See pp. 1-2, 5-6 re: law & lit.

OUTLINE OF PRESENTATION

LEGAL ETHICS *VERSUS* THE RULES OF PROFESSIONAL RESPONSIBILITY?: THE DEBATES OVER MULTI-DISCIPLINARY PRACTICE AND UNAUTHORIZED PRACTICE OF LAW, WITH REFERENCE TO THE PROFESSIONALISM MOVEMENT AND SHAKESPEARE'S *MEASURE for MEASURE*

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October 22, 1999, 3-5 p.m.
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I. INTRODUCTION: THE PERCEIVED DECLINE IN LEGAL ETHICS

A. Loss of civility, increased commercialism

The civility movement of the 1980's was an attack on aggressive litigation tactics that were not technical violations of the codes of professional conduct. Various state bars and courts adopted civility codes, some voluntary and some with sanctions. The new Virginia rules of professional conduct prohibits frivolous discovery requests and requires compliance with legal discovery requests (Rule 3.4).

In the 1990's, numerous A.B.A. and state bar presidents have chosen professionalism as their theme of office, and have not only mourned the loss of civility but blamed the loss on commercialism and the pressures on young attorneys to maximize billed hours.

B. The Rules/Ethics Distinction

Throughout the discussions of the decline of professionalism, a distinction is made between the rules and "something else" that is required for professionalism, such as civility or moral intuition. Two different responses to the need for "something else" can be distinguished.

On the one hand, to the extent that the rules do not reflect ethical ideas, some suggest that the rules should change. For example, prohibiting frivolous discovery and requiring compliance with discovery in the new Virginia rules (Rule 3.4) are attempts to codify civility and cooperation. We might say that the old Code did not reflect the high ethical ideals of the profession, thus there was a difference between ethics and the (inadequate) rules, and the new rules are brought into line with ethics. Another example of the same phenomenon would be to *resist* changes to the rules that

would move the rules away from ethical ideals or core values of the profession. The proposal in Virginia to allow attorneys to discuss a client matter with another attorney, that is, to get help, was not adopted in the new Virginia rules because the principle of confidentiality was viewed as too central, too important, to be compromised. Similarly, the ABA proposal to allow multi-disciplinary practice (discussed below) can be viewed as a change that would make the rules unethical – confidentiality and independence would be compromised.

Another response to the sense that the rules do not embody legal ethics is also obvious in the civility and professionalism movements, namely the argument that the rules will never be enough, that ethical ideals cannot be codified, and that the rules must be supplemented by moral intuition and ethical mentoring. Civility and professionalism come from the heart, not from rules, so that even if the rules permit you to take advantage of a mistake of opposing counsel (e.g., accidentally faxing a confidential client letter to you), your ethical ideals would lead you to be more helpful (e.g., send the letter back without reading it).

C. Historical Perspectives

The decline of legal ethics is a perennial theme in the history of lawyering. Throughout U.S. history, lawyers have complained that crass commercialism and loss of civility are running the profession. In literary representations of lawyers, usually bad, the profession is often corrupt. Dickens' *Bleak House* offers, for example, a 19th century perspective on lawyers as cold, unfeeling, and unethical. Even in Shakespeare's plays, there is a persistent critique of law and lawyering as enterprises that are often corrupt. In *Measure for Measure*, a play in which law is a primary theme, legal institutions are presented as capable of producing injustice as well as justice, depending on (a) whether the written laws embody justice, and (b) the character of the lawyers or judges who practice or enforce law. Indeed, in Shakespeare there is a sense that the law can be unfair, as well as the sense that law is itself insufficient and needs to be supplemented with "something else" – mercy, equity, or higher ideals of justice.

II. RECENT CONTROVERSIES IN LEGAL ETHICS

A. Ethical Structures in the Rules of Professional Conduct: Confidentiality, Conflict of Interest, Independence

To highlight the destruction between rules and ethics, we can look at the debates surrounding changes and proposed changes to the rules of professional conduct. The principles of confidentiality, conflict of interest, and independence can be seen as ethical boundaries or core values necessary for professionalism. See *Va. Rules 1.6, 1.7, & 5.4* (attached). When the A.B.A. proposed to allow multi-disciplinary practice, which would allow fee-sharing with non-attorneys, some argued that we would be sacrificing ethics for monetary gain. Indeed, we ought, the argument goes, to be stopping the

unauthorized practice of law by accountants and financial planners, not joining up with them! Similar concerns were raised when alternative dispute resolution came into fashion, because mediators were doing what attorneys used to do. Are fundamental values of the profession compromised by mediation? Proponents of multi-disciplinary practice and mediation think that legal protectionism is behind the opposition, rather than a commitment to professionalism and service to consumers.

