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Can Lawyers Live With Multidisciplinary Practice?

BY GARY A. MUNNEKE

There has been considerable debate concerning the question of multidisciplinary practice, or MDP for short. The discussion has centered on the strategy of international accounting firms to create "one-stop shopping" for professional services. MDPs could conceivably include a legal branch, an accounting arm, consulting services, a research section, a mediation! dispute resolution center, and a variety of other professional services. Clients could select the services that worked best to achieve the client's objectives. The MDP could keep all the business in house. Outside the United States, leading accounting firms have acquired law firm subsidiaries, and within this country many of these professional service firms (as they now call themselves) have expanded the scope of their services to include business and tax planning that traditionally has been the work of lawyers.

The reaction of some lawyers has been to "circle the wagons" and fight the perceived intrusion as unauthorized practice of law, despite the fact that unauthorized practice statutes are ill-suited to prosecute activities that do not fall directly under lawyers' professional monopoly to represent others in courts. Other lawyers have embraced the advent of MDPs with degrees of enthusiasm, ranging from those who argue that MDPs are here to stay, so lawyers need to learn how to compete against them, to those who contemplate their own legally-based MDPs. After all, the ABA in Model Rule 5.7 recognized that law firms could own ancillary businesses. It is a small step from owning an ancillary business to operating an MDP. Although most jurisdictions' ethical rules prohibit lawyers from having nonlawyer partners, the District of Columbia has permitted the practice in a limited form for several years now, with no serious side effects.

ABA Issues Preliminary Report

A diversity of opinion has been generated concerning the potential impact of MDPs on the practice of law. The ABA created a Multidisciplinary Practice Commission, which has taken testimony, and in February released a preliminary report, which essentially describes the issues. The Commission is scheduled to issue its final report prior to the ABA Annual Meeting in August. If the New York State Bar Association, which produced its own MDP report in March, provides any insights into what the ABA might do, expect a report that disappoints the hard-liners, but falls far short of embracing MDPs, by raising many ethical impediments to multi-professional practice. Some of these include: conflicts of interest, confidentiality, independent professional judgment, fee sharing, nonlawyer partnerships, unauthorized practice, and misleading advertising (for an interesting overview of the topic, see Professor Linda Galler's article in the February 1999 New York Professional Responsibility Report, entitled "When Lawyers Work for Accounting Firms").

A symposium on MDPs, held on March 5, sponsored by the Pace Law Review, highlighted many of the facets of the question. New York Bar President James C. Moore and Southern District Judge Charles

Breiant, joined this author in recognizing that the legal profession cannot address the challenge of MDPs in a reactionary way. By trying to prosecute every accounting firm that engages in business planning activities for the unauthorized practice of law, and threatening disciplinary action against lawyers who choose to work in accounting firms, the legal profession undermines its own credibility in the eyes of the public. Robert Cunningham, a partner with Baker & McKenzie, and Ruben Diaz, a partner at Ernst & Young (and former partner at Steele, Hector and Davis in Miami) debated whether accounting firms could or should compete with law firms for transactional work. Professor Peter Kostant, of Roger Williams School of Law, explored the nuances of confidentiality as a construct for protecting clients in a professional service practice. He argued that the existing legal standard protecting client secrets as well as privileged information goes further than necessary in compelling a lawyer's silence in the face of client wrongdoing. All the panelists agreed that whether lawyers are happy about it or not, accountants and other nonlegal service providers are here to stay.

Lawyers Need To Communicate Value Of Services

Lawyers, individually and institutionally, must communicate to clients, potential clients and society at large that we stand for finding ways to help people solve their problems in efficient, cost-effective ways. We should make it clear that we are working to find innovative approaches to delivering services to people, and that we are not merely guarding our turf when we raise ethical issues. We should be able to articulate the benefits clients in adversary proceedings receive when they are represented by lawyers. We should let people know that legal training makes lawyers particularly well-suited to handle representation outside of litigation, and that negotiation, mediation, conciliation, and other forms of dispute resolution are simply alternative forms of problem solving at lawyers' disposal. We must explain to consumers the value of the unique services we provide.

Although much of the published commentary on the multidisciplinary practice issue has focused on accounting firms competing with large law firms for the work of large transnational businesses, in reality the problem extends far beyond the rarified world of these international players. Lawyers and law firms in smaller cities and towns that will never see an international case are facing competition for professional services from banks and lending institutions, real estate and title companies, insurance and financial planning agencies, counseling and dispute resolution services, book distributors and internet providers, as well as retail chains and entrepreneurs. The competition is not always one on one, as service providers explore joint ventures, controlled business arrangements, affiliated networks, office hoteling, and other creative relationships to reach out to new markets. How long will it be before MDPs appear on the landscape of the small county seats?

Lawyer Use Of Other Professionals

Lawyers already have recognized that they can practice with lay service providers in a variety of circumstances. A lawyer can always retain professional services on a contract basis in order to provide quality legal services, e.g., a jury consultant, an investigator, an economic analyst. A law firm can create an ancillary nonlegal business, consistently with Model Rule 5.7. In fact, the legal profession has much less difficulty accepting lawyer control of nonlegal businesses than lay control of the legal business. Yet, political action organizations pursuing first amendment rights, e.g., the ACLU, can operate under the control of a lay board of directors, as can labor union sponsored group legal services. Even in-house corporate legal departments operate under the direct control of a nonlegal authority. We have already crossed the Rubicon in allowing lawyers to practice law in organizations controlled by the laity, and in

permitting nonlawyer partners. We cannot win an argument that says we can practice with other professionals only if we are in charge.

Competing Effectively By Adapting To Change

Once lawyers realize that they can practice in a variety of different settings in combination with a number of different professionals, they can stop worrying about whether accounting firms will bring about the demise of the legal profession as we know it, and start thinking about ways to practice competitively. Both law firms and individual lawyers will need to consider what special skills they bring to any transaction, and what other professionals can work with them to enhance the quality of services. In the future, more lawyers may practice alone, joining other professionals on an ad hoc basis to represent clients, and many lawyers will choose to work in organizations that are only peripherally legal service providers. Even those who practice in firms where the primary product is legal service eventually will engage in multidisciplinary practice.

In the end, lawyers will not be run out of town by the accounting firms, but they will have to adapt to those changes in the world that are driving multidisciplinary practice: the information revolution, client autonomy, a competitive unregulated marketplace, and ambiguity about the limits of lawyers' professional autonomy. Those who confront these trends in creative and positive ways will thrive, while those who stick their heads in the sand will find themselves clientless and jobless.

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