

Ethics Barriers Could Protect BigLaw From Big 4 Competition

By **Matthew Villmer**

Law360, New York (June 25, 2014, 6:32 PM ET) -- Despite recent promises of aggressive expansion into the legal market by the Big Four accounting firms, many attorneys believe current attorney-client privilege and conflict of interest rules will prevent PricewaterhouseCoopers LLP, Ernst & Young LLP, Deloitte Touche Tohmatsu Ltd., KPMG LLP and others from posing a serious threat to the legal industry.

The current Big Four expansion into the legal services industry is happening primarily overseas, but some experts believe the rules barring attorneys from sharing fees with nonattorneys in the U.S. will likely be revamped in the near future, leaving E&Y and others with an open path to directly compete with U.S. law firms.

"The issue of big accounting firms competing with BigLaw for legal work has been percolating for years, but now there's a groundswell," Jerry D. Miller, a principal with Joseph Greenwald & Laake PA, told Law360. "It's the commoditization of the legal practice, and it's likely that you'll see nonlawyer fee sharing rules take hold in the U.S., just as they have in Europe, Africa and other [areas]."

E&Y has already taken advantage of lax fee sharing rules in Europe, the Middle East and Africa, and according to Dr. Cornelius Grossmann, the company's global law leader, its ongoing expansion and plans for the coming years are "aggressive."

Rather than create new law firms, the company's strategy is to build on current relationships and win new business by offering integrated teams of tax, regulatory, accounting and legal specialists, cutting out the need for companies to seek legal help outside of the E&Y network for matters such as transactions and restructuring.

"Our strategy is to go to the market in a different way, to combine legal with many of our other services ... and offer legal services at the same quality as the international firms," Grossmann told Law360.

But assuming current U.S. laws will be altered to allow accounting firms to direct the operation of attorneys in a formal legal practice, many experts believe that state rules of professional conduct surrounding client confidentiality could cause problems for the Big Four.

Brian M. Katusian, an attorney with Seltzer Caplan McMahon Vitek, says state bar associations have long struggled with whether and how to permit multidisciplinary practices, such as accounting firms employing attorneys. Although the one-stop shop for accounting and legal services would be attractive

to some, it would likely raise serious client privilege problems.

"Independent from the economics of a one-stop shop for a client are attorney-client relationship concerns," Katusian told Law360. "The core values of independent judgment, conflicts of interest, giving conflict-free advice and confidentiality, for example, may all be compromised in an MDP setting."

Under current U.S. law, communications between attorneys and clients are generally privileged and cannot be discovered by opposing counsel or admitted in court. The work product privilege also protects the internal notes and work performed by clients, attorneys or others in preparation for litigation.

Accountants are not, however, afforded the same levels of privilege when working with clients, and if a client relies on the legal advice of attorneys and accountants operating at the same Big Four accounting firm, this could put attorney-client privilege in jeopardy.

"Attorney-client privilege would definitely be an issue in the U.S., particularly if it's a CPA firm operating with a law firm subsidiary," Julie Bradlow, counsel with Moore & Van Allen PLLC, told Law360. "The Internal Revenue Code offers some protection to accountant-client communications, but it's not as expansive as the common-law privilege that applies to attorneys, and it doesn't cover the things that the common-law work product privilege covers. The No. 1 duty of an attorney is to protect confidential client communication, so this would make it tough for the Big Four."

Experts also told Law360 that if the Big Four were to operate law firm subsidiaries under the control of the accounting firm itself, the integrity of the legal services provided by the accounting firm's lawyers might be compromised.

"The American judicial system is partially based upon the independence and integrity of attorneys," Miller told Law360. "If you're a lawyer and you're answering to a nonlawyer in a supervisory role, like an accountant, that compromises your integrity and independent judgment."

Katusian said that nonlawyers often do not understand the legal nuances of a client's case, and that attorneys ultimately answering to accountant supervisors would affect the sacred attorney-client relationship.

"My take, as a California tax attorney, is that my clients highly value the ability to speak freely and in a privileged setting about their tax concerns," Katusian told Law360. "Clients have the knowledge that my independent judgment is not being 'directed' by a nonlawyer superior who may not understand or appreciate the legal nuances of a client's matter, and that advice and legal services provided are not 'tainted' by conflicts of interest."

Others believe there might be a fundamental philosophical difference between the services provided by accountants and attorneys, creating a barrier to entry by the Big Four. Although Phillip England, a shareholder with Anderson Kill PC, believes a Big Four expansion into the legal services realm would be a welcome change to the industry, he told Law360 that the roles of accountants and attorneys are, by nature, a dichotomy.

"The basic role of an accountant is to take a concept that is intrinsically gray, and make it black and white," England said. "But the basic role of a lawyer is to make something that appears black and white, gray, so it can be subject to dispute and an ultimate resolution."

But if the Big Four are ultimately able to compete against BigLaw in the U.S., firms should watch out because they pose a serious threat to business, experts say.

"The large firms are already under attack, and their traditional business model is suffering," said Michael S. Fried, an attorney with Fried & Rosefelt LLC. "If accounting firms create a large presence in the legal business, I can imagine a scenario where the Big Four shutter some large firms in the U.S."

--Editing by Elizabeth Bowen and Katherine Rautenberg.

All Content © 2003-2014, Portfolio Media, Inc.