

A Proposal to Permit Multi-Disciplinary Partnerships

BY JOHN B. HARRIS

In recent months, the legal profession has intensely debated whether partnerships between lawyers and other professionals (so-called “multi-disciplinary partnerships” or “MDPs”) will ultimately benefit consumers and the involved professions. Perhaps because MDPs are a direct challenge to long-accepted ethical rules preventing lawyers from splitting fees and forming partnerships with nonlawyers, the initial reaction among many bar leaders was to condemn MDPs and question whether they were anything other than a turf-expanding vehicle for the major accounting firms. But others have increasingly questioned whether a continuing ban on MDPs makes sense for the profession in providing efficient client service or in combating the profession’s public image as elitist and protectionist.

As organizations from the American Bar Association on down debate MDPs, the discussion often devolves into strongly-held opinions about policy: Can lawyers in a partnership with nonlawyers maintain their ethics and independence if they are “controlled” by the nonlawyers? Will an MDP be scrupulous about maintaining client confidences, resolving conflicts of interest, performing pro bono work and maintaining “professionalism?” Or will the MDP sink to an approach focused solely on the bottom line based on the assumption that other professionals are more profit-driven than lawyers? Unfortunately, the focus on matters of philosophy and policy often overshadows the more practical question of whether MDPs can be regulated in such a way as to satisfy both proponents and detractors.

Some Concrete Suggestions

Is there a way to accommodate the legitimate concerns on both sides of the MDP issue, loosening the rules without destroying professionalism? In all the debate over MDPs, almost nothing concrete has been offered as a specific rule or legislation that would govern the practice. One reason may be that any proposed rule that tries to chart a middle course will be subject to criticism from both those who say the rule does not go far enough in permitting MDPs and those who say that it goes much too far.

Nevertheless, over the last several months, as the Professional Responsibility Committee of the Association of the Bar of the City of New York (which I chair), has struggled with whether MDPs can or should be permissible, I have tried to come up with guidelines that would govern MDPs. The following are proposed guidelines that — at a minimum — will focus the debate on the question of how MDPs could work within the existing ethical framework of the legal profession:

(A) Who can form an MDP? The first issue is whether lawyers should be permitted to form partnerships with non-professionals or professionals who do not actually serve the clients of the MDP. If the purpose of an MDP is truly “one-stop shopping” for professional services, there should be nothing lost if MDPs are limited to: (a) other professionals; and (b) professionals who actually serve the organization’s clients.

Having a nonlawyer merely “invest” in an MDP without participating in the rendering of services would not be permissible.

(B) Who Controls the MDP? There is little evidence but widespread speculation — that giving nonlawyers control over the provision of legal services by lawyers will ultimately result in an erosion of lawyer ethics, pro bono service and an increased focus on the bottom line. One could perhaps eliminate this concern in theory by requiring that the MDP’s lawyers control the MDP. That philosophy is akin to that followed in the “ancillary business” rule in the District of Columbia, which provides that a lawyer may enter a partnership with a nonlawyer so long as the partnership serves the law firm’s clients and the lawyer is in control. However, it is hard to justify why lawyers should control the rendition of, say, accounting services or social work performed by other professionals. A rule that would require lawyers to stay in control of that portion of the MDP that renders legal services would deal with the independence concern, while at the same time avoiding the unrealistic requirement that lawyers must be the dominant force in those aspects of the MDP that do not involve the provision of legal services.

(C) Effect of Lawyer Disciplinary Rules. There can be no question that lawyers in the MDP must remain bound by lawyer ethical rules notwithstanding their partnership with nonlawyers. It is also appropriate to require the MDP itself — as a condition of its right to engage in the practice of law in any form — to agree that the MDP would be treated as a “law firm” for purposes of discipline under New York’s newly-amended DR 1-104. Just as New York disciplinary authorities can theoretically fine, suspend or even disbar a law firm that engages in violations of the rule, so too the right of the MDP to engage in legal practice would hinge on compliance with the rules. It is undeniable that the MDP may be managed by nonlawyers who are not individually subject to the disciplinary rules. To the extent that the presence of nonlawyers increases concern that the MDP will be run in a manner inconsistent with lawyer ethical rules, the MDP surely could be required to submit to some monitoring process, funded by the licensing fee that enables it to engage in the practice of law. This provision would work even in the absence of special monitoring because no MDP will risk the public embarrassment (and inevitable adverse business consequences) of discipline, and therefore has a strong incentive to adhere closely to ethical mandates.

