

1-1-2000

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Recommended Citation

Hazard, Geoffrey C. Jr., "Changing Structures in the Practice of Law" (2000). *Faculty Scholarship Series*. Paper 2347.
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Changing Structures in the Practice of Law*

*Geoffrey C. Hazard, Jr.***

I. INTRODUCTION

The "MDP" controversy has engaged the attention of the profession for the last year or so. For anyone who has not heard of "MDP," it stands for Multidisciplinary Practice. In the narrowest and most controversial connotation the acronym refers to the efforts of the large accounting firms to legitimate the offering of legal services to their accounting and management services clientele. In a larger and better sense, it refers to provisions of legal and other professional services in coordinated fashion. Such varied assistance includes: advice about life insurance coordinated with estate planning, advice about financial structure of business coordinated with legal advice about mergers and acquisitions, and psychological counseling coordinated with legal advice in marital dissolution or in matters within the jurisdiction of a juvenile court.

Yet, even if the "MDP problem" is defined in its broadest terms, it refers to only one aspect of the powerful forces now being felt in the traditional practice of law. In this presentation, in memory of Judge Alvin Rubin, I wish to address these larger forces and their effects on the structures in which law is practiced. These forces are, in the most general sense, various forms of intellectual competition. However, we can consider them as specialization, balkanization and obsolescence. These forces are all having powerful effects on the traditional law firm organization.

II. SPECIALIZATION

It is a familiar phenomenon that law practice is becoming increasingly specialized. Specialization is evidenced in the curriculum of the law schools, where courses in specific fields have wildly proliferated in the last two decades. It is evidenced in the curricula of continuing legal education, where proliferation has made the specialization of the legal profession more dramatic. It is evidenced in the organization of law firms, as indicated by internal designations of special departments, such as estate planning, litigation, bankruptcy, intellectual property and so on. Specialization is evidenced in the very organization of the profession, in the emergence of increasingly diverse subassociations, such as the American Trial Lawyers Association, the American Association of Corporate Counsel, and the proliferation of separate Sections and Committees within the American Bar Association and in bar associations at the state level.

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* Lecture I of the Sixth Judge Alvin B. and Janice Rubin Visiting Professorship of Law Program Year 2000 Lecture Series given at the Paul M. Hebert Law Center on March 14, 2000.

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The cumulative effect of divergent specialization is that members of the legal profession have less and less technical lore that we hold in common. The tax lawyer does not know what a litigation lawyer is talking about in a reference to the term "26(b)," and a litigation lawyer does not know what a tax lawyer is talking about in a reference to Subchapter S. By the same token, lawyers in various fields of specialization increasingly share technical lore with specialists who are not lawyers. A tax lawyer can confer intelligently with a tax accountant about Subchapter S and many product engineers can confer intelligently with lawyers about the requirements of a "reasonable alternative design" for a product whose safety has been challenged in litigation. That is, the vocabulary used by lawyers and other professionals is increasingly derived from specific subject matter in areas of practice rather than from legal terminology as such. The change in vocabulary symbolizes the distancing among lawyers in different fields of specialization and the increasing proximity of professionals in different disciplines who are engaged in addressing the transactions in which they are specialists, regardless of profession.

A. Balkanization

The cumulative effect of specialization is the development of different bases of personal identity. To return to our example of tax lawyers and litigation lawyers, specialists in these respective fields have come to think of themselves as lawyers only in connection with law firm meetings where their different vocations and income patterns must somehow be accommodated. There are many advantages to practicing in a law firm, but there are concurrent tensions and sources of conflict. Beyond normal and unavoidable personality conflicts, are conflicts arising from differences in what can be called the "practice worlds" in which the various specialists find themselves.

These tensions have become very evident in discussions about the rules of ethics and possible changes in these rules. It is no accident that the strongest concerns in this respect are expressed by litigation lawyers. As litigation lawyers are specialists in conducting argument, we might expect them to be in the forefront of disputation on any and all subjects. However, in the case of disputes over the rules of ethics, there is a deeper explanation for the salience of the litigators. The plain fact is that of all the specialties in law practice, litigation has changed least over the last 100 years. I recognize that there have been changes in the law of discovery, in the burgeoning of class suits, and so on. I do not wish to suggest that litigators are dinosaurs, however great the resemblance in some cases. I do suggest that litigation involves essentially the same ethical problems today that it involved a century ago. Many other fields of specialization, however, have come to confront very different contexts than the "old fashioned conveyancer" and therefore deal with very different ethical problems.

B. Obsolescence

Our profession is becoming increasingly specialized in its functions and vocabulary. It is also becoming increasingly balkanized in the frameworks in which lawyers carry on practice. The center of a lawyer's practice is no longer the law firm as such, but rather his specialized department or boutique. The lawyer's relevant connections outside of the office are with other professionals specializing in the same field, including many professionals who are not lawyers. The relevant connection with clients often is with specific individuals performing specific functions in some large corporate structure, and not with the corporate structure itself. Thus, lawyers represent General Motors or IBM only in a legal and nominal sense. Their actual working relationships are with specific individuals in the General Motors or IBM law and engineering departments.

