The Viability of Multidisciplinary Practice

by Mortimer M. Caplin

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Today the organized bar finds itself in the midst of a high degree of introspection and soul-searching on the status and welfare of the legal profession. Two current developments are the primary cause: ancillary business activities and multidisciplinary practice.

The first, ancillary business activities, or law-related services, refers to the growing involvement of law firms in activities related to law practice but not technically treated as the practice of law. Sometimes organized as separate businesses or subsidiaries, these arrangements allow nonlawyers to own part of or even control the enterprise, share profits, and join lawyers in providing these nonlegal services to "customers" who at times may also be the lawyers' clients.

Briskly advertised today, for example, are such enticing offerings as trust management and investment services; real estate investment and insurance; health care consulting; public relations and lobbying; translation and private investigations; and one even touting a former FBI agent as the principal in charge. The law firm of Bingham Dana LLP has gone one step further, merging its money management practice with an investment house, Legg Mason. The tune of the day seems to be "We've got everything!"

Over the years many objections had been raised in the American Bar Association (ABA) House of Delegates. But finally, in 1994, after a series of flip-flops, the ABA amended Rule 5.7 of the Model Rules of Professional Conduct to allow law-related services as long as the lawyers took "reasonable measures" to make clear to "purchasers" or "users" (that is, customers) that they were not receiving legal services or getting any of the protections of the client-lawyer relationship. If customers happen to be existing clients, the lawyers may find themselves subject to all ethical requirements.

As can be seen, these activities tend to place law firms alongside businesses in the commercial world, with lines often being blurred between law and business, and the public at times left uncertain as to what the differences are between lawyers and nonlawyers.

Of even greater significance to the profession is the second development, multidisciplinary practice (MDP), described as "the most important issue facing the legal profession in the past 100 years." Involved here is a sustained campaign to allow lawyers and nonlawyers to join together in partnerships, provide mixed professional services, and share in the resulting fees. This is not ethically allowed today, at least not in the form of total business integration, for Rule 5.7 of the ABA Model Rules, the template for state ethical rules, flatly prohibits lawyers from (1) maintaining partnerships with nonlawyers where law practice is included, (2) sharing fees with nonlawyers, and (3) permitting nonlawyers to supervise or control their professional judgment.

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These prohibitions are strongly defended as serving the best interests of the public and the profession — protecting the public against inadequate or improperly focused representation. Critics, in contrast, loudly cry that this is simply economic protectionism.

Nevertheless, intense efforts have been in high gear for some time to change these ABA Model Rules, led primarily by the Big 5 accounting firms — Deloitte & Touche, Ernst & Young, KPMG, PricewaterhouseCoopers, and until recently Arthur Andersen — powerful organizations with tens of thousands of employees and offices throughout the world, and possessing huge resources.

Ever on the alert to expand markets and attain larger market shares, these firms continue on the lookout for law associates, law partners, and even entire law firms. They flatly maintain that their lawyers, at least in the United States, rather than practicing law, are merely offering "consulting services," outside the ambit of lawyers' professional conduct rules or bar discipline. Yet the accounting firms' ultimate aim is quite clear: to form dual-practice, full-service partnerships, working together as a team to provide "a seamless web of services" — accounting, consulting, law, you name it. One-stop shopping, if you will, supplying all the products you need!

Not that the accountants are alone in this effort. For within the bar itself there are parallel forces fully supporting removal of the ethical barriers. For them the competitive and commercial advantages of such multifaceted marketing are obvious. Too late, they say, to resist the change. The horse is

out of the barn. Many forms of MDPs already exist, at home and abroad.

In sharp opposition, though, is another body of determined lawyers who completely back the existing bans, stoutly manning the barricades. They regard our profession as unique, "indispensable to the functioning of civilized society," and take special pride in being lawyers.

