

ABA Commission: Change The Fee Sharing Rules

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[Editor's Note: Professor Daly served as the Reporter to the ABA Commission- on Multidisciplinary Practice. The views expressed in this article are her own and not those of the Commission.]

"Multidisciplinary practice" and "multidisciplinary partnership", frequently referred to as "MDPs", are currently among the hottest topics of debate in the legal profession both in the United States and abroad. This article will examine the recent proposals of the ABA Commission on Multidisciplinary Practice and relate them to the New York Code of Professional Responsibility and associated statutes.

As used in this article, MDP means (1) a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has, as one, but not all, of its purposes the delivery of legal services to a client(s) other than the organization itself or that holds itself out to the public as providing nonlegal, as well as legal, services; or (2) an arrangement by which a law firm joins with one or more other professional firms to provide services and there is a direct or indirect sharing of profits as part of the arrangement. Reduced to its core, the debate raises the question whether and to what extent lawyers should be permitted to practice law and share

The American Bar Association Commission on Multidisciplinary Practice has just issued a Recommendation calling on the ABA House of Delegates to amend the Model Rules of Professional Conduct to permit fee sharing and partnership under limited circumstances. The Commission has asked the House to approve the Recommendation at its annual meeting in August 1999. The Recommendation and the accompanying Report and Reporter's Notes as well as voluminous background material can be found at <http://www.abanet.org/cpr/multicom.html>

The New York State Bar Association and regulators in the United Kingdom, Canada, and Europe are engaged in a similar debate. The NYSBA Special Committee on Multi-Disciplinary Practice and the Legal Profession published its first report on January 8, 1999. The Report is a thoughtful analysis of MDP issues and proposes further study of the issues.

Sources Of Prohibitions

The prohibitions against fee sharing and partnership with a nonlawyer are found in DR 3-101(A), DR 3-102 and DR 3-103, 22 NYCRR § 1200.16-.18. See also DR 5-107 relating to professional corporations; *Id.*, § 1200.26. DR 3-101 prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law. A lawyer employed by an accounting firm who provides legal services to the firm's clients may be violating DR 3-101 or DR 5-107 and subject to discipline. In addition, New York's Judiciary Law § 495 forbids a corporation or voluntary association from practicing law or furnishing attorneys to the public.

The public policy supporting the prohibitions springs from the belief that a nonlawyer is unlikely to appreciate the unique professional obligations of a lawyer and is more “bottom line” oriented than a lawyer. Consequently, allowing partnership, fee splitting, and the corporate delivery of legal services would almost inevitably result in powerful pressure by the non-lawyer on the lawyer to ignore the lawyer’s professional obligations in favor of economic gains. *In re Cooperative Law Co.*, 198 N.Y. 479, 483-84, 92 N.E. 15 (1910). Critics of the prohibitions, of course, take a less charitable view of the justification, arguing that the prohibitions are a barely disguised form of economic protectionism.

Read together, the disciplinary rules and Section 495 have profoundly impacted the delivery of legal services to individual and business clients. The New York courts and bar association ethics committees have interpreted the term “the practice of law” in DR 3-103 broadly, thereby discouraging partnerships between lawyers and non-lawyers and have prevented lawyers employed by corporations from giving legal advice to their employers’ customers.

Clients and lawyers in New York and elsewhere have recently come to question whether the prohibitions make sense, given the changes that have occurred in the legal profession over the past thirty years and the complex nature of today’s society. They also note that due to the interpretive difficulty of defining “the practice of law”, bar regulators have displayed a notable reluctance to commence unauthorized practice of law proceedings against the Big Five accounting firms or other consulting firms. For example, the UPL Committee of the Supreme Court of Texas dismissed a complaint against Arthur Anderson after an eleven month investigation. See Arthur S. Hayes, *Accountants vs. Lawyers: Bean Counters Win*, Nat’l L.J., Aug. 10, 1998, at A4; see also Reporter’s Notes at C10-11.