I believe the transformations suggested above are results of fundamental social and economic changes. These changes have been going on for many years but their pace is now so accelerated that we cannot ignore them. We also notice that the changes are occurring world wide. That too has been true for a century, but the scope of "globalization" has so enlarged recently that we cannot ignore its effects. A related change is the rate of change itself—the compression of time in typical transactions.

III. SIGNIFICANCE FOR THE STRUCTURE OF LAW FIRMS

The modern law firm is a group of specialists who practice together because the benefits of association outweigh the disadvantages. The benefits of association can be conceptualized in terms of information transfer, although that way of considering the problem may be unfamiliar. It is a familiar phenomenon that it is usually easier for a lawyer to connect up with someone who is a partner or associate in the same law firm than it is to connect up with a practitioner in a different firm across town, or across the country, or in some other part of the world. For one thing, one can more readily check against the risk of conflict of interest in undertaking a new matter. Furthermore, lawyers in the same firm have better information about the technical capabilities of the lawyers in their firm, whereas that kind of knowledge about other lawyers may be fragmentary or inaccurate. Lawyers in the same firm have better information about legal capacity in terms of the immediate availability of various lawyers in the firm. When it comes to coordination and assigning priority in various undertakings by a firm, the firm is able to work through an established system of internal government, instead of having to negotiate an arrangement to meet the problem at hand.

However, there are corresponding disadvantages to the law firm as an organization. A principal disadvantage is that a conflict on the part of one lawyer in the firm is imputed to all other lawyers. This means that many new matters that are attractive to one department of the firm have to be rejected on grounds of conflict of interest having nothing to do with the lawyers in that department.

Another disadvantage is that there are strong economic and organizational pressures to employ lawyers in the firm in a matter—even where it is clear that other lawyers elsewhere would be better qualified for the matter in question. A related problem is that the government of the firm may not be capable of effectively resolving disputes over priorities on a sustained basis. Differentials in the fees clients are willing to pay for various kinds of services are of course a continual source of conflict. It is notorious that the typical estate planning department cannot produce the revenue per capita that is produced in by the corporate “M&A” lawyers. Thus, although there are strong centripetal forces that sustain the modern law firm, there are also strong centrifugal forces impelling law firms to come apart or not to be formed in the first place.

It is impossible to generalize about the strength and direction of these forces. They are at work everywhere in the legal profession. Essentially similar forces are at work in other professions—witness the breakup of Ernst & Young in recent months—and indeed in the corporate world itself. The results of these forces are apparent in two seemingly different phenomena in the legal profession. On the one hand, many large law firms are becoming even larger. For example, there are dozens of law firms having more than 500 lawyers. If we count the large accounting firms as organizations providing legal services—a plain fact that the accounting firms of course deny—then the count of large firm firms is even greater. Moreover, the pressure of information efficiency is a powerful force inducing multidisciplinary professional relationships. As I interpret the law, lawyers and other professionals now can establish very close working relationships as long as they maintain formally separate firms. That is, the working relationship can be the functional near equivalent of a firm of mixed professionals as long as it is not designated as a partnership or a corporation. Hence, in my opinion, the “MDP” is not simply coming, it is here.

On the other hand, we are witnessing the proliferation of boutique law firms, that is, law firms of (say) ten or fewer lawyers engaged in highly specialized practice. Plaintiff personal injury lawyers all used to practice in boutiques, but some of them are now consolidating in larger firms. Corporate lawyers generally used to practice in large law firms, but many of them are now splitting off into boutiques. One aspect of this division of practice involves senior lawyers who withdraw from a law firm with which they have long been associated and enter solo consulting practice. Another aspect is the emergence of “temp” lawyers, i.e., lawyers who are solos but who hire out to other law firms in a sequence of separate engagements.

IV. CONCLUSION

Several observations can be made about these developments in the structure of law practice. First, the “natural boundary” between professionals is not necessarily their formal professional identity—such as lawyer or accountant or financial analyst. Rather, the natural boundary is common familiarity with some specific activity to which the various professionals can all provide useful assistance, such

as health care or corporate financial or domestic relations. Second, within the legal profession, the large firm is not a "natural organization." Rather, the organizational setting in which any specific lawyer is employed is determined by a specific interaction between the centripetal and centrifugal forces referred to above. Third, the structure of a law firm at any given time is highly unstable. The forces of change will not abate and the rate of change will probably increase.

The result may be that we should consider that a career in law practice—and in the practice of other professions—to be essentially an individual pathway in which each will be professionally engaged in various settings over the course of time. In that sense, the situation is similar to what it was around 1870—before the emergence of the modern law firm. Everyone then was a solo practitioner, none was an "organization man." Some observers consider those to have been "the good old days."