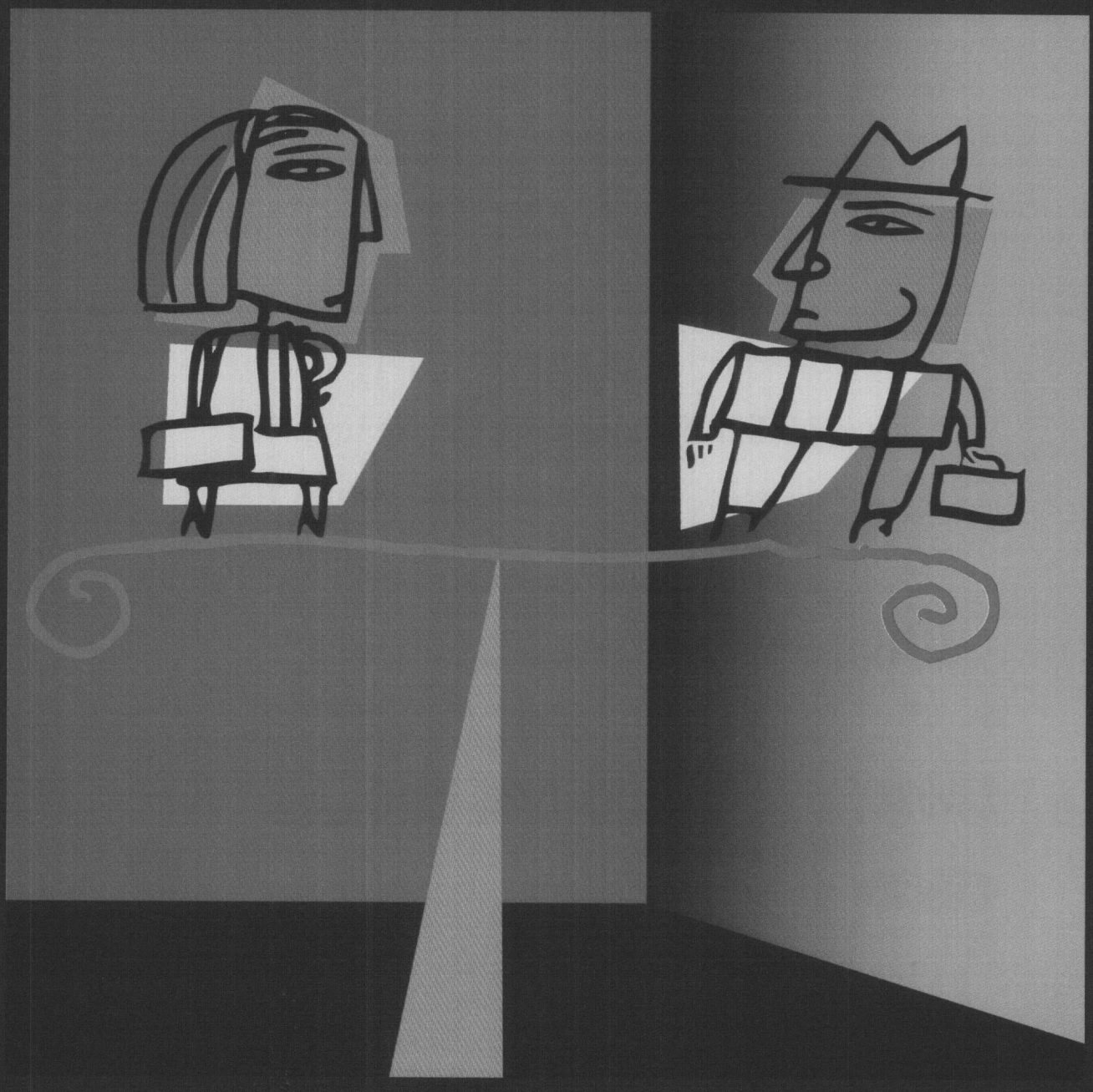
Balancing the interests of both professions

Attorneys and CPAs: Cooperation or Confrontation?