The Commission’s Study

The process by which the Commission reached its recommendation proceeded in two steps. First, it asked whether the current prohibitions were in the best interest of clients and the public; and second, how the core values of the client-lawyer relationship could be protected if it answered the first question in the negative. To carry out its mission, the Commission conducted seven days of open hearings and met in executive session on six occasions. It heard from fifty-six witnesses and maintained a comprehensive web site. The web site was particularly valuable, allowing the Commission to hear the views of individuals and entities who were unable to attend its hearings. See *supra*, p.I. No other bar association in the United States than the Commission has conducted as extensive an examination that included live testimony of the issues relating to multidisciplinary practice.

To find the best interest of clients and the public, the Commission listened especially attentively to representatives of individual and corporate clients. Support for relaxing the prohibitions came from the Council of the ABA General Practice, Solo and Small Firm Section and various consumer groups, including the American Association of Retired Persons (AARP), the National Resource Center for Consumers of Legal Services, and the Consumers Alliance of the Southeast. See Reporter’s Notes at C15-16. The American Corporate Counsel Association urged that the ethical barriers to the establishment of multidisciplinary partnership be dismantled. Other representatives of corporate clients expressed similar sentiments.

The Commission also considered the enormous structural changes that had occurred in the practice of law between 1928 when the prohibitions were adopted and 1999. In 1928 and for the next four decades, uncertainty existed whether lawyers who worked for, or were supervised by, nonlawyers-were capable of exercising the same degree of independent professional judgment as lawyers in traditional law firms. That uncertainty no longer exists, and few observers of the U.S. legal profession today would systemically question the professional independence of the lawyers who work for corporations, unions, legal services organizations, and other non-law firm providers of legal services.

MDPs Should Observe Same Rules

The Commission weighed these considerations against the arguments presented in favor of maintaining the current prohibitions and concluded that it was in the best interest of clients and the public to relax the ban on fee sharing and partnership with nonlawyers. This conclusion compelled the Commission to grapple with the difficult issue of how to preserve the core values of the client-lawyer relationship in a multidisciplinary practice context. Underlying this issue was the fundamental question whether and to what extent lawyers practicing in an MDP should be singled out from lawyers in other practice settings and made subject to a separate regulatory regime. After great internal debate, the Commission concluded that to the maximum extent possible, lawyers in an MDP should be required to observe the same rules of conduct as lawyers in other practice settings. *See e.g.*, Recommendations 5 & 7. Thus, equality of obligation is a theme that runs through the entire Recommendation.

At the same time, the Commission realized that permitting fee sharing and partnership was a significant departure from the rules of lawyer conduct in every jurisdiction in the United States with the exception of the District of Columbia, which permits fee-sharing and partnership with non-lawyers. In light of the extremely limited experience of the legal profession with lawyer-nonlawyer partnership and fee splitting, the Commission concluded that some specific regulatory oversight was needed as an additional protection for independence of professional judgment. See Reporter's Notes at C20. Borrowing from various state licensing regimes -for foreign legal consultants and legal services organizations, the Commission proposed review and audit oversight procedures for MDPs. The Commission exempted lawyer-controlled MDPs from these procedures, however, on the theory that such entities were likely to pose less of a threat to lawyer independence than MDPs controlled by nonlawyers. The Commission also recommended that passive investments in MDPs be prohibited.

Core Values Preserved

With respect to the core values of the legal profession such as loyalty, confidentiality, and conflicts of interest, the Recommendation imposes the same obligations on lawyers in MDPs as on lawyers in traditional practice settings. For example, a lawyer in an MDP who is assisted by a nonlawyer would remain responsible for ensuring that the nonlawyer is aware of and respects the sanctity of all confidences and secrets of the client. See Code, EC 4-2.

The Commission was aware that in certain types of MDPs, unique confidentiality issues might arise because of a nonlawyer's obligation of disclosure. A social worker in an MDP might have an affirmative ethical obligation to disclose suspected child abuse, for example. The Recommendation makes it clear that a lawyer must make reasonable efforts to ensure that a client understands that the lawyer and nonlawyer may have different disclosure obligations and that the courts may treat the client's communications to the lawyer and nonlawyer differently. Recommendations 9-10; Report at 4-5.