(D) Informed Consent. An MDP should also be required to make sure that clients are fully informed about the risks and advantages of an MDP. Although a requirement of written consent by the client is relatively unusual in the Code of Professional Responsibility, such a requirement was recently proposed by the New York State Bar as an amendment to DR 5-104 dealing with business transactions between a lawyer and client, and it makes sense to have such a formal requirement in place (at least for now) in the MDP area.

(E) Conflicts of Interest. The MDP must also satisfy the conflict rules imposed by lawyer disciplinary rules. Many critics of MDPs have focused on the inherent, irreconcilable conflict between the “advocate” function — where the lawyer is zealously representing client interests, preserving confidences and displaying a duty of loyalty solely to the client — and the “audit” function, which requires disclosure in the public interest of the very matters the advocate is bound to keep confidential. Such inimical roles would almost certainly fail to satisfy the provisions of DR 5-105. Even were it otherwise, as a practical matter, merging the auditor and advocacy functions is strongly opposed by the Securities and Exchange Commission. One can also easily envision the enthusiasm a plaintiffs’ securities lawyer would display at suing a dual-purpose auditor / advocate when a public company fails to make appropriate disclosures.

(F) The Attorney-Client Privilege. Critics have warned that an MDP will be unable adequately to safeguard confidences and secrets that would be protected by the attorney-client privilege in a conventional law firm. The extent to which the privilege will apply is a matter of substantive law, not a matter of ethics. However, a lawyer or MDP permitting disclosure of client confidences and secrets to third parties would be liable under the disciplinary rules either for unauthorized disclosure under Rule 4-101 or failure to supervise under DR 4-104(A) and (B). Nor does the rule specifically address advertising by MDPs, but there is no reason that the MDP could not be required to adhere to the same advertising standards governing lawyers.

Giving effect to these guidelines, a New Disciplinary Rule might read as follows:

DR 5-XXX

A lawyer or law firm may practice law in a partnership or other form of organization in which nonlawyers hold an ownership interest and the nonlawyers perform professional services which assist the organizations legal clients, but only if:

- (1) one or more lawyers have sole control and managerial authority over the services performed by the organization that involve the practice of law;
- (2) the lawyers affiliated with the organization are in all respects bound by the disciplinary rules as if the organization or partnership were engaged exclusively in the practice of law;
- (3) the organization agrees to be treated as a “law firm” for purposes of DR 1-104, and specifically agrees that it is subject to discipline in the event lawyers or nonlawyers violate the disciplinary rules;
- (4) before undertaking representation of a client, the lawyer determines that the representation does not constitute a conflict of interest and otherwise comports with the disciplinary rules, and obtains from the client written consent to such representation after full disclosure of actual or potential conflicts arising from any activities of the organization, the implications to the client of the representation and the advantages and risks thereof.

My proposed rule is unlikely to make the accounting firms and other MDP proponents happy because of its various restrictions on how MDPs could be structured and how they would be regulated. Nor will it delight critics because it opens the door to some extent to MDPs and will therefore be perceived as creating a slippery slope that will ultimately end the independence of the legal profession. Nevertheless, I believe the rule recognizes the reality that the ban on partnerships between lawyers and nonlawyers is anachronistic and that the abolition of the rule — subject to appropriate regulations — would not undermine the integrity of the legal profession. I invite these criticisms because, at a minimum, it makes the MDP debate practical and concrete and forces proponents and critics alike to deal with the possibilities MDPs offer and the restrictions that must attach to them.

John B. Harris is a litigation partner at the Manhattan law firm of Stillman & Friedman, P.C. He has served as the chair of the Committee on Professional Responsibility of the Association of the Bar of the City of New York since 1996. The views expressed in this article are his own.