By Ronald J. Huefner and Stephen Kellogg



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In Brief

Friend or Foe?

CPAs are by now well versed in practicing in a changing professional environment. The financial realities that triggered the sea change in the accounting profession are now beginning to bear on the legal profession as well. Ironically, such change has been heralded by the Big Five firms' expansion into the practice of law. Though not permitted in the United States, CPA ownership of law firms is commonplace internationally. Attorneys are now exploring how law firms can diversify the services they offer and how they are delivered, injecting terms like "consolidation" and "holding out" into their professional discourse.

As the practice interests of accountants and attorneys increasingly overlap, the question is whether this will lead to cooperation or confrontation. There are obstacles to cooperation; most notably, the different ways in which the two professions serve clients and the currently inhospitable regulatory environment. The prevailing unauthorized-practice-of-law standards have been a flashpoint in recent confrontations, both for nonattorneys expanding into law practice and for lawyers that have tried to partner with outside professionals.

Regulatory reform is a prerequisite to further cooperation and will be driven by the marketplace. It remains to be seen whether attorneys will take an active role in shaping the future professional environment, such as CPAs have done with the UAA. Discussion of the issues has only just begun, and only time will tell if attorneys follow the example set by accountants.

Recent years have seen major changes in the conduct and structure of the professions and in the delivery of professional services. Ownership of a professional practice has expanded beyond the confines of members of the profession. For example, in pharmacy, the pharmacist-owned-and-operated store has been replaced by the retail chain; in medicine, increasing numbers of doctors are employees rather than owners of a practice. In accounting, non-CPA ownership has been a recent but accelerating trend; each week seems to herald the acquisition of another CPA firm.

As CPA ownership has broadened, the nature of professional activity has also changed. Issues involving the scope of services and the ability of CPAs to render services outside the CPA firm have dominated the profession for many years. Services offered by CPAs have diversified considerably, though the profession's franchise remains the attest service. The proposed new Uniform Accountancy Act (UAA), which is being considered by a number of states, clarifies CPAs' authority to offer nonattest services in a variety of organizational contexts and to partner with other professionals for service delivery, even in the attest field, where CPAs need only have a majority ownership position in CPA firms.

One effect of these changes is the hiring of a greater variety of personnel by CPA firms. Many CPA firms now employ significant numbers of attorneys, a practice that has not escaped notice by the legal profession. Indeed, the most recent statistics available to the American Bar Association (ABA) indicate that accounting firms now constitute four of the top five employers of lawyers worldwide.

Many in the legal profession are concerned over both the increased competition for legal talent and the possible inroads by CPA firms into the practice of law. In addition, the rules on unauthorized practice of law may potentially affect CPA firms and their attorney-employees. A recent article in *The CPA Journal* addressed the application of unauthorized-practice-of-law (UPL) rules to work done by CPAs ("CPAs and the Unauthorized Practice of Law," August 1998). Equally important is the application of UPL rules to attorneys that work in a CPA firm.

The legal profession is both examining its rules on the delivery of legal services and discussing the apparent inroads CPA firms have made into legal practice. In this ever-changing environment, will the coming years be ones of cooperation between the two professions, or will they be marked by confrontation?

Recent Events

Two sets of recent events, both involving the accounting profession, are indicative of the issues and concerns that confront the legal profession. The first set of events was the actions taken by the Texas State Bar regarding two large CPA firms. A formal complaint was filed with the Texas State Bar against Arthur Andersen, alleging unauthorized practice of law. It contended that the CPA firm offered a variety of legal services, including forming legal entities by drafting corporate and partnership organizational documents; doing estate planning; preparing legal documents such as employment agreements, stock option plans, and severance agreements; assisting in merger and acquisition agreements; and litigating in Tax Court. Around the same time, an inquiry was begun into the possibility of similar unauthorized practice by Deloitte & Touche. The complaint against Arthur Andersen was subsequently dismissed, and no formal proceeding ever commenced against Deloitte & Touche. While no

public report was issued in the Arthur Andersen matter, it appears there was insufficient evidence that the CPA firm had clearly engaged in the practice of law. Regardless, the publicity surrounding these cases, and the high profile of the CPA firms involved, has directed much attention to this issue.