Several witnesses before the Commission questioned whether a lawyer in an MDP should be allowed to provide legal services to a client if the MDP was also providing audit services to the client. The Securities and Exchange Commission (SEC) Auditor Independence regulations state that the roles of auditor and attorney are incompatible. The SEC specifically advised the Commission that it had asked the Independence Standards Board (ISB) to examine the issue. The Commission concluded that it did not need to study this difficult issue at the present but noted that when the ISB concludes its study it may be appropriate for ABA entities to comment on its recommendations and, if appropriate, adopt formal positions. See Report at n.3.

Finally, the Commission also emphasized the obligation of a lawyer in an MDP to honor other values as well, such as the lawyer's responsibility to render voluntary pro bono public legal services, charge reasonable legal fees, and segregate client funds. See Recommendation 14(E); Report at 4-5; Reporter's Notes at C17-18.

No Change In Conflicts Of Interest Rules

Consistent with the theme of equality of obligations discussed earlier, the Commission declined to recommend any change in the rules of conduct relating to conflicts of interest or imputation. Thus, it recommended that all clients of the MDP be treated as the lawyer's clients for purposes of the conflict of interest rules and that the same rules of imputation be applied to a lawyer in an MDP as to a lawyer -- in a law firm. Recommendation 8; Report at 4-5.

The regulatory regime proposed by the Commission serves a number of important public policies. It would allow greater choice of providers for the purchasers of legal services and at the same time provide regulatory protections. The Commission learned through its hearings that there is a growing number of lawyers who provide consulting services to clients. These services are difficult, if not impossible, to distinguish from the legal services being provided by lawyers in traditional practice settings in law firms and corporate legal departments. Because of the broad sweep of UPL definitions, these lawyers insist that they are not engaged in the practice of law. Amending the rules of professional conduct to permit MDPs would have the effect of bringing these lawyers "under the regulatory tent," facilitating greater oversight by the disciplinary authorities.

The regulatory scheme would provide a disciplinary body with an annual statement from each MDP within the jurisdiction, identifying the lawyers who deliver legal services to the MDP's clients and attesting to the MDP's observance of certain procedures (called "undertakings") designed to preserve the lawyers' independence of professional judgment. The MDP must agree to the payment of an annual certification fee, the purpose of which is to allow the appropriate regulatory body at its discretion to review and conduct an administrative audit of the MDP to determine compliance with the undertakings.

Significance For New York Lawyers

What significance does the Commission's Recommendation have for lawyers in New York? If the ABA House of Delegates approves the Recommendation, it will send a clear signal that multidisciplinary practice is a pressing and important issue. An affirmative vote would not mark the end of the MDP controversy, however. The Commission is asking the House only for its approval of the Recommendation. While proposed amendments to the Model Rules are attached as an exhibit to the

Report, they are included for illustrative purposes only. The House is not being asked to adopt those rules. If the Recommendation is adopted, other ABA entities — including the Standing Committee on Ethics and Professional Responsibility and the Commission on the Evaluation of the Rules of Professional Conduct — will have the responsibility for proposing specific amendments to existing rules and drafting new rules. The House will review those changes and either adopt or reject them as it sees fit. If the House rejects the Commission's Recommendation, the Recommendation is still likely to serve as a jumping off spot for state bar association discussions of MDP issues.

The Recommendation will serve as a catalyst for further debate and dialogue within the New York professional responsibility community. The Appellate Division could easily amend the Code to include changes identical to those proposed by the Commission. To the extent that Section 495 requires amendment, the legislature is not likely to oppose remedies that would offer consumers a greater choice of legal service providers. Where there is a will, there is a way. The question is: do NY lawyers possess the will to change the rules against fee sharing and partnership with nonlawyers.

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