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Hot Town, Summer In The City: The MDP Debate Heads For Showdown In New York

BY STEVEN C. KRANE

For a little over two weeks in late June and early July 2000, New York State will be the focus of attention for the American legal profession, as the debate concerning multidisciplinary practice reaches a climax. The New York State Bar Association House of Delegates will address the issue first at its June 24 meeting in Cooperstown. Then, on July 10 at the Annual Meeting in New York City, the American Bar Association House of Delegates will be presented with several options relating to MDPs. As a result, there is a significant possibility that the organized bar in the United States will emerge from New York State in mid-July with a nationwide position on the MDP issue.

The question for the profession is whether lawyers should be permitted freely to form partnerships and share fees with nonlawyer professionals. In the "fully integrated" version of the MDP, as it has come to be known, all partners, whether lawyers or nonlawyers, would have a proportionate interest in and control over each other's practice. This would be a multidisciplinary *partnership*.

Also under consideration, however, is the ability of lawyers to engage in multidisciplinary *practice,* in which professionals of more than one calling work together, to one degree or another, to provide coordinated professional services to clients. Lawyers have done this in one form or another for years. The present issues are whether the practice should be encouraged, expanded or regulated.

Acquisitions By "Big 5" Prompt ABA Commission

The movement to permit multidisciplinary partnerships was prompted by the activities of the major accounting firms in Europe and other countries in the mid-1990s. Law firm acquisitions in Europe by the "Big 5," and the stated intention of those firms to acquire law firms in the United States, prompted the ABA to create a Commission on Multidisciplinary Practice in 1998.

In June 1999, the ABA Commission recommended that changes be made to the law governing lawyers to permit fully integrated MDPs. The Big 5 were dissatisfied with the report, however, because it recommended that conflicts of interest be imputed within an MDP. This meant, for example, that an accounting firm could not provide legal services to a client with interests adverse to those of one of its accounting clients. In any event, in August 1999 the ABA House of Delegates rejected the Commission's proposal by a 3-1 margin. The Delegates resolved:

> that the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.

New York Creates Special Committee To Report On MDP Issues
In the meantime, many states were also studying the MDP question, including New York. In July 1999, following debate on a preliminary and inconclusive report of a predecessor committee, the NYSBA created a Special Committee on the Law Governing Firm Structure and Operation to study the issue in depth and make concrete recommendations as to how the organized bar should respond.

In April 2000, the Special Committee, chaired by former ABA and NYSBA President Robert MacCrate, released a comprehensive report entitled "Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers." This 400-page report was unanimously endorsed by the NYS-BA Executive Committee at a special meeting on April 28 and released shortly thereafter. Several thousand copies of the report have been distributed, with requests for copies coming from all over the world. (The report is available in "pdf" format at the NYSBA web site, *www.nysba.org*. Printed copies may also be obtained by request directed to Associate Director John Williamson, who can be reached at *jwilliamson@nysba.org* or at 518-463-3200.)

The thrust of the New York report is that if, as proponents of MDP suggest, the reason for permitting MDPs is to satisfy a demand on the part of consumers of legal services for "one stop shopping," that goal can be accomplished without permitting multidisciplinary partnerships or otherwise sacrificing the ability of lawyers and law firms to ensure that the core values of the legal profession are maintained. It recommends that lawyers be permitted to provide ancillary nonlegal services to their clients, either directly or through subsidiaries or divisions of their firms. The report also suggests that lawyers and nonlawyers be permitted to enter into inter-professional contractual relationships with one another — so called "side by side" arrangements — provided that no nonlawyer or nonlawyer entity has any ownership or investment interest in, or supervisory right, power or position in connection with, the practice of law by any lawyer or law firm.

The report rejects, however, any joint enterprise in which nonlawyers play a role in the management of the legal practice. The lawyer must remain completely responsible for his or her own independent professional judgment, for maintaining the confidences and secrets of clients, and for otherwise complying with the full panoply of legal and ethical principles governing lawyers in the United States.

The "free marketplace," according to the report, cannot be the final arbiter of ethics for the legal profession. Indeed, the report reminds us that society has historically needed frequent protection against the free marketplace. It notes that competitive forces often turn pernicious when left to complete "freedom." Lawyers have never allowed the consumer of legal services to choose which rules of professional conduct will govern the legal profession. According to the report, this sort of "ethical cafeteria plan" would be manifestly unwise and damaging to societal interests.

Finally, the report calls for renewed enforcement of statutes controlling the unauthorized practice of law, and asks to that end that attention be paid to refining the definition of the "practice of law." The report correspondingly urges that the statutes barring corporations and other voluntary associations from providing legal services or furnishing lawyers, such as section 495 of the New York Judiciary Law, be maintained in effect and vigorously enforced.

Because the MacCrate Committee's report could not be approved by the NYSBA House of Delegates until its next meeting in June 2000, and because the deadline for filing reports for consideration by the House

of Delegates at its July meeting was April 26, the substance of the report was filed in the name of Chairman MacCrate. Whatever final resolution is reached by the New York State House of Delegates will be substituted for the MacCrate resolution and will become a New York State Bar Association resolution.

ABA Commission Issues "New" Report Recommending Lawyer-Controlled MDPs

In mid-May 2000, shortly after the NYSBA report was released, the ABA Commission returned with a recommendation that so-called "lawyer-controlled" MDPs be permitted. Backing away from its initial position, the ABA Commission expressed the view that:

> Lawyers should be permitted to share fees and join with nonlawyers in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.

Surprisingly, however, after demanding that the matter be put to a vote last July, and after insisting throughout this year that it was imperative that the issue be resolved immediately, the ABA Commission prefaced its report with a request that the entire issue be deferred for discussion at the ABA Midyear Meeting in February 2001.

Horse Trading And Real Politics

Far more interesting than the pageants the Republicans and Democrats will perform for the public this summer is the behind the scenes horse-trading and maneuvering various states are engaged in, in advance of the ABA meeting. The states are starting to line up behind one or more positions. By early June, a handful of states had indicated that they intended to support the ABA Commission's position permitting some form of lawyer-controlled MDPs. About half of those expressing their views stated an intention to endorse the New York approach. A handful were leaning toward deferring the issue to the next ABA meeting. Still others, believing that both the ABA and the NYSBA were going too far toward permitting lawyers and nonlawyers to work together, were planning to recommend adherence to the 1999 ABA resolution — that there be no change in the applicable rules — coupled with a vote to discharge the ABA Commission, with thanks for its efforts.

Conclusion

The legal profession is finally on the verge of taking a unified position on MDPs. This has the potential for defining the way in which lawyers will practice law over the new century, and is generally viewed as the most important development to affect the legal profession during our lifetimes.

We all wait to see whether any action is taken by the ABA this summer; or whether it waits for February 2001; or if the individual states will take steps which render the ABA decision — whatever it may be — an irrelevancy. The issue, however, cannot be ducked. Outside forces will not permit evasion. The profession will have to address MDP, and hopefully it will do so swiftly and cohesively.

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