The second set of events relates to an international trend toward the acquisition of law firms by CPA firms. Such mergers are permitted in Europe, Latin America, and elsewhere. KPMG acquired the largest law firm in France. Coopers & Lybrand, prior to its merger with Price Waterhouse, had announced plans to be among the largest providers of legal services in the world by the year 2000. Arthur Andersen currently practices law in the United Kingdom, France, and Spain and recently acquired an Australian law firm. Arthur Andersen also sought to become one of the largest law firms in the United Kingdom by acquiring one of England's major law firms. While this transaction did not materialize, its high visibility raised the level of awareness and concern over the increasing role of accountants in the practice of law worldwide.

Accountants and the Practice of Law

The involvement of U.S. CPAs in legal matters has been longstanding and widespread. Indeed, such involvement would be virtually impossible to avoid, as nearly all business and financial activity has a legal component to it.

The field of taxation has long been dominated by accountants. Many years ago, this was a cause of friction between the two professions. The marketplace showed that CPAs were the tax preparers of choice, however, and the provisions in Federal law enabling CPAs (and others) to prepare tax returns and represent taxpayers before the IRS overrode any state restrictions. The CPA's role in taxation has been further strengthened by the provision in the IRS Restructuring and Reform Act of 1998 that granted, for noncriminal proceedings, privileged status to communications between the taxpayer and any individual authorized to practice before the IRS. To some extent, the broad and growing role of accountants in taxation has been tolerated, if never truly accepted, by parts of the legal profession.

As the practice of CPA firms has expanded beyond the traditional market of attestation and taxation, it has migrated into the field of law. Emerging areas of CPA practice have included personal financial planning, litigation support services, compensation and benefits planning, and a myriad of consulting services affecting most every area of business activity. Virtually all of these have legal components. Accounting firms have defined these areas as part of the "practice of accounting" and, thus, maintain a claim that they are not involved in the "practice of law." Additionally, many CPA firms are careful to refer clearly legal matters to outside law firms, even if they have attorneys on staff.

To adequately provide this expanded menu of services, CPA firms have diversified their staffs to include many types of professionals, but perhaps lawyers most of all. It is said that Ernst & Young employs 2,400 attorneys throughout the world, more than any single law firm. Arthur Andersen is ranked third in number of attorneys employed, both in the United States and internationally, and is said to have hired more lawyers in 1997 than any U.S. law firm. Concern over this brain drain is beginning to be expressed by the legal profession.

Thus, the U.S. accounting profession has become a major player in the rendering of services by attorneys, without the formality of acquiring law firms and with surprisingly little debate about just what constitutes the practice of law. The extent of this has begun to alarm many in the legal profession.

In general, the accounting profession seems open to cooperation. It sees new opportunities for partnering between CPAs and attorneys on the horizon. The accounting profession is moving in many jurisdictions to permit non-CPA partners, and lawyers appear to be desirable candidates for these roles. The legal profession is much more cautious at the moment, perhaps because it has just begun to examine the topic. The previously mentioned actions in Texas indicate that the current attitude is one of confrontation rather than cooperation. To some extent, the present posture of the legal profession is not unlike that of the accounting profession of a few years ago, as it became acquainted with the prospect of such players as American Express Tax & Business Services entering its arena.

The Case for Cooperation

Many practical factors promote cooperation between the accounting and legal professions. Business activity has become increasingly complex and is seldom one-dimensional. A particular business issue may have legal, tax, reporting, strategic, and financial dimensions. A multidisciplinary team is probably the best way to attack such an issue. Accounting firms have led the way in assembling such teams and have thus become major suppliers of professional services to business and other entities.