B. The Debate over Multi-disciplinary Law Practice

1. Background

Even though the rule of professional responsibility prohibit lawyers from practicing with non-lawyer professionals, an A.B.A. commission proposes to change this rule, perhaps in view of the fact that lawyers are already practicing with non-lawyers in Europe, where accounting firms are merging with law firms. Moreover, lawyers who practice with accounting firms, financial management firms, consulting firms, insurance companies, and banks are collecting fees for their employers. Finally, there is an increasing tendency to allow non-lawyers to provide services traditionally provided by attorneys – e.g., non-lawyer representation before administrative bodies, forms services, and self-help book publishing. The A.B.A. proposal attempts to open new business opportunities for lawyers while "preserving the legal profession's core values and client protection." (ABAJ, Aug. 1999, at 14). Multi-disciplinary practices not run by lawyers would be subject to the authorities that regulate lawyers, including audits to insure compliance with legal professional standards. Even non-lawyers would have to meet legal standards, and be supervised by an attorney. Accounting firms often insist that they are consulting, and not practicing law, thus they may oppose the proposal because it suggests unauthorized practice of law. Some bar leaders also oppose the ABA plan because it allows unauthorized practice of law to continue, and reverses a 30-year-old ban on fee-splitting with non-lawyers. Others say it is necessary to protect lawyers from accounting firms.

2. Arguments for allowing multi-disciplinary practice

– it serves consumer need

– we shouldn't try to protect our turf, because such efforts will eventually fail

– it's already happening, so we should make the rules

3. Arguments against multi-disciplinary practice

– confidentiality and conflict of interest rules would have to change

– undivided client loyalty is a core value of the profession; independent

professional judgment would be compromised

– the profit motive will corrupt the profession

4. Both arguments blame "materialism"

a. Legal protectionism for profit

b. Breaking the rules of confidentiality and independence for profit

C. Mediation and Unauthorized Practice of Law

The new Virginia Guidelines (attached) acknowledge that mediation raises conflict of interest and confidentiality concerns for an attorney-mediator, and unauthorized practice of law concerns for the non-attorney mediator. See *Va. Rule 5.5* (attached).

1. When does mediation constitute the unauthorized practice of law?

– The five tests for law practice
  * commonly-understood
  * client reliance
  * application of law to facts
  * affecting legal rights
  * attorney-client relationship

– Clients may be injured by reliance on erroneous information given by non-lawyer mediators

– Va. L.E.O. 1368 suggests that providing legal information and drafting a settlement argument are not the practice of law.

2. Rules for Lawyer-mediators

–*Va. Rule 2.10* allows lawyer as third party neutral; no legal advice

– *Va. Rule 2.11* allows lawyer-mediators; lawyer can offer an evaluation

3. Legal information vs. legal advice

– asking questions that raise legal issues is permitted; raising the issue and predicting an outcome are not.

4. Another turf battle, but this one is already lost

– mediation is here to stay

– "How can we explain the twin pillars of confidentiality and freedom from conflict of interest (which are so important to preserve the independence of a lawyer's advice and actions) to a public that demands the convenience of one-stop shopping for the least expensive professional services?" Tony Alvarado, 62 Tex. B.J. 689 (July 1999)

III. MORAL INTUITION AND ETHICAL MENTORING: THE STRONG DISTINCTION BETWEEN RULES AND ETHICS

Professor Schiltz, in *Legal Ethics in Decline*, 82 Minn. L. Rev. 705 (1998), argues that the minimalist rules of professional responsibility are actually irrelevant in the development of ethical practitioners. Using examples from his own law practice, he identifies ethical intuition as the appropriate guide for behavior. The best lawyers have a sense or intuition about the right thing to do, and they have a responsibility to mentor young lawyers to help them develop that sense or intuition. Moreover, Schiltz argues that law schools could, but have not, provided the kind of mentoring that would help in character formation. Finally, Schiltz identifies materialism – the need to bill more hours – as the primary obstacle to ethical practice.

IV CONCLUSION

Two pictures of the legal profession emerge from the debates are multi-disciplinary practice and unauthorized practice of law. One is of the profession trying to protect its turf, from non-lawyer providers of service, for material gain – a sort of corruption. Another is of the legal profession trying to preserve core values in the face of corruption by those non-lawyers who seek material gain by offering legal services. In either case, the rules – those that protect lawyer's turf, or those that allow non-lawyers to invade that turf – can be viewed as unethical when measured against "higher" rules or values, which echoes Shakespeare's persistent critique of law in his plays. Indeed, the arguments on both sides of multi-disciplinary practice and unauthorized practice of law debates are reflected in *Measure for Measure*. Opponents of multi-disciplinary practice argue that the current rules are not being enforced – the law is a scarecrow that birds rest on. Proponents say the current rules are too

harsh and insensitive to consumer needs – the law sometimes prohibits a benign activity while allowing harmful activities to flourish.