, accountant, or medical professional be required to testify in a deposition in order for the other side to discover information? What about documents given to the ancillary professional and those prepared by

the professional - are they protected? Modifications of the Model Rules are aimed at addressing these issues and clarifying the concerns about confidentiality. Despite these attempts, the ancillary is not a secretary or paralegal, but often a certified professional in his or her own right. In the case of the former, all conduct, all information, and all conclusions are funneled through the lawyer actually or constructively so that the lawyer assumes responsibility for issues of confidentiality. In the case of the latter - ancillary professionals - the funneling process is not necessarily the same, and it is likely that the professional will be held to a different standard based on established standards for that profession. The involvement of the lawyer may, in fact, offer absolutely no protection to the client.

Despite the passage of modifications of the Model Rules, courts have the option to rule differently based on many criteria. By adopting ancillary business practices, the organized bar is opening the client, the ancillary professionals, and the lawyer to untold and unforeseen legal and ethical consequences.

The organized bar should, therefore, take a close look at this proposal. Much like the hunter who shoots himself in the foot, the bar is engaged in a self-defeating and dan-

gerous course of action. The short term issues of ancillary business practices look good for the lawyer and, at least superficially, for the client. However, the long term implications are frightening. Small firms unable to compete with larger firms will cease to exist, and as a consequence, affordable legal services for the less wealthy client will no longer exist. Some solo practitioners and small firm practitioners with a unique practice area will survive, but for the general practitioner, ancillary business activities are ominous. Without access to these ancillary services, the general practitioner will not be able to compete for the client and the economics of general practice will. If this seems gloom and doom, one only has to look at the competition for cases already taking place. If wealthier firms are allowed to engage in ancillary businesses, their competitive position will only be enhanced to the detriment of the general practitioner.

While lawyers are busy managing a variety of businesses along with their practice, the opportunities for creative legal thinking, adjunct teaching, and writing will diminish. Moreover, the opportunity for leadership roles will diminish as the demands on the lawyers' time, attention, and most importantly, fo-

cus increase. The profession as a whole will suffer for that.

The essence of the practice of law is that unique relationship between the client and the lawyer during which the lawyer thoughtfully and thoroughly evaluates the client's legal problem(s), utilizing an intellectual process based on education, training, and understanding of the law. Thereafter, the lawyer helps the client to seek appropriate solutions within the legal system. To diffuse this process by bringing in other professions and businesses will alter that unique relationship. Further, the opportunity for the Bar as a whole to serve as the voice and conscience of society with regard to the development of the law will be undermined.

About the Author:

Professor William I. Weston is a faculty member at the University of Baltimore School of Law and a frequent contributor to the *Law Forum*. He is a member of the Maryland and Washington, D.C. Bars. Prior to joining the faculty, he served as Bar Grievance Administrator and Executive Director of the Bar Association of Baltimore City. Professor Weston currently serves as editor-in-chief of the *Compleat Lawyer*, a publication of the ABA.

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