There is also an increasing demand for one-stop shopping on the part of business and clients. Recognizing that multidisciplinary service is needed, clients prefer to find the entire array under one roof, rather than deal independently with several providers. Even a relatively simple personal financial plan may involve professionals from the fields of taxation, law, investments, and insurance. The demand of clients for the convenience and cost-efficiency of dealing with a single multidisciplinary provider is in opposition to the old model of freestanding professions.

Perhaps the major factor driving the legal profession toward cooperation is its fear that changes will happen with or without its involvement. As the legal profession recognizes its vulnerability to uncontrolled change, it is beginning to try and exert some control through the ABA and various state bar associations.

The Case for Confrontation

There are significant barriers to formal cooperation between the accounting and law professions. One barrier has to do with their different models of client–professional interaction; another barrier involves the current regulatory environment.

Different Client Models. The professional–client relationship is quite different in the two professions. In accounting, the client belongs to the firm, and the firm typically serves the client's needs through a team of personnel, which may well change over time. In law, the client belongs to the lawyer, even though the lawyer may be a mem-

ber of a large law firm. Thus, the relationship is a much more personal one. This fundamental difference is exhibited in several ways. The ratio of staff to lawyers is much lower in a law firm than is the ratio of staff to partners in a CPA firm. The law client will typically see only the lawyer; staff will do background work but will have little client interface. The CPA client is likely to interact with a variety of staff members, from the entry level to the partner level.

Because the relationship of lawyer to client is a personal one, law practices typically cannot be sold without the prior consent of each client. Nor can a law firm prevent a departing lawyer from taking clients along; in accounting, such behavior is often controlled via employment agreements and enforced through legal action.

Differing client models also lead to differing ethics between the two professions. The practice of law is one of client advocacy, and the ethics are rooted in the close and trusting relationship necessary between lawyer and client. Thus, attorney-client privilege is central to the field of law. The practice of accounting is based on independence from the client, at least for the attest field. Indeed, where publicly traded companies are concerned, an auditor may be required to report the client's illegal acts to the Securities and Exchange Commission. Responsibility to the public is paramount in the conduct of the audit, though an advocacy role is common in nonattest services. The accounting profession has long been troubled by conflict between its advocacy role and its independence role. Accounting ethics are thus more process-based than client-based, involving such concerns as due care, adequate supervision, peer review, and the like.

This fundamental difference in professional ethics is often a source of concern to attorneys. They find it difficult to envision practicing in the diverse environment of the CPA firm while retaining their client-based ethical system.

Scope of Practice. A second major barrier to cooperation between the professions is the scope of practice that is subject to regulation and discipline. What areas of practice are the exclusive province of lawyers? What kinds of organizational units can be used to render legal services? Accountants recently faced similar questions, and have largely resolved these issues. While the scope of accounting practice is quite large, only the attest function is the exclusive province of CPAs. Furthermore, there has been a need to determine exactly which services fall within the confines of attest. The accounting profession is currently questioning how it delivers its services. The old answer was that CPAs must deliver all their services through a CPA firm—a regulated entity with ownership restrictions. The emerging answer is that only attest services need be delivered by a CPA firm, and even there ownership constraints are being relaxed. All other services can be delivered by any type of organization, and CPAs may play any role in such an entity.

The legal profession is beginning to reexamine these same issues. What is the scope of the practice of law? In what organizational arrangements can lawyers render legal services? The current answers to these questions are quite constraining. Whether broader answers will emerge, as they have in accounting, remains to be seen.

Surprisingly perhaps, the practice of law is not well defined. Each state has a statute or court regulation on the topic, but the definition is often all-encompassing and open-ended, a situation that is probably not sustainable. For example, section 81.101 of the Texas Government Code defines the practice of law as preparing pleadings, managing an action on behalf of a client before a judge in court, rendering services outside of court, giving advice, or rendering "any service requiring the use of legal skill or knowledge." The Texas code also states that the above description is not exclusive, giving the courts the authority to determine, on a case-by-case basis, whether "other services and acts not enumerated may constitute the practice of law."

The inability to partner with other professionals and provide the range of services demanded by clients inhibits the conduct and growth of practice.

In general, however, the practice of law is defined as the authority to appear before the courts on behalf of others. Several extensions follow from this fundamental concept. The first is that the practice of law also involves the authority to give advice about possible outcomes before courts or other government agencies. A second extension is that the practice of law involves providing opinions and instrumental documents, such as pleadings, contracts, and wills.

How far can this interpretation proceed before reaching the impossible position that any and all citizen interactions with government agencies or with legal documents require lawyers as indispensable intermediaries? A boundary is clearly needed, but historically none has existed. The legal profession has chosen to leave the definition broad and vague, and to selectively address borderline issues on a case-by-case basis.

The Unauthorized Practice of Law

Nonlawyers. Every state, except Arizona, has a statute or regulation prohibiting UPL. The concept of UPL is a double-edged sword: It has been used to prevent nonlawyers from rendering legal services, and it also has been used against attorneys themselves, to constrain the way in which legal services can be delivered.

The recent actions against two large CPA firms, cited earlier, are examples of UPL complaints against nonlawyers. The range of actions can be quite broad. For example, Nolo Press, a California publisher of self-help law books, has been cited in Texas for UPL on the grounds that legal advice is contained in the books, which are being sold by a nonlawyer. Most cases are directed against individuals deemed to be giving legal advice, even if only by selling forms for divorce filings or advising people what forms might be required for a particular purpose.

A major exception to UPL occurs in cases where the Federal preemption of state law applies. The Supreme Court established this principle in the 1963 *Sperry* case. Federal law had granted authority to the Commissioner of Patents to establish regulations as to who could practice before the Patent Office. To the extent that nonlawyers were so authorized, state statutes on UPL were overridden. Similarly, Federal law permits CPAs and enrolled agents to practice before the IRS, and, as indicated, they may now even assert a confidentiality privilege similar to the attorney-client privilege, albeit one that does not cover corporate tax shelters and criminal matters. Many other Federal agencies allow nonlawyers to represent parties. In these specific areas, Federal law preempts any state rules on UPL. Outside these specified areas, state regulations apply.

Lawyers. The UPL provisions also serve to constrain the manner in which lawyers may practice law. State regulations prohibit the sharing of legal fees between an attorney and a nonattorney. This provision has hindered the ability of lawyers to partner with others in ventures that may be deemed to involve the practice of law. In one example, a nonattorney was engaged in representing Social Security claimants in disability cases, an activity permitted under the Federal preemption. A lawyer sought to partner with this nonattorney. An advisory opinion by the Florida Bar concluded that such an action would be unethical. The work involved was deemed to be the practice of law, even though Federal law allowed nonattorneys to do it. Thus, where the attorney otherwise maintained a practice of law or held herself out as a lawyer, the fees charged would be legal fees, and these could not be shared in partnership with a nonattorney.

All jurisdictions except the District of Columbia prohibit fee sharing. There, this rule has been modified to permit a nonlawyer business manager to be a partner and to allow fee sharing with nonlawyers such as registered lobbyists.

Many jurisdictions also prohibit partnership with a nonlawyer if any of the partnership's activities constitute the practice of law. Furthermore, practice in corporate form is prohibited if nonlawyers hold any financial interest in the company, serve as officers or directors of the company, or otherwise have any right to direct or control the lawyer's professional judgment. Violation of these (and similar) provisions by a lawyer constitutes unauthorized practice of law and subjects the lawyer to professional discipline and, in some cases, possible criminal prosecution. At present, lawyers working in CPA firms are very careful to avoid crossing that ill-defined line. Activities that appear to be unambiguously the practice of law—such as the preparation of certain documents or representation in court—are routinely referred to outside firms. This is an inefficient practice, but one that seems necessary under current UPL provisions.

The motivation behind these provisions is to allow the lawyer to exercise independent professional judgment with regard to the client's interests, not the interests of third parties. However, these provisions also severely constrain the form of practice. As CPAs have learned in the past, the inability to partner with other professionals and provide the range of services demanded by clients inhibits the conduct and growth of practice and increases vulnerability to inroads by other providers of similar services.

Directions in the Legal Profession

The legal profession recognizes the conflicts between its traditional modes of practice and the changing world in which it operates. In August 1998, the ABA appointed a commission on multidisciplinary practice to examine trends and to make recommendations to the ABA's policy-making body, the House of Delegates, by August 1999. According to an ABA news release, it was given the following instructions:

The commission is directed to study and report on the extent to which and the manner in which professional service firms operated by accountants and others that are not lawyers are seeking to provide legal services to the public. Additionally, the commission will analyze:

- the experience of clients, foreign and domestic, that have received legal services from professional service firms and report on international trade developments relevant to the issue;
- the existing state and Federal legislative frameworks within which professional service firms may be providing legal services and recommend any modifications or additions to these frameworks that would be in the public interest;
- the impact of receiving legal services from professional service firms on a client's ability to protect privileged communications and to have the benefit of advice free from conflicts of interest; and
- the application of current ethical rules and principles to the provision of legal services by professional service firms and recommend any modifications or additions that would serve the public interest.

The tone of the release is arguably confrontational. It has been observed that every member of the commission is a lawyer and that no attempt was made to recruit members that might hold opposing viewpoints. In contrast, most ABA panels are designed so that a range of opinions is represented. Nevertheless, the commission is holding public hearings on the issue, suggesting that it might consider broad and diverse input. The ABA also has a standing committee, the National Conference of Lawyers and CPAs, that addresses issues between the professions in a more cooperative manner.

At the state level, the Florida Bar is actively studying the topic of involvement of lawyers in ancillary businesses. The North Carolina Bar Association has held formal meetings with representatives of the major accounting firms, seeking avenues for clarification and resolution of issues between the professions.

As stated earlier, lawyers are prohibited from partnering with nonlawyers in any area deemed to involve the practice of law, and the definition of the practice of law is extremely broad and open-ended. These factors have made it difficult for lawyers to expand their scope of practice into closely related areas. Just as CPAs have felt it essential to expand into new services, many lawyers also feel the financial pressure to broaden their menu of services.

What's Next?

Many of the issues now beginning to impact attorneys have previously affected the accounting profession; moreover, CPAs have been a major catalyst in triggering the current reexamination of the legal profession. There is a certain irony at work here. The accounting profession aggressively fought non-CPA ownership of CPA firms while expanding its reach across professional borders and, in some parts of the world, acquiring law firms. Similarly, the accounting profession opposed CPAs holding out as such when employed by non-CPA firms, while it employed large numbers of attorneys to render legal services.

Just as these issues have caused major debate and dissent in the accounting profession over the past several years, they are currently at the forefront of the legal profession's discourse. CPAs have a strong interest in the direction that these issues will take. With an increasing interest in collaborating with other professionals for the delivery of both attest and nonattest services, CPAs will look to attorneys as potential partners. Readers wishing to follow the ongoing developments on this topic should consult the ABA's website for its Commission on Multidisciplinary Practice at www.abanet.org/cpr/multicom.htm. ❑

Ronald J. Huefner, PhD, CMA, CPA, *is the Distinguished Teaching Professor of Accounting at the State University of New York at Buffalo and past president of the Buffalo Chapter of the NYSSCPA.* ***Stephen Kellogg, JD,*** *is an adjunct assistant professor of business law, also at the State University of New York at Buffalo.*