They harken back to our history, our traditions, our training; to our special responsibilities relating to the proper functioning of government, upholding the rule of law, and providing service to the community. As officers of the court, they emphasize, we are committed to strengthening the judicial process, to ensure that it is working effectively and that access is available to all citizens.

Of similar importance are our traditions of higher ethical and fiduciary conduct, our integrity, our pro bono commitments and continuing concern for the public interest — our profession's "spirit of public service."

Will all this be eroded, watered down, if lawyers and law firms are combined in partnership with other professions? What about the differences in our rules on confidentiality and lawyer-client privilege, conflicts of interest and client loyalty?

And what about "independence of professional judgment"? What happens when nonlawyer partners play leading roles in firm management and firm policy — bottom-line responsibilities — and when at stake is the retention of wealthy clients and major businesses, the source of huge fees?

Some point to lawyers already practicing in settings where they have no ownership and the supervisors at the top are nonlawyers: for example, corporate in-house law departments, government law offices, prepaid legal services, and legal aid organizations. The differences in these analogies are obvious. Moreover, the ABA Model Rules oblige these organizations to structure their internal relationships so that the lawyers' exercise of independent judgment on behalf of their clients is without restriction.

In sum, all of these issues relate to core values — core principles, if you will — seen as marking the difference between being a member of the bar and a member of another profession: competence, independence of professional judgment, protection of confidential client information, loyalty to the client through avoidance of conflicts of interest, and *pro bono publico* obligations. These values have recently been reaffirmed in probing studies by the American Law Institute in *Restatement of Law Governing Lawyers* and the ABA Ethics 2000 Commission in *Report on the Evaluation of the Model Rules of Professional Conduct.*

In this environment, and by resolution specifically upholding these core values, the ABA House of Delegates in July 2000 brought the MDP debate to an end, at least for the time being. By an overwhelming vote of nearly three to one (314 to 106), the delegates flatly rejected the recommended MDP paradigm along with the ethical changes proposed by the ABA Commission on Multidisciplinary Practice.

However, the MDP issue is not dead, not by a long shot. It has many supporters, and the ball is now in the state bars' court. ABA ethics actions are only recommendations to the individual state bars, each being the arbiter on the rules in its own state, subject to final approval by the state supreme court.

The District of Columbia is the only jurisdiction in the country that, in a very limited way, already permits nonlawyers to join law partnerships and share in their fees. But here, according to Rule 5.4 of the D.C. Rules of Professional Conduct, the law firm must be engaged *solely* in the practice of law, with nonlawyer partners allowed to perform professional services only to assist the firm in the representation of its clients.

This exception applies to D.C. Bar members alone, and only when legal services are provided in the District of Columbia. But it did catch the eye of the ABA Commission on Multidisciplinary Practice. Some minority members supported a variation of the D.C. rule as a way to resolve the controversy: that is, require that "there be a lawyer majority ownership of an MDP (or a supermajority, as any individual state might determine) and that a *primary purpose* of the MDP be the delivery of legal services."

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For the majority of members, however, this was not sufficient, for they quickly saw its inadequacies from the standpoint of the Big 5. The accounting firms clearly want 100 percent ownership for themselves, or at least substantial control; and they prefer unfettered discretion in deciding how much and what kind of work they will conduct, the Securities and Exchange Commission permitting.

They and others are not standing still. Many forms of accountant-lawyer experimentation are under way, far beyond the traditional referrals and coordinated undertakings on behalf of a common client.

Instead new types of long-term alliances are being structured under flexible nonexclusive contractual arrangements, with efforts made to avoid ethical or unauthorized-practice-of-law questions. For example, PricewaterhouseCoopers and Miller & Chevalier, Chartered have widely publicized their contractual working arrangement on primarily litigation matters. KPMG has created a strategic alliance with Morrison & Foerster LLP, Horwood Marcus & Berk, Chartered, and Holland & Knight LLP, law

firms that are members of Saltnet, a network of state and local tax lawyers.

Most controversial to date is the action of William McKee and William Nelson, who left a large law firm to establish the D.C. law firm McKee Nelson Ernst & Young LLP, to engage in "integrated professional services" with the accounting firm Ernst & Young. The new organization — still identifying itself as an independent law firm, and stating that it is in full compliance with the D.C. ethics rules — announced that inclusion of the "Ernst & Young brand in the firm's name demonstrates our commitment to making a success out of this new venture."

The accounting firm Ernst & Young has agreed to furnish a significant amount of start-up capital to the law firm McKee Nelson Ernst & Young, to lease it space in a building owned and occupied by Ernst & Young, and to share Ernst & Young computers and other services, all at reasonable costs to the law firm. Both firms assert that they are separate entities, although some commentators characterize the arrangement as forming a "captive law firm" and "virtual MDP." Others regard it as a first step toward fully integrated multidisciplinary partnerships that include legal services. And with no legal challenge to date, this arrangement is predicted by some to become "a blueprint for other major U.S. accounting and law firms eager to join forces."

Whether this will happen depends in large part on the attitude and actions of the oncoming generation of lawyers.

Recently, the D.C. Bar Special Committee on Multidisciplinary Practice entered the MDP fray with the release of its "Report and Recommendation," which was published in the January issue of *The Washington Lawyer.* The committee concluded that "lawyers and non-lawyers should be permitted to work together and share fees in the delivery of professional services," and that the current D.C. Rule 5.4 was too restrictive, establishing "an unwarranted impediment to delivery of multidisciplinary services to the public."

In that spirit, the committee recommended "that the Board of Governors propose to the District of Columbia Court of Appeals that . . . the Court amend D.C. Rule of Professional Conduct 5.4 to permit lawyers to practice and share fees with non-lawyer professionals engaged with them in multidisciplinary practice." Moreover, the committee concluded that a less restrictive rule could be accomplished "without sacrificing the core values of the legal profession."

I am dubious. I believe that preserving and strengthening the legal profession's core values serve society to a vastly higher degree than the commercial advantages or enhanced client services allegedly flowing from multidisciplinary practice.

I also believe that respect for these core values will be weakened and watered down in an environment dominated and controlled by other professions. Our profession is truly unique, with its own history and traditions, with its own set of commitments to higher ethical and fiduciary conduct and pro bono and other activities serving the public interest. Even though we often falter in honoring these inherent obligations, they are deeply imbedded in us and carried by us with a continuing sense of societal obligation. The legal profession's "spirit of public service" has served the nation well throughout history, and we would indeed be the poorer if that spirit was lost.

I do not think the D.C. Bar Special Committee on Multidisciplinary Practice has fully appreciated the weight of "the pressures that economic forces place on professionalism." The tradition, training, outlook, and culture of other professions are quite different from those of the legal profession. In some instances, the bottom line has become all-important and the concept of "public service" or "obligation to serve the public good" rarely enters into the operating equation.

When nonlawyer partners play leading roles in both firm management and firm policy, and when at stake are the retention of wealthy clients and other sources of huge fees, the pressures asserted on a lawyer's "independence of professional judgment" can be enormous. Nor is this condition alleviated by the paper-thin proposal of organizing the "lawyers within a multidisciplinary practice into a separate organizational unit." Rather the perceived overriding interests of the nonlawyer-owned or -controlled entity would more likely be far more meaningful.

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Careful consideration should also be given to differences existing between the legal profession's rules and those of other professions relating to confidentiality and lawyer-client privilege, conflicts of interest, and client loyalty. While some changes are under consideration by the American Bar Association's Ethics 2000 Commission, no public interest would be served by following standards lower than those established by the bar.

If Rule 5.4 is to be expanded, I strongly urge that lawyer majority ownership and lawyer control of all multidisciplinary practice entities be required. I also urge the committee to recommend to the D.C. Bar Board of Governors its proposed alternative to Rule 5.4 on the professional independence of a lawyer.