Justice and the Internet

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Today, with a computer, a modem, a touch-tone phone line, and an Internet Service Provider, a lawyer can provide services from virtually anywhere in the world – certainly from anywhere in the United States – to anywhere in the United States. Internet technology offers tremendous opportunities to serve more clients, better. The Rules of Professional Conduct should not prohibit lawyers from using innovative ways to meet the needs of clients efficiently.

The ABA's consideration of multidisciplinary practice provides a useful backdrop to the discussion. Twenty years ago, the ABA Kutak Commission proposed eliminating the restrictions in the Rules on sharing legal fees with non-lawyers and having nonlawyer partners. The Kutak Commission appears to have recognized that the anticompetitive effects of the rules could not be justified by the principal public policy argument offered in their defense, namely, that the rules were necessary to preserve the ability of lawyers to exercise independent legal judgment. Nonetheless, the ABA House of Delegates rejected the recommendation.

The renewed debate about MDPs over the last four years has underscored a fact that has significant implications for the regulation of the legal profession. With the exception of appearing in most state and federal courts, there is very little that lawyers do that <u>only</u> lawyers do. Except by expanding the legal monopoly in a way that is both politically and practically infeasible, there is no way to stop a client

from seeking advice from anyone the client believes has the expertise and judgment to be helpful.

Competition for talent between law firms and non-law firms, not legal ethics rules, will determine where clients go for what we now regard as legal services in the future. During the House of Delegates debate on the ABA Commission's initial MDP proposal, someone quoted the great American philosopher Groucho Marx. When he was asked for his views on sex, Groucho thought a moment, then said "I think it's here to stay."

MDP is also here to stay. Lawyers need to find ways to provide the services that are important to our clients or we will watch our former clients obtain those services from others who will. The phrase "survival of the fittest" expresses a truth. It is not, however, the strongest or the smartest or the fastest who are most likely to survive, but the most adaptable.

Trying to stop MDPs or the many other new vehicles for delivery of legal services that technology makes possible is exactly the wrong focus. The vast majority of people in this country are not wealthy enough to afford to hire lawyers and not nearly poor enough to qualify for free services, so they do not consult lawyers at all. Pricing legal services out of the reach of the majority of Americans in the name of professional ethics, is neither professional nor ethical. Nor is it particularly professional or ethical to prevent lawyers from competing to provide legal services as efficiently and effectively as possible.

The most substantial impediment to lawyers fully exploiting the Internet to provide better services to more clients may arise from uncertainty as to the reach of state UPL rules and statutes. The work of the ABA Commission on Multijurisdictional Practice (MJP) is a useful and welcome step forward out of the Birbrower morass.[i] Remarkably, however, the MJP Commission does not appear to address any of the multijurisdictional practice issues raised by use of the Internet to provide services, except to say: a lawyer's "[p]resence [in a state] may be systematic and continuous even if the lawyer is not physically present in [the state]." Rule 5.5, Comment [4]. Although it is not clear, the comment suggests that a lawyer might be held to have engaged in the practice of law in a state in violation of Rule 5.5(b)(1) or other applicable state law, even if the lawyer never set foot in the state.[ii]

It remains to be seen whether any jurisdiction is prepared to invoke UPL rules to sanction a lawyer who never set foot in the state, but blurring the bright line that might have been drawn between physical presence and virtual presence in a state is not helpful. A lawyer admitted to practice only in State A who uses the Internet (or telephone, telecopy, or mail) to advise a client physically located in State B with respect to the federal securities law implications of particular kinds of financings, should not have to fear a UPL prosecution in State B, under any imaginable circumstances.

Similarly, the tremendous uncertainty as to the line between providing legal advice and providing information about the law is a major impediment to development of Internet services. Whether offering forms and other information over the Internet to prepare enforceable documents or court papers is providing legal advice and constitutes the practice of law ought to be clear one way or the other. The question

is of tremendous practical importance. If the lawyer is providing legal advice, an attorney-client relationship may be created by each visitor to the site who uses the form to prepare documents.

The attorney-client relationship carries substantial obligations, including the duty of loyalty, which precludes the representation of parties who are adverse to each other without the informed consent of both. Model Rule 1.7. Thus, the lawyer would be obliged to set up a conflicts checking mechanism that would collect information about each client or prospective client and any adverse parties in any new matter. Unless the lawyer screens visitors to his web site, which, if nothing else, would increase his costs of operations, the lawyer has no control of who accesses his web site and cannot check for conflicts.

Further, if providing the form and information to fill it out constitutes the practice of law, then the lawyer may need to adopt consent forms requiring each visitor to the site to waive any and all current or future conflicts. Whether requiring such a formality would provide any additional protection to the user is doubtful. The entire relationship consists of the user accessing the site, downloading the form, and information needed to fill out the form. When that is done, the relationship is terminated. Requiring the lawyer to comply with the conflicts rules, will increase the cost and expense to the lawyer and the client, but not provide any appreciable increase in protection for the client.

Even if providing the form and necessary information constitutes legal advice and only lawyers may provide the form and information, the lawyer should be

free to limit the scope of the representation and objectives to providing the form and the information necessary to fill it out. Model Rule 1.2. In light of the brief, limited nature of the services being provided, the lawyer should be free to disclaim any additional duty to explore whether the form is appropriate, whether any additional action should be taken, or any duty to follow up. The lawyer's malpractice exposure should be conmensurate with the limited nature of the services provided. If such limitations are inconsistent with the nature of an attorney-client relationship, that is a good reason for concluding that the service is not legal advice or the establishment of an attorney-client relationship in the first instance.

If providing the form and information necessary to fill it out is nothing more than providing legal information, a non-lawyer could administer the site and provide the information; a lawyer could assist the nonlawyer in developing appropriate content without violating the rule against helping a nonlawyer violate UPL restrictions. More "clients" would get what they believe they need, at a price they can afford.

My point is not that providing information over the Internet is or is not legal advice, but that there is no reason to construe the Rules to prevent a lawyer from providing a valuable service, at affordable costs, unless there is some compelling evidence that there is a real threat to users. If we construe the Rules to make it prohibitively expensive or impractical for lawyers to provide the service, lawyers will not provide the service, but the service will be provided. If the MDP experience taught us nothing else, it taught us that legal ethics rules are not likely to prevent willing buyers and willing sellers from finding each other.

[i] Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P2d 1 (CA 1998).

[ii] Under Rule 5.5(b)(1), "[a] lawyer who is not admitted to practice in this jurisdiction, shall not (